No. 08-

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

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

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

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

LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Margaret Bagley. See Fed. R. Civ. P. 25(d).

The Respondent is Michael Bies, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, Warden, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008), is reproduced at App. 33a-66a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc, *Bies v. Bagley*, 535 F.3d 520 (6th Cir. 2008), is reproduced at App. 1a-32a. The United States District Court for the Southern District of Ohio's order is reproduced at App. 67a-68a. The state post-conviction court's opinion and orders, denying the petition for post-conviction relief, are reproduced at App. 95a-105a. The Ohio Supreme Court's opinion in *State v. Bies*, 658 N.E.2d 754, 756 (Ohio 1996), affirming Bies's conviction and sentence, is reproduced at App. 106a-128a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on August 5, 2008. The State timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any person be

subject for the same offence to be twice put in jeopardy of life or limb."

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

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

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

INTRODUCTION

More than ten years ago, the Ohio Supreme Court upheld the death sentence imposed on Respondent Michael Bies for the brutal murder of a ten-year-old boy. In a conclusory statement in its

decision, the court remarked that evidence of "Bies's personality disorder and mild to borderline mental retardation merit[s] some weight in mitigation." App. 120a. But the court found that the heinous and cruel nature of the crime, among other aggravating factors, outweighed this mitigating evidence beyond a reasonable doubt.

Even though the Ohio Supreme Court made its off-hand comment on Bies's mitigating evidence in a decision *upholding* Bies's death-penalty conviction, the Sixth Circuit nevertheless found that the statement was legally conclusive in establishing that Bies was *ineligible* for the death penalty. The Sixth Circuit reached this contorted result by concluding, on double jeopardy grounds, that the Ohio court's statement precluded the State from submitting evidence in a state post-conviction hearing to determine whether Bies is ineligible for capital punishment because he is mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Sixth Circuit's holding runs contrary to fundamental double jeopardy principles and warrants this Court's review for three reasons. First, jeopardy never terminated in Bies's case because no court has ever "acquitted" Bies on a sentence of death. On the contrary, every level of Ohio court has agreed that the death penalty is appropriate in Bies's case, and thus the Sixth Circuit was wrong to treat the *imposition* of the death penalty as an "acquittal." Second, a state post-conviction proceeding under *Atkins* does not twice put Bies in jeopardy of life or limb because it does not expose him to the risk of an additional criminal

sanction. Third, the Double Jeopardy Clause's collateral estoppel component does not apply to Bies's case because the Ohio Supreme Court did not actually and necessarily find that he is mentally retarded under *Atkins*.

The Sixth Circuit's decision is without precedent. The Warden is aware of no case in any other court that has barred an *Atkins* hearing on such a novel double-jeopardy theory. More to the point, because the state court's decision to proceed with the *Atkins* hearing was consistent with this Court's clearly established precedent, the Sixth Circuit's contrary conclusion violated the constraints of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

This Court should grant review to reverse the Sixth Circuit's erroneous grant of the writ.

STATEMENT OF THE CASE

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

On May 12, 1992, police uncovered the body of ten-year-old Aaron Raines in the basement of an abandoned building in Cincinnati. App. 106a. The autopsy showed that Raines died from multiple blunt injuries to his head, neck, chest, and abdomen. App. 109a. He suffered nineteen separate lacerations to his scalp, five broken ribs, and a collapsed lung, and the left side of his face was flattened because of severe skull fractures. App. 108a-109a. Raines's injuries suggested that he had been severely beaten

with a piece of concrete and a metal pipe, strangled with a piece of twine, and kicked. App. 108a.

After a nine-week investigation, the police concluded that Bies and an accomplice, Darryl Gumm, murdered Raines. App. 109a. The two men lured the boy into the abandoned building with the intent to rape him. App. 107a. When Raines resisted, they beat him and left his body in the basement. App. 107a-108a. When officers later questioned Bies about the murder, Bies made inculpatory statements about his role. App. 109a.

Bies was indicted and later convicted of aggravated murder, attempted rape, and kidnapping. App. 110a. During the penalty phase of his trial, in way of mitigation, Bies offered an unsworn statement through his attorney asking for mercy. *Id.* He also presented the testimony of a clinical psychologist, Donna E. Winter. The Ohio Supreme Court recounted Winter's testimony:

> Winter reviewed an evaluation made of Bies when he was three years old, in which he was characterized as being "violent and uncontrollable." Hospital records of Bies indicated that he was abused during his childhood, and that his upbringing was chaotic, neglectful and violent. Between the ages of five and thirteen, Bies had made several suicide attempts or threats. Bies was too disruptive for public school, so he was placed in several different special schools. Winter believes that Bies is still a very impulsive person, who at times cannot control his anger and

> becomes hostile. Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded. Although Winter described Bies as a "very dense individual" lacking common sense, she conceded that everyone who evaluated Bies, including herself, concluded that Bies knew right from wrong at the time of the murder.

