No. 08-598

# In the Supreme Court of the United States

DAVID BOBBY, WARDEN,
*Petitioner,*

v.

MICHAEL BIES,
*Respondent.*

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

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF FOR THE PETITIONER

In his Opposition, Respondent Bies offers a lengthy recitation of facts—his childhood history, state agency reports, and Dr. Winter's trial testimony—to demonstrate that he is mentally retarded. And, as Bies notes, the Ohio Supreme Court indicated that he suffered from "mild to borderline mental retardation" when it affirmed his conviction in 1996. All these facts demonstrate what the Warden does not dispute: that Bies has a viable claim that he cannot be executed in light of *Atkins v. Virginia*, 536 U.S. 304 (2002).

The question in this litigation, however, is not whether Bies has an *Atkins* claim, but rather whether he has a *double-jeopardy* claim—specifically, whether Bies can use the Double Jeopardy Clause as a sword to prevent a state post-conviction court from determining whether his mental impairments are so severe that the Eighth Amendment bars his execution. Even though the two fundamental requirements for a double-jeopardy claim—an acquittal or some other event that terminates jeopardy, and a second proceeding that places Bies at risk of additional criminal punishment—are missing in this case, the Sixth Circuit vacated Bies's death sentence on double-jeopardy grounds. Bies's Opposition offers no defense of that expansive and unprecedented holding.

### A. The Warden seeks review of the Sixth Circuit's holding that Bies can, as a matter of law, invoke double jeopardy to bar a state post-conviction proceeding.

Bies first contends that the Warden's legal arguments are not properly before this Court because the Sixth Circuit relied exclusively on 28 U.S.C. § 2254(d)(2) to grant relief. Opp. at 11. According to Bies, the Sixth Circuit vacated his death sentence solely because the state post-conviction court made an "unreasonable determination of the facts" when it rejected his double-jeopardy claim. 28 U.S.C. § 2254(d)(2). He insists that the Sixth Circuit did not make any determination that the state court misapplied federal law and, therefore, did not trench on § 2254(d)(1).

This argument contorts the Sixth Circuit's opinion and ignores the pivotal flaw in the lower court's analysis. The state post-conviction court had held, as a legal matter, that Bies could not invoke the Double Jeopardy Clause as a vehicle to vacate his death sentence. See App. 95a. The Sixth Circuit disagreed, holding that Bies could pursue relief because the Clause is triggered whenever "an issue of ultimate fact" has been determined between the parties. See App. 45a (citation omitted); see also App. 4a (Clay, J., concurring in the denial of rehearing en banc) (asserting that Bies "may claim relief" under double jeopardy). The Warden now seeks review of that *legal* holding. He argues that this Court's precedents foreclose any reliance on the Double Jeopardy Clause, that the state post-conviction court properly rejected Bies's claim, and

that the Sixth Circuit violated § 2254(d)(1) by holding otherwise.

In insisting that the Sixth Circuit relied exclusively on § 2254(d)'s "unreasonable determination of facts" prong, Bies puts the cart before the horse. He pins his argument on a factual determination that the Sixth Circuit was able to make only *after* reaching an erroneous *legal* conclusion on the Double Jeopardy Clause. Specifically, Bies relies on an excerpt from the Sixth Circuit's opinion, see Opp. at 13-14, in which the court concluded that the state post-conviction court's ruling—that the Ohio Supreme Court had not determined the issue of Bies's mental retardation for purposes of *Atkins*—was based on an unreasonable determination of fact because the Court's 1996 opinion referenced Dr. Winter's conclusion that Bies suffered "mild to borderline mental retardation." App. 65a. The Sixth Circuit then held that "[Bies's] *double jeopardy rights* are being violated pursuant to a state court decision that is based on unreasonable determinations of fact." *Id.* (emphasis added). This entire assessment, however, is predicated on the court's earlier holding that Bies has double-jeopardy rights to assert in this case—a holding that is contrary to this Court's precedents and the strictures of 28 U.S.C. § 2254(d)(1).

