

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 DAVID BOBBY, WARDEN, :

4 Petitioner :

5 v. : No. 08-598

6 MICHAEL BIES. :

7 - - - - - x

8 Washington, D.C.

9 Monday, April 27, 2009

10

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

14 APPEARANCES:

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

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

19

20

21

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	BENJAMIN C. MIZER, ESQ.	
4	On behalf of the Petitioner	3
5	JOHN H. BLUME, ESQ.	
6	On behalf of the Respondent	19
7	REBUTTAL ARGUMENT OF	
8	BENJAMIN C. MIZER, ESQ.	
9	On behalf of the Petitioner	42
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear
argument next in Bobby v. Bies.

Mr. Mizer.

ORAL ARGUMENT OF BENJAMIN C. MIZER

ON BEHALF OF THE PETITIONER

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

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

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

Much of the dispute in this case centers on

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

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

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

25 MR. MIZER: The reason to do it again, Your

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

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

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

1 that the defendant has a 65 IQ, but that in light of the
2 heinous nature of the offense, this is not a mitigating
3 factor, and that he should be sentenced to death.

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

6 MR. MIZER: No, it can't --

7 JUSTICE KENNEDY: Or must that be reopened?

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

10 JUSTICE KENNEDY: Can -- can be reopened?

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

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

24 JUSTICE KENNEDY: But could the -- could the
25 defendant argue the -- that -- the accused argue that at

1 least as to the finding of the 65 IQ, that that is a
2 given.

3 MR. MIZER: And --

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

6 MR. MIZER: And the answer to that is no,
7 Your Honor, for issue preclusive purposes, because the
8 issue is completely different in the mitigation context
9 from the post-Atkins context. And I think that
10 difference is highlighted by the difference between
11 Penry and Atkins.

12 Pre-Atkins, what the sentencer was talking
13 about, the jury and then the Ohio Supreme Court when it
14 affirmed, was what this Court told it to talk about in
15 Penry. It was talking about mental retardation as a
16 mitigating factor, and the State of Ohio and the Ohio
17 courts had no definition of "mental retardation"
18 pre-Atkins. In fact, I think if there had been a
19 definition and if the courts had excluded evidence from
20 the jury if it didn't rise to a certain level of
21 severity, then we would have run into a -- a post -- a
22 Penry and Tennard problem. And so all of the evidence
23 was allowed in, and it was treated as mitigating.

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

1 evidence of mental retardation.

2 But post-Atkins, the inquiry is very
3 different because Atkins effectively constitutionalized
4 a clinical judgment in making -- in defining a
5 categorical bar on executing the mentally retarded. And
6 so post-Atkins it's necessary to be very careful about
7 the clinical judgment. And this record does not suffice
8 for that clinical judgment, and I think it -- think it
9 does not behoove either party to suggest that the record
10 --

11 JUSTICE SOUTER: When you say "the clinical
12 judgment," do you mean the specific finding of 65 IQ?

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

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

26 MR. MIZER: Because, Your Honor, I think

1 there are two different meanings of "necessary." It was
2 -- it was necessary in the sense that it had to be done,
3 but it wasn't necessary in the issue preclusive offense
4 because it -- it wasn't --

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

9 MR. MIZER: Correct.

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

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

14 JUSTICE SOUTER: Okay.

15 MR. MIZER: And -- and --

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

23 Then at the appellate level, is there a
24 continuing adversary contest about whether retardation
25 exists and, therefore, is a mitigator, or is it just the

1 -- the judge, the appellate judge, looking over the
2 record that has been made at trial?

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

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

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

24 And so none of the parties thought that
25 mental retardation in 1992 through 1996 was very

1 persuasive, because the courts didn't treat it and the
2 jury didn't treat it as very persuasive, perhaps for the
3 reasons that this Court underscored in Atkins, where the
4 Court said that, as it had said in Penry, that mental
5 retardation evidence presented to a jury in mitigation
6 could be a two-edged sword, because some jurors might
7 perceive and the prosecutor might argue that that
8 evidence went to future dangerousness, and therefore the
9 -- the State of Ohio argued that the mental retardation
10 evidence here was simply not persuasive and it was
11 outweighed by the -- the aggravating factors that the
12 jury had found. Atkins told the --

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

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

25 But the -- the jury's verdict and then the

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

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

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

21 The mental retardation evidence was relevant
22 under two of those mitigating statutory factors: one,
23 factor 3, which went to mental disease or defect, and
24 then the catch-all, factor 7. But the -- but I think
25 Poland helps to illuminate what the -- not only what the

1 jury was doing, but also what the Ohio Supreme Court was
2 doing when it --

3 JUSTICE GINSBURG: Well, first, go back to
4 the jury. How do we know that the jury found mental
5 retardation as a mitigator?

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

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

20 But -- but Poland says it's wrong to think
21 of that marking of that Eighth Amendment guidepost as a
22 mini-verdict on mental retardation, and instead it
23 should just be thought of as one of the factors that was
24 bounding the discretion of the sentencer. And so Poland
25 instructs that Mr. Bies and the Sixth Circuit are wrong

1 to think of mental retardation as actually having been
2 found in some sense that affords preclusive effect,
3 because instead it was just an Eighth Amendment
4 balancing.