App. 110a-111a. The jury recommended a sentence of death, which the trial court imposed. App. 111a. The Ohio court of appeals affirmed the conviction and sentence. *Id.*[1]

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

On Bies's direct appeal as of right, the Ohio Supreme Court conducted an independent review of Bies's death sentence for appropriateness and proportionality, as Ohio law requires. See Ohio Rev. Code § 2929.05. Referencing Winter's testimony, the court stated that "Bies's personality disorder and mild to borderline mental retardation merit some weight in mitigation." App. 120a. It further noted that Bies lacked a significant criminal record and that he had a violent and unstable family environment. *Id.* Nevertheless, the court concluded that the aggravating circumstances, including the

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[1] Bies's accomplice, Gumm, was also convicted of murder, attempted rape, and kidnapping, and sentenced to death. See *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995). His death sentence was later vacated after the state post-conviction court found, consistent with *Atkins*, that Gumm was mentally retarded. See *State v. Gumm*, 864 N.E.2d 133 (Ohio Ct. App. 2006).

heinous and brutal nature of the crime, "outweigh[ed] the mitigating factors beyond a reasonable doubt." App. 121a. The court therefore affirmed the sentence.

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

Bies filed his first petition for post-conviction relief in the state court of common pleas, arguing, among other things, that the Eighth Amendment's cruel and unusual punishment clause bars his execution because he is mentally retarded. The court rejected the claim on its merits. The Ohio court of appeals affirmed, concluding that Bies had waived his Eighth Amendment claim by not raising it on direct appeal. See *State v. Bies*, 1999 Ohio App. Lexis 3108, *18 (Ohio Ct. App. June 30, 1999). The Ohio Supreme Court dismissed the appeal without a decision. See *State v. Bies*, 719 N.E.2d 4 (Ohio 1999).

Bies then filed a petition for writ of habeas corpus in federal district court, arguing again that the Eighth Amendment bars his execution because he is mentally retarded. While that petition was still pending, Bies filed a second post-conviction petition in the state courts. The court of common pleas dismissed the petition, and the Ohio court of appeals affirmed. See *State v. Bies*, 2003 Ohio App. Lexis 459 (Ohio Ct. App. Jan. 31, 2003). The Ohio Supreme Court dismissed the appeal without a decision. See *State v. Bies*, 788 N.E.2d 648 (Ohio 2003).

After this Court issued its decision in *Atkins*, Bies—at the direction of the federal district court—filed a third petition for post-conviction relief in state

court. He then moved for summary judgment on that petition, arguing that the trial record affirmatively established the fact of his mental retardation, that the Ohio Supreme Court recognized his mental retardation on direct appeal, and that double jeopardy precluded the State from taking a contrary position.

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

Bies filed a renewed motion for summary judgment, arguing expressly that a hearing would put him twice in jeopardy on the question of his mental retardation. The court of common pleas denied the motion without further comment, referencing its prior decision. App. 95a.

D. Bies returned to federal court to pursue his double jeopardy claim.

After the state court denied his summary judgment motion, Bies returned to federal district court on his double jeopardy theory. The district court granted him leave to amend his petition to include the claim and bifurcated the proceedings to expedite its consideration. In March 2006, the district court granted the writ, agreeing with the

magistrate judge's recommendation that the Double Jeopardy Clause applied to Bies's case and that the Ohio courts had adjudicated the issue of Bies's mental retardation. App. 67a-68a.

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

The State sought panel rehearing or rehearing en banc, which the court denied over Judge Sutton's dissent. App. 1a-2a. Judge Sutton concluded that the Double Jeopardy Clause does not apply to Bies because Bies had never received an "acquittal"; instead, the state courts had affirmed his sentence of death. App. 22a-23a. Judge Sutton further objected to the panel's application of collateral estoppel rules. He noted that that the Ohio Supreme Court did not actually decide the issue of Bies's mental retardation under *Atkins* because that court examined the issue only through the lens of a mitigation analysis:

> The mitigation and *Atkins* inquiries flow from different constitutional requirements under the Eighth Amendment—the requirement that capital defendants receive individualized consideration of mitigating factors and the categorical (i.e., non-individualized) requirement that those who are mentally retarded not be executed due to the diminished deterrent value of the death penalty on, and the diminished culpability of, such individuals.