The central issue raised by the Warden—the applicability of the Double Jeopardy Clause to Bies's efforts to vacate his death sentence—is properly before this Court. The Sixth Circuit squarely addressed this issue, and Bies's suggestions to the contrary are without support.

### B. *Ashe v. Swenson* confirms that double jeopardy is not triggered when the jury imposes, and the state courts affirm, a sentence of death.

Following the Sixth Circuit's lead, Bies argues that the Double Jeopardy Clause includes an independent collateral estoppel component that bars the state post-conviction court from conducting an *Atkins* hearing. Opp. at 15. Under Bies's theory, the State may not litigate the fact of his mental retardation because the Ohio Supreme Court resolved that issue in his favor in 1996 when it affirmed his death sentence.

This position ignores the fundamental requirement that "there [be] some event, such as an acquittal, which terminates the original jeopardy," to trigger the Double Jeopardy Clause. *Richardson v. United States*, 468 U.S. 317, 325 (1984). And in capital-sentencing proceedings, "the touchstone for double-jeopardy protection . . . is whether there has been an 'acquittal.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003); see also *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (holding that, "for double jeopardy purposes," "the proper inquiry is whether the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate") (alteration and internal quotation marks omitted); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984) (asking whether there was "an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for respondent's offense"). And there has been no acquittal in this case. The jury imposed,

and the state appellate courts affirmed, a death sentence for Bies. Accordingly, jeopardy has never terminated.

In response, Bies invokes *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, a group of armed men broke into a private home and robbed six individuals as they played poker. *Id.* at 437. Missouri charged Ashe with armed robbery of one of the participants, but a jury acquitted him. *Id.* at 438-39. Missouri then charged him with armed robbery of a second participant and secured a conviction. *Id.* at 439-40. This Court held that the Double Jeopardy Clause contained a collateral estoppel component that protected Ashe from the second trial because the jury in his first trial had already acquitted him of any role in the armed robbery. *Id.* at 445-47.

Bies contends that the *Ashe* Court also relaxed the Double Jeopardy Clause's "acquittal" requirement, but his argument distorts *Ashe*'s language. He asserts that, "[a]s *Ashe* recognized, the acquittal requirement should not be applied in a 'technically restrictive' way, but rather 'with realism and rationality.'" Opp. at 17 (quoting *Ashe*, 397 U.S. at 444). What this Court actually said is that "[t]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. In the very next sentence, the Court indicated that this collateral estoppel rule should be used to evaluate the force of "a *previous judgment of acquittal* . . . based upon a general verdict." *Id.* (emphasis added).

At no point did the *Ashe* Court import a standalone collateral estoppel component into the Double Jeopardy Clause. Quite to the contrary, the Court affirmatively stated that its collateral estoppel analysis was predicated on an earlier judgment of acquittal: "For whatever else [double jeopardy] may embrace, it surely protects a man who *has been acquitted* from having to 'run the gantlet' a second time." *Id.* at 445-46 (emphasis added and citations omitted). And if more confirmation is needed, one need only look the Court's later decisions in *Rumsey*, *Poland*, and *Sattazahn*. In each, the double-jeopardy analysis turned on a threshold inquiry of whether the defendant had received an "acquittal" in his earlier capital proceeding. The very argument raised by Bies—that specific factual findings on aggravating and mitigating factors in the penalty phase carry a preclusive effect in later proceedings—was rejected in *Poland*. See 476 U.S. at 155-56.

Because no acquittal has occurred in this case, Bies cannot invoke double jeopardy to attack his death sentence.

### C. Bies offers no support for his argument that double jeopardy applies to a state post-conviction proceeding that does not expose him to further punishment.

Bies wrongly contends that allowing the state courts to adjudicate his *Atkins* claim would "offend the interests protected by the Double Jeopardy Clause." Opp. at 20. But in *Helvering v. Mitchell*, 303 U.S. 391 (1938), this Court defined the narrow interests that the Clause protects: "[T]he double jeopardy clause prohibits merely punishing twice, or

attempting a second time to punish criminally, for the same offense." *Id.* at 399. Because the state post-conviction proceeding at issue does not place Bies at risk of any *additional* punishment, he cannot claim a double jeopardy violation.