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

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

19 Suppose it was a gun case, and the Supreme
20 Court originally -- you thought you could convict people
21 who sell drugs, simple possession of a gun. There's a
22 finding, because it's a bench trial, that he simply
23 possessed but did not otherwise use the gun. Then the
24 Supreme Court holds that that isn't enough under the
25 statute. So now the State wants to argue, because the

1 proceeding on appeal or whatever is still going on, we
2 want a second shot at this; we want to show he did more
3 than simply possess. Is the State bound by what it
4 previously lost on, or can the State -- can he
5 get a second shot?

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

15 But on the double jeopardy doctrine --

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

24 MR. MIZER: No, Your Honor, because it is
25 important to remember that this is -- that this is a

1 double jeopardy case because of Ashe, and because this
2 is in Federal habeas.

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

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

20 It also applies only in a case where the
21 defendant is facing a successive jeopardy of some sort.
22 Now, Mr. Bies's sentence is -- is surely at issue in
23 this case, but it's at issue in the sense that it would
24 be at issue in, say, a direct appeal. It's only --
25 there has only been one prosecution. The State has only

1 taken one crack at convicting him or imposing a
2 sentence, and that one sentence is what's at issue here.

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

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

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

17 And so we are fine with the Sixth Circuit
18 precedent that holds that in that case the Federal
19 courts can act in habeas to prevent exposure to a double
20 jeopardy. We simply maintain that there is no second
21 jeopardy here. But the Atkins claim itself is
22 unexhausted, and the Federal magistrate that first dealt
23 with this case in Federal court held that it was
24 unexhausted. And so now this case needs to go back down
25 to the Ohio postconviction court, for that court to do

1 what it was about to do, which is to hold an Atkins
2 hearing for the very first time in this case.

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

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

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

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

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

25 JUSTICE KENNEDY: Would the State -- would

1 you say the State has an independent obligation to -- to
2 ensure itself that he has an adequate IQ?

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Blume.

10 ORAL ARGUMENT OF JOHN H. BLUME

11 ON BEHALF OF THE RESPONDENT

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

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

24 And it was on that basis the court went
25 through the evidence and determined that, in fact,

1 Dr. Winter had used the clinical definition of "mental
2 retardation" in rendering her opinion and that that
3 meant that the Ohio Court of Appeals and the Ohio
4 Supreme Court made a finding of mental retardation based
5 on the clinical -- the clinical definition of mental
6 retardation.

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

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

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

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

22 JUSTICE GINSBURG: And the Ohio Supreme
23 Court acting years before Atkins.

24 MR. BLUME: Pardon me?

25 JUSTICE GINSBURG: The -- wasn't the Ohio

1 Supreme Court decision in this case pre-Atkins?

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

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

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

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

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

25 MR. BLUME: Well, clearly that is the more

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

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

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

18 JUSTICE GINSBURG: But it's -- the question
19 is what is the issue, and an intermediate finding, say
20 mitigation, on the way to the ultimate conclusion, life
21 or death, is not the same issue as if retardation is
22 found, no death penalty. It's -- it's -- the ultimate
23 issue in the case that was before the Ohio Supreme Court
24 is, do the aggravators outweigh the mitigators? That's
25 the ultimate determination, and that's what would have

1 preclusive effect, not the many intermediate findings
2 that may have been made on the way to the ultimate
3 determination of death.

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

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

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

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

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

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

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

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

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

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

9 MR. BLUME: Yes, it could have.

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

12 MR. BLUME: Well --

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

21 MR. BLUME: Well, --

22 JUSTICE SOUTER: And -- and the sense of
23 necessity which is used normally in -- in this kind of
24 preclusion analysis just doesn't apply here.

25 MR. BLUME: Well, that is not my reading of

1 the necessary cases. I read that the function that the
2 necessary prong serves as trying to serve two goals.

3 Number one, was the issue -- the question, the issue --

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

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

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

23 But now, on to the winner point. So if
24 that's necessary -- I don't think there's anything in
25 *Ashe v. Swenson* that says you have to win on the

1 ultimate outcome. It's do you win on the fact? If
2 that's right -- and let's imagine --

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

6 MR. BLUME: I understand.

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

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

13 But if the Warden is right -- and let's
14 imagine now Mr. Bies goes back for his mental
15 retardation hearing, and the court says: Yes, Mr. Bies
16 is mentally retarded; on the other hand, I think Atkins
17 was wrongly decided. It goes up on appeal to the Ohio
18 Supreme Court and they say: Yes, Mr. Bies is mentally
19 retarded, but we think Atkins was wrongly decided. The
20 case comes to this Court, and you summarily reverse and
21 say Atkins is still the law of the land.

22 Now it goes back, and the Warden could then
23 say: Well, now that we know you're serious about
24 Atkins, we want to reopen the judgment and we want
25 another shot --

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

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

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

17 MR. BLUME: Well --

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

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

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

25 (Laughter.)

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, that's
25 narrowing it to your particular context. I would have

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

8 MR. BLUME: Well, it's a theory of
9 collateral estoppel which is based in the Double
10 Jeopardy Clause, which is what -- the issue on which the
11 panel resolved this question. And I think that, as I
12 read the -- the collateral estoppel cases, again and
13 even in the context of capital sentencing and double
14 jeopardy, the finding would have to be either at the --
15 at the criminal liability stage, would it absolve the
16 defendant of liability, like in the Ashe context. The
17 finding was