App. 26a-27a (internal citations omitted). Finally, Judge Sutton explained that the issue of Bies's mental retardation was not necessary to the Ohio Supreme Court's decision affirming the imposition of a death sentence: "Far from being necessary to the judgment, the Ohio courts' mental-retardation findings cut against it—making them quintessentially the kinds of rulings not eligible for issue-preclusion treatment." App. 27a

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's grant of habeas relief departs from settled law and violates AEDPA's clear strictures in three ways. First and foremost, the state post-conviction court's rejection of Bies's double jeopardy claim was consistent with clearly established federal law. In the penalty phase of a capital murder trial, jeopardy terminates only upon an "acquittal"—when "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland v. Arizona*, 476 U.S. 147, 155

(1986) (alteration and internal quotation marks omitted). No such judgment has ever been rendered in this case. Instead, all of the relevant sentencing bodies—the jury, the trial court, the Ohio court of appeals, and the Ohio Supreme Court—expressly endorsed a death sentence for Bies. Because jeopardy never terminated, the Double Jeopardy Clause does not apply.

Second, the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (internal citations omitted). Bies has never been exposed to the possibility of multiple criminal punishments for his murder offense. Rather, Bies has initiated state post-conviction proceedings in which *he* seeks to vacate his original punishment.

Third, even if the Double Jeopardy Clause applies to this case, its collateral estoppel component does not bar a state court hearing on Bies's *Atkins* claim. After examining the record, the state post-conviction court correctly concluded that the Ohio Supreme Court had not actually and necessarily determined whether Bies's "mild to borderline mental retardation" qualified as a complete bar to the death penalty under *Atkins*. That ruling is consistent with pronouncements from the Ohio Supreme Court and the Ohio appellate courts distinguishing the penalty-phase inquiry, which looks to the presence of a defendant's mental retardation as a potential mitigating factor, from the *Atkins* inquiry, which assesses whether the

magnitude of the defendant's retardation bars the imposition of the death penalty.

A. The Ohio Supreme Court's decision affirming Bies's conviction and death sentence did not trigger the Double Jeopardy Clause's protections.

The Sixth Circuit's decision overlooked a critical element of the double-jeopardy analysis—that jeopardy must "terminate" with respect to the offense in question before constitutional protections are triggered. See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) ("[O]nce a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense."). Specifically, jeopardy terminates when a defendant is "acquitted"—meaning either that the factfinder found him not guilty of the elements of the offense, see *United States v. Scott*, 437 U.S. 82, 97 (1978), or, in the death-penalty context, that the sentencer found that the prosecution failed to prove its case for a capital sentence, see *Sattazahn*, 537 U.S. at 109 ("[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'"); *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984) ("[T]he Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty.").

Every Ohio court that examined the appropriateness of the death penalty in Bies's case—the state trial court, the Ohio court of appeals, and the Ohio Supreme Court—determined that the

prosecution had proven its case for the death penalty. Accordingly, Bies was not "acquitted" of capital punishment, jeopardy never terminated, and the Double Jeopardy Clause was never triggered. The Sixth Circuit's contrary holding—that the Ohio Supreme Court "acquitted" Bies when it simply mentioned his mild to borderline mental retardation in its opinion—is not only incorrect, but also barred by AEDPA.

1. No "acquittal" occurs when the jury imposes, and the appellate courts affirm, a sentence of death.

"[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" *Sattazahn*, 537 U.S. at 109. In this context, the definition of an "acquittal" is well-settled: "[T]he 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." *Poland*, 476 U.S. at 155 (alteration and internal quotation marks omitted). Put another way, the sentencer must make "findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Sattazahn*, 537 U.S. at 108.

By definition, a capital defendant is not "acquitted" when he or she is sentenced to death. See *Poland*, 476 U.S. at 156 ("This concern [of the Double Jeopardy Clause] with protecting the finality of acquittals is not implicated when . . . a defendant is sentenced to death, *i.e.*, 'convicted.'"). Instead, the Double Jeopardy Clause requires a triggering event—a judgment or dismissal that terminates jeopardy with respect to offense in question—before

its protections attach. See *Richardson v. United States*, 468 U.S. 317, 325 (1984) ("[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.").