Bies's own authorities confirm this position. See *United States v. Jorn*, 400 U.S. 470, 479 (1971) (noting that the Clause "limit[s] the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws") (emphasis added); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) ("The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused."). The state post-conviction proceeding does not offend double jeopardy because it is not a second criminal proceeding, nor was it brought by the State.

At bottom, Bies mistakenly equates a self-initiated post-conviction proceeding with a second criminal trial brought by the State. See Opp. at 20 ("Reopening the issue of mental retardation . . . would succeed only in providing the State with an opportunity to further pursue a wrongful execution."). But in the state post-conviction proceeding, the State is not seeking to impose a death sentence. Rather, Bies is "taking a second run at vacating his death sentence—which is assuredly his right, but just as assuredly does not offend the double-jeopardy bar." App. 23a (Sutton, J., dissenting from the denial of rehearing en banc).

### D. Bies erroneously asserts that the Warden has conceded material facts in an effort to shield this case from review.

On multiple occasions, Bies argues that the State has conceded certain facts about Bies's mental condition that undermine the Warden's Petition. As an initial matter, Bies confuses the doctrine of judicial estoppel with the doctrine of collateral estoppel, see Opp. at 19 n.9 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001)), and there is no suggestion that judicial estoppel is relevant here or applicable here. More to the point, these purported concessions do not bear on the central issue in this litigation—whether Bies can invoke the Double Jeopardy Clause in this habeas proceeding. Even assuming that the Clause applies (which it does not), and that the State's purported concessions carry legal significance (which they do not), Bies's position is inaccurate and unsupportable.

The Warden did not, as Bies asserts, concede "that Dr. Winter used the appropriate clinical definition of mental retardation [under Ohio law]" in his Petition, Opp. at 5 n.2, 14 n.7, much less accept, as Bies suggests, the force of Winter's diagnosis. On page 26 of the Petition, the Warden summarized the Sixth Circuit's collateral estoppel analysis: (1) The Ohio Supreme Court referenced Winter's diagnosis when it affirmed his death sentence in 1996; (2) Winter's methods in 1992 conformed to the mental retardation standards later adopted by the Court in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), in response to *Atkins*; and therefore (3) the Court must have actually decided the *Atkins* issue in 1996. The

Warden then attacked this chain of inferences: "This reasoning improperly assumes that because Dr. Winter applied the diagnostic method that was later outlined in *Lott*, the Ohio Supreme Court must have decided the question using the standard as well." Pet. at 26. This text in no way endorses the Sixth Circuit's conclusion that Dr. Winter's diagnosis of Bies conformed to the judicial definition of retardation developed ten years later by the Ohio Supreme Court. It simply demonstrates that the Sixth Circuit's ultimate conclusion does not automatically follow from its two factual premises.

Bies next contends that the State has conceded the fact of Bies's mental retardation in various state proceedings. See Opp. at 19. Again, this is a misrepresentation. The statements referenced by Bies were summaries of the trial record by prosecutors—that Bies has an I.Q. of 68 or 69, that he is not intelligent, and that he suffers from mild retardation.

The State has *not* conceded that these facts are dispositive, or even sufficient, for the *Atkins* inquiry. As the Ohio Supreme Court has noted, a mental retardation inquiry involves three individualized and specific factual findings: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott*, 779 N.E.2d at 1014. And I.Q. score is only "one of the many factors that need to be considered." *Id.* Such findings have never been made, let alone conceded, in this case. In fact, Dr. Winter's report itself

acknowledges that Bies "functions on a slightly higher level than test results would indicate." Joint Appendix to Sixth Circuit case no. 06-3471, at 1507. Bies is therefore wrong to attribute to the Warden a concession that the Warden could not, and did not, make.

Finally, Bies suggests, wrongly, that the Warden has conceded that a mental retardation inquiry was necessary to the Ohio Supreme Court's 1996 decision affirming Bies's death sentence. See Opp. 22-23. The Warden recognized only that Ohio's sentencing scheme required the Court to conduct an independent assessment into the appropriateness of the death penalty.[1] See Pet. at 28. Because Ohio law did not mandate the level of inquiry contemplated by *Atkins* and *Lott*, it was not a necessary component of the Court's analysis. Cf. *Lott*, 779 N.E.2d at 1014 (noting "the absence of a statutory framework to determine mental retardation" in Ohio).