No such triggering event occurs when a court, during the penalty phase, makes factual findings that do not preclude a sentence of death. This Court's decision in *Poland v. Arizona* is instructive. The prosecutors in that case presented two aggravating factors: (1) the defendants expected pecuniary value from the murder, and (2) their crime was especially heinous, cruel, or depraved. 476 U.S. at 149. The trial court held that the State established the second factor but not the first, because the crime was not a contract killing. *Id.* It imposed a death sentence for both defendants. The Arizona Supreme Court later reversed the convictions, finding error in the guilt phase and penalty phase. *Id.* at 150. With respect to the penalty phase, the court held (1) that the trial court improperly limited application of the pecuniary-gain factor to contract killings, and (2) that the State had not presented sufficient evidence to establish that the defendant's crime was especially heinous, cruel, or depraved. *Id.*

After the defendants were again convicted on retrial, the State introduced additional evidence supporting the two original aggravating factors as well as a third aggravating circumstance (previous conviction of a violent felony). *Id.* The trial judge found all three aggravating circumstances and reimposed death sentences, and the Arizona Supreme Court affirmed. *Id.* at 150-51.

The question before this Court was whether the Double Jeopardy Clause precluded Arizona from seeking the death penalty on retrial because the defendants had been independently "acquitted" during the first trial of each aggravating factor. *Id.* at 155. The Court disagreed with the defendants' argument "that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an 'acquittal' of that circumstance for double jeopardy purposes." *Id.* The Court also rejected the characterization of the penalty-phase proceeding as "a set of minitrials on the existence of each aggravating circumstance." *Id.* at 156. Instead, the Court explained, "the proper inquiry" for "acquittal" purposes "is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate*." *Id.* at 155 (internal citation omitted). Because the defendants had not been "acquitted" within the meaning of the Double Jeopardy Clause in the first trial, Arizona could relitigate any aggravating factor at the second trial.

Poland's holding applies with full force to this case. Even if the Ohio Supreme Court recognized the fact of Bies's mental retardation—a doubtful proposition given the court's merely passing reference to the issue—it affirmed the imposition of the death penalty as an appropriate punishment. Therefore, Bies was never "acquitted," and the Double Jeopardy Clause does not preclude the State from relitigating the issue of mental retardation.

Despite *Poland*'s clear applicability to this case, the Sixth Circuit adopted a different definition of the term "acquittal": "In the context of a capital

sentence," the court said, "a criminal defendant is protected against double jeopardy when a judge or jury 'enter[s] findings sufficient to establish legal entitlement to the life sentence.'" App. 45a (quoting *Sattazahn*, 537 U.S. at 109). Applying that definition, the Sixth Circuit concluded that Bies was "acquitted" when the Ohio Supreme Court noted that he suffered from "mild to borderline mental retardation," and that statement sufficed to establish legal entitlement to a life sentence.

The Sixth Circuit's new definition of "acquittal," however, distorts the very case on which it relies. In *Sattazahn*, the defendant was convicted of first-degree murder, but when the jury could not agree unanimously on whether to impose a death sentence, the trial court, consistent with state law, entered a default sentence of life. 537 U.S. at 104-05. The state appellate court reversed the conviction because of a faulty jury instruction, and on retrial the jury again convicted Sattazahn of first-degree murder, but elected to impose a death sentence. *Id.* at 105.

In finding no double-jeopardy bar to imposing the death penalty at the second trial, the Court focused on the definition of "acquittal." See *id.* at 108 (asking whether the "first life sentence was . . . based on findings sufficient to establish legal entitlement to the life sentence—*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt."). The defendant did not receive an "acquittal" at his first trial, the Court held, because no judgment had been made as to the appropriateness of the death penalty. *Id.* at 109.

Life imprisonment was simply the default option. Cf. *United States v. Peoples*, 360 F.3d 892, 895 (8th Cir. 2004) ("The mere imposition of a life sentence is not enough; there must be an affirmative choice by the jury not to impose a death sentence."). Accordingly, jeopardy never terminated and Pennsylvania was free to seek a death sentence at the second trial.

The critical factor in determining whether an "acquittal" occurred, then, is whether the sentencer or reviewing court has found that the death penalty is not appropriate. This Court followed that same approach in *Arizona v. Rumsey*, where the trial court imposed a life sentence after it "entered findings denying the existence of each of the seven statutory aggravating circumstances." 467 U.S. at 211. After the Arizona Supreme Court found error and remanded for a new sentencing proceeding, the trial court imposed a death sentence. *Id.* at 207-08. This Court found a double jeopardy violation because the trial court's earlier judgment was based on an explicit finding that the State had not proven the existence of *any* aggravating circumstance. The Court explained that "[t]hat judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Id.* at 211.

In this case, no factfinder—neither the jury nor any reviewing court—ever found that Bies was entitled to a life sentence. On the contrary, the Ohio courts unanimously held precisely the opposite: that Bies's death sentence should be affirmed.

The Sixth Circuit therefore stretched the double-jeopardy rule beyond all bounds when it

somehow ruled that the imposition of a *death sentence* may constitute an "acquittal" under the Double Jeopardy Clause. Nothing in *Poland*, *Sattazahn*, or *Rumsey* supports this holding, and the panel did not cite, nor can the Warden locate, any authority supporting this proposition. And the reason why no such authority exists is easy to ascertain: In no sense can a verdict of death be characterized as "an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for [the defendant's] offense." *Rumsey*, 467 U.S. at 211.

The state trial court, the state appellate court, and the Ohio Supreme Court all agreed that the prosecution had proven its case that the death penalty was an appropriate punishment for Bies. "[B]ecause the reviewing court[s] did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty 'acquittal.'" *Poland*, 476 U.S. at 157. Accordingly, jeopardy never terminated, the protections of the Double Jeopardy Clause were never triggered, and the Sixth Circuit's contrary conclusion was erroneous.

2. The Sixth Circuit's contrary ruling, even if correct, was not clearly established federal law at the time of the state court's decision.

Under AEDPA, Bies must establish that the Ohio court's decision was "contrary to" or "an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1). On state post-conviction review, Bies presented his double-jeopardy argument in both his summary judgment motion and his

renewed motion for summary judgment. The state court denied both motions. Because the court did not specifically explain its reasoning in rejecting Bies's double jeopardy claim, the "unreasonable application" prong of § 2254(d)(1) does not apply. See *Bugh v. Mitchell*, 329 F.3d 496, 507-08 (6th Cir. 2003). Thus, the question is whether the state court's decision was "contrary to" clearly established federal law—that is, whether it "applie[d] a rule that contradicts the governing law set forth" by this Court or "confront[ed] a set of facts that [were] materially indistinguishable from a decision of this Court and nevertheless arrive[d] at a result different from [this Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

At the time of the state post-conviction court's decision, all relevant Supreme Court authorities defined an "acquittal" at the penalty phase of a capital murder trial as the prosecutor's failure to convince the jury or reviewing court that death was the appropriate punishment. In other words, an "acquittal" necessarily required the imposition of a life sentence. See *Sattazahn*, 537 U.S. at 108 (asking "whether a first life sentence was an 'acquittal' based on . . . findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt"); *Poland*, 476 U.S. at 154 ("Plainly, the sentencing judge did not acquit, for he imposed the death penalty."); *Rumsey*, 467 U.S. at 211 (asking whether the "initial sentence of life imprisonment was . . . an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for [the defendant's] offense"). Because the State convinced the jury and the reviewing courts that death was an

appropriate punishment for Bies, the state post-conviction court's denial of Bies's double jeopardy claim was not contrary to any of those precedents.

The Sixth Circuit's ruling that individual factual findings by a reviewing court may function as an "acquittal," even if the same court affirms the death sentence, clearly extends those precedents. Under the panel's framework, the Ohio Supreme Court's passing observation that Bies suffered from "mild to borderline mental retardation" converted into an "acquittal" in 2002, when this Court issued its opinion in *Atkins*. Even if that analysis were correct (and it is not), the state post-conviction court's contrary decision did not contradict this Court's clear case law. No decision by this Court has ever recognized an "acquittal" based on events that occurred years after the defendant's conviction had become final.

Because Bies does not meet the requirements for habeas relief either on the merits of his double jeopardy claim or under the strictures of AEDPA, the Sixth Circuit's grant of the writ should be reversed.

B. A state post-conviction proceeding on the question of Bies's mental retardation does not twice put Bies in jeopardy because (a) it does not expose him to the risk of additional criminal sanctions, and (b) the State did not initiate the proceeding.

Even if Bies somehow was "acquitted" of the death penalty, the Sixth Circuit failed to address the second critical element of the double-jeopardy analysis—that a successive proceeding must place

the defendant at the risk of additional criminal sanctions. "The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." *Hudson*, 522 U.S. at 99 (internal citations omitted). If no criminal sanction is possible as a product of the proceeding, the defendant cannot claim any protection from the Double Jeopardy Clause. See *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) ("[T]he double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.").

The Double Jeopardy Clause does not protect Bies from factfinding on the question of his mental retardation in state post-conviction proceedings because those proceedings are "quasi-civil" in nature. *State v. Nichols*, 463 N.E.2d 375, 377 (Ohio 1984). Because they do not place Bies at the risk of any *additional* punishment—criminal or otherwise—for his murder of Aaron Raines, the Double Jeopardy Clause simply does not apply. Cf. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) ("[T]he forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments.").