**E. This case is worthy of review.**

Contrary to Bies's suggestion, this case warrants review because the Sixth Circuit's analysis is not confined to "the highly idiosyncratic circumstances of this case." Opp. at 10. First, the decision will influence future habeas proceedings. Before *Atkins*, capital defendants frequently raised

[1] Nor did the Warden characterize Ohio's appellate review process in a manner that contravenes *Tennard v. Dretke*, 542 U.S. 274 (2004). See Opp. at 22 n.11. The Ohio Supreme Court has never excluded arguments of mental retardation as irrelevant; it simply gave them less weight absent a direct nexus to the crime.

allegations of mental retardation as a mitigating factor in assessing the appropriateness of the death penalty. As it did for Bies, the Ohio Supreme Court regularly included a passing remark on direct appeal that the defendant's evidence of "mild retardation" was deserving of some weight in mitigation, but that it did not overcome the aggravating circumstances of the case.[2] See, e.g., *State v. Fears*, 715 N.E.2d 136, 155 (Ohio 1999) (noting that defendant's "low IQ of eighty, near the borderline range of mild mental retardation" was "entitled to some weight"); *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) (same); *State v. Waddy*, 588 N.E.2d 819, 840 (Ohio 1992) (same); *State v. Holloway*, 527 N.E.2d 831, 839 (Ohio 1988) (same). Following the Sixth Circuit's guidance, federal district courts in Ohio and elsewhere in the circuit must grant habeas petitions brought by such prisoners. In fact, one such case is in the pipeline. See *State v. Hill*, 177 Ohio App. 3d 171, 181-86 (Ohio Ct. App. 2008), *appeal docketed*, No. 2008-1686 (Ohio Aug. 25, 2008) (holding that the State could litigate the issue of a capital prisoner's mental retardation because the matter had not been resolved in a pre-*Atkins* penalty-phase proceeding).

Moreover, the decision potentially has ramifications for all types of criminal cases. The Sixth Circuit has allowed an individual who has neither been acquitted of a crime, nor subjected to a second prosecution, to invoke the Double Jeopardy

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[2] Bies's repeated citations to lower state court opinions, see Opp. at 4-6, 18, are irrelevant because, under AEDPA, the federal courts "look to the last state-court decision on the merits." *Garcia v. Andrews*, 488 F.3d 370, 374 (6th Cir. 2007).

Clause as to one specific issue of fact. It is difficult to predict how this unprecedented analysis could expand double-jeopardy protections to other factual determinations in criminal proceedings—suppression motions, evidentiary rulings, sentencing findings, and the like.

Finally, the decision invites unwarranted federal interference in state-court proceedings. Immediately after the state post-conviction court denied his motion for summary judgment, Bies raced to federal court under the cloak of double jeopardy, thereby frustrating any progress in that proceeding or development of the record on the *Atkins* issue. The Sixth Circuit then effectively enjoined the state proceeding without regard for the principles of comity and federalism that inhere in AEDPA, see 28 U.S.C. § 2254(b)(1)(A) (requiring petitioners to "exhaust[] the remedies available in the courts of the State"), *Atkins*, 536 U.S. at 317 (assigning "to the States the task of developing appropriate ways to enforce the constitutional restriction") (citation omitted), and the federal-state judicial balance generally, see *Younger v. Harris*, 401 U.S. 37, 45 (1971).

The existing trial record confirms that Bies has a colorable claim that his mental retardation is so severe that the Eighth Amendment bars his execution. That record, however, was developed years before *Atkins* was decided, without any understanding of the constitutional standards that now govern allegations of mental retardation. At this stage, the Warden is simply asking that habeas petitioners like Bies be put to their proof. In the

unlikely event that the state courts unfairly or improperly adjudicate Bies's *Atkins* claim, the federal courts stand ready to correct the error.

## CONCLUSION

For the above reasons, the Court should grant the Petition.

Respectfully submitted,

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