Moreover, it was Bies, not the State, who initiated the state post-conviction proceedings. Cf. *United States v. Balsys*, 524 U.S. 666, 673 (1998) ("[N]one of [the Fifth Amendment's] provisions is implicated *except by action of the government* that it binds.") (emphasis added). As Judge Sutton explained in his dissent from the denial of rehearing

en banc, "Bies was never 'twice put in jeopardy' in the post-conviction claim *he* filed in state court. Quite to the contrary: he was 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. Accordingly, the Sixth Circuit's grant of the writ should be reversed.

C. The Sixth Circuit misapplied the rules of collateral estoppel to preclude the State from challenging Bies's claim of mental retardation under *Atkins*.

In the context of a federal criminal proceeding, "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." *United States v. Dixon*, 509 U.S. 688, 705 (1993) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). "[W]hen 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*, 397 U.S. at 443. Specifically, relitigation of a factual issue will be precluded where the issue has already been "*actually* and *necessarily* determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added).

As discussed above, the State has not "lost" an earlier prosecution. Accordingly, double jeopardy has not been triggered and the doctrine of collateral estoppel does not bear on the resolution of this case. And assuming that double jeopardy did apply, the state post-conviction court's rejection of Bies's collateral estoppel argument was not contrary to or

an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254(d)(1). See *Schiro v. Farley*, 510 U.S. 222, 232 (1994) (explaining that the preclusive effect of an earlier criminal proceeding is a question of law). The Sixth Circuit was wrong to have second-guessed it.

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

When it affirmed his death sentence in 1996, the Ohio Supreme Court offered a conclusory statement that Bies's evidence of "mild to borderline mental retardation merit[s] some weight in mitigation." App. 120a. The court did not explain how it arrived at this observation, nor did it offer a definition or standard of mental retardation.

Six years later in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Ohio Supreme Court implemented this Court's directive in *Atkins* to "develop 'appropriate ways to enforce the constitutional restrictions' on executing the mentally retarded." *Id.* at 1014 (quoting *Atkins*, 536 U.S. at 317). The inquiry would be guided by three standards: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Id.* The court further held that an I.Q. score above 70 established a rebuttable presumption that the defendant was not mentally retarded. *Id.* Nevertheless, it cautioned that I.Q. score alone was not sufficient to make a final determination on the issue. *Id.*

In light of this sequence—affirmance of Bies's conviction and sentence on direct review, followed years later by *Lott*'s implementation of *Atkins*—the state post-conviction court rejected Bies's assertion that the Ohio Supreme Court had actually determined the question of his mental retardation for purposes of the Eighth Amendment. It specifically noted that *Atkins* and *Lott* had not yet been decided at the time of his direct appeal. App. 104a.

This ruling was objectively reasonable. In 2002, the Ohio Supreme Court and the Sixth Circuit observed that the State of Ohio had no standards for assessing claims of mental retardation. See *Lott*, 779 N.E.2d at 1014 (noting "the absence of a statutory framework to determine mental retardation"); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death."). In light of *Lott* and *Hill*, the state post-conviction court logically concluded that the Ohio Supreme Court could not have decided the issue of Bies's mental retardation for purposes of the Eighth Amendment before 2002.

Moreover, the Ohio Supreme Court in *Lott* recognized that *Atkins* claims, by their very nature, involve disputed issues of fact that are "best resolved in the trial court." 779 N.E.2d at 1014. A proper inquiry requires de novo fact-finding, reliance on professional evaluations, taking expert testimony, and issuing a written opinion. *Id.* at 1015. The Ohio Supreme Court's brief, conclusory statement that Bies suffered "mild to borderline mental retardation" carries none of the hallmarks of the requisite *Atkins*

fact-finding. Accordingly, the state post-conviction court reasonably found that the Ohio appellate courts had not determined the fact of Bies's mental retardation for Eighth Amendment purposes.

Finally, the state post-conviction court's ruling is consistent with pronouncements from every Ohio appellate court that has compared the penalty-phase inquiry into mental retardation with the *Lott* inquiry into mental retardation. These courts uniformly have concluded that the two proceedings address different issues. As one court succinctly put it, "[t]he mitigation hearing, by definition, [does] not address the three-part test for mental retardation set forth in *Atkins* and adopted by Ohio in *Lott*." *State v. Lorraine*, 2005 Ohio 2529, ¶ 29 (Ohio Ct. App. May 20, 2005); see also *State v. Bays*, 824 N.E.2d 167, 171 (Ohio Ct. App. 2005) ("Although the expert testimony presented at Bays's mitigation hearing regarding his intellectual limitations is relevant to Bays's *Atkins* claim, it was not developed either to prove or to disprove the issue presented by his *Atkins* claim—whether Bays is so impaired that his execution would constitute cruel and unusual punishment."); *State v. Hughbanks*, 823 N.E.2d 544, 548 (Ohio Ct. App. 2004) ("But the penalty-phase evidence was offered to probe the issue of whether his mental illness mitigated against the imposition of the death penalty. It was not intended to probe the issue, posed by his *Atkins* claim, of whether he fell within the range of mentally retarded offenders whose execution the Eighth Amendment prohibited."); *State v. Carter*, 813 N.E.2d 78, 83 (Ohio Ct. App. 2004) (same). See generally App. 26a-27a (Sutton, J., dissenting from denial of rehearing en banc) ("The mitigation and *Atkins* inquiries flow from different

constitutional requirements under the Eighth Amendment—the requirement that capital defendants receive individualized consideration of mitigating factors and the categorical (i.e., non-individualized) requirement that those who are mentally retarded not be executed . . . ." (internal citation omitted)).

With no mention of AEDPA, the Sixth Circuit reached the opposite conclusion. The panel observed that the Ohio Supreme Court's "finding that [Bies] is mentally retarded was based solely on the diagnosis of Dr. Donna Winter," and it concluded that Dr. Winter "applied the same clinical method of diagnosing mental retardation which was described by the court in *Lott*." App. 51a. Therefore, "the state supreme court applied the same clinical definition of mental retardation in its determination that [Bies] is mentally retarded as it did in deciding *Lott*." App. 49a.

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 that standard as well. But the Ohio Supreme Court nowhere indicated that it was aware of or applied the standards that it would promulgate six years later in response to *Atkins*. Rather, as shown by the opinion's summary of the testimony, the court's passing observation that Bies suffered from "mild to borderline mental retardation" appears to have been based primarily on Dr. Winter's assessment of Bies's I.Q. score. See App. 111a ("Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded."). And the Ohio Supreme Court

underscored in *Lott* that I.Q. score alone does not suffice to establish mental retardation. See 779 N.E.2d at 1014.

In any event, the Sixth Circuit's independent analysis of the collateral estoppel doctrine in this case is beside the point. What matters is that the state post-conviction court concluded that the Ohio Supreme Court had not actually decided the issue of Bies's retardation under the Eighth Amendment, and that conclusion was well supported: *Atkins* and *Lott* had not been decided at the time of the direct appeal, the Ohio Supreme Court's opinion is devoid of analysis on the mental retardation issue, and a wealth of Ohio case law has distinguished the *Lott* inquiry from the penalty-phase mitigation inquiry. The state court's ruling therefore was not contrary to or an unreasonable application of this Court's precedents.

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

Collateral estoppel "'attaches only to determinations that were *necessary* to support the judgment'"—in this case, the ultimate decision affirming the death penalty. *Schiro*, 510 U.S. at 233 (quoting 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4421, p. 192 (1981)) (emphasis added). Even a cursory familiarity with Ohio's death-penalty scheme demonstrates the flaw in the Sixth Circuit's conclusion that a finding on Bies's mental retardation was "necessary" to the Ohio Supreme Court's judgment affirming his death

sentence. As Judge Sutton explained in his dissent from the denial of rehearing en banc, "[f]ar from being necessary to the judgment, the Ohio courts' mental-retardation findings cut against it—making them quintessentially the kinds of rulings not eligible for issue-preclusion treatment." App. 27a.

Ohio law requires the state appellate courts to conduct an independent assessment of the imposition of the death penalty, including a weighing of aggravating and mitigating factors presented during the penalty phase. See Ohio Rev. Code § 2929.05(A). The Sixth Circuit reasoned that, as part of the weighing process, the state appellate courts must necessarily engage in fact-finding. See App. 56a ("[B]ecause a sentencing court's inquiry is open ended, determining which mitigating factors are actually present in a case is a necessary first step to determining whether those factors outweigh the aggravating circumstances."). And, reasoned the Sixth Circuit, because the Ohio Supreme Court weighed Bies's "*mild to borderline mental* retardation" as a mitigating factor, it necessarily must have found that Bies had established that fact. App. 57a. But that analysis conflates two distinct sets of findings: the statutorily requisite balancing of aggravating and mitigating circumstances on the one hand, and post-*Atkins* mental-retardation findings on the other.

Although the Ohio Supreme Court has a *statutory obligation to identify all relevant* mitigating factors in its analysis of whether the death penalty is an appropriate punishment for a particular defendant, mental-retardation findings were not necessary for it to affirm or reverse Bies's

death sentence. Before *Atkins*, proof of a defendant's mental retardation was not particularly germane to the analysis of whether a death sentence was an appropriate punishment. See *State v. Rojas*, 592 N.E.2d 1376, 1383 (Ohio 1992) ("[W]e do not find, in this case or from empirical evidence generally, that a fixed correlation can be made between a defendant's level of intelligence and a defendant's moral culpability."). The issue of mental retardation emerged as a significant factor in the mitigation calculus only if the defendant established a specific link between his retardation and his crime. See, e.g., *State v. Gumm*, 653 N.E.2d 253, 270 (Ohio 1995) ("[D]espite his low IQ, Gumm is able to distinguish right from wrong . . . ."); *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) ("[W]e find a very tenuous relationship between the acts he committed and his level of mental retardation."); *State v. Jenkins*, 473 N.E.2d 264, 301-02 (Ohio Ct. App. 1984) ("There was no evidence to suggest that appellant's low intelligence distorted the decision-making process he employed in perpetrating this robbery and murder . . . .").

In this case, although Dr. Winter testified that Bies suffered from mild to borderline retardation, she did not link that condition to Bies's crime. Accordingly, the Ohio Supreme Court had no need to pass on the credibility of her testimony; it was not necessary to the determination that a death sentence was an appropriate punishment for Bies. See *State v. Hill*, 2008 Ohio 3509, ¶ 56 (Ohio Ct. App. July 11, 2008) ("There was no reason for the State to contest the evidence of retardation . . . because that evidence did not link Hill's alleged retardation with his culpability for the murder of Raymond Fife. Without

this connection, the fact that Hill might be mentally retarded was not particularly relevant to whether Hill could be executed.").

Because the issue of Bies's mental retardation under *Atkins* was not a necessary component of the Ohio Supreme Court's decision affirming Bies's death sentence, the Sixth Circuit was wrong to hold that the State was collaterally estopped from litigating the issue in a later *Atkins* proceeding in state court.

3. The Sixth Circuit's ruling deprives the State—and only the State—of a full and fair opportunity to litigate claims of mental retardation under *Atkins*.

As a final matter, the Sixth Circuit rejected the State's argument that it did not have a full and fair opportunity to litigate the fact of Bies's mental retardation in proceedings before the Ohio court of appeals and the Ohio Supreme Court because the law had changed. "Petitioner's mental retardation was a contested issue," the Sixth Circuit said. App. 58a. "In briefs before both courts, both parties presented arguments and cited evidence in the record regarding whether Petitioner suffers from mental retardation." *Id.* This analysis fails to recognize the legal significance of mental retardation claims before and after *Atkins*.

Under well-established case law, "collateral estoppel may not be invoked when controlling facts or legal principles have changed significantly." *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987); see also *Montana v. United States*, 440 U.S. at 155 (same). "Preclusion is most

readily defeated by specific Supreme Court overruling of precedent relied upon in reaching the first decision." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4425, p. 674 (2002).

At the time of Bies's conviction, the issue of mental retardation had only tangential relevance to the sentencing phase of a capital trial. This Court had held the Eighth Amendment did not proscribe the execution of mentally retarded defendants. See *Penry v. Lynaugh*, 492 U.S. 302 (1989). And, as discussed above, although defendants often presented mental retardation as a possible mitigating factor in the sentencing calculus, they were rarely successful because they could not link the condition to their crime. The State therefore had little incentive to mount a vigorous defense to Bies's claim of retardation.

Atkins changed this landscape. In proscribing the execution of mentally retarded defendants under the Eighth Amendment, this Court expressly disavowed *Penry* and directed the States to implement the new constitutional mandate. See *Atkins*, 536 U.S. at 317. The Ohio Supreme Court immediately recognized the gravity of *Atkins*, refusing to preclude defendants from relitigating claims of mental retardation under *Atkins* even though they had unsuccessfully raised the issue of retardation during the penalty phase of their trials. See *Lott*, 779 N.E.2d at 1015.

The Sixth Circuit's ruling unfairly binds the State—and only the State—to decisions and rulings made in the pre-*Atkins* legal landscape where the fact of a defendant's mental retardation was not a

dispositive or persuasive factor in the death-penalty calculus. In light of the dramatic reconfiguration of that landscape after *Atkins*, the State must be afforded the same opportunity as habeas petitioners to litigate claims of mental retardation on a clean slate. The Sixth Circuit's ruling should be corrected before this errant precedent is applied, in the Sixth Circuit and elsewhere, to other capital defendants who introduced evidence of their limited intellectual functioning in pre-*Atkins* penalty-phase proceedings.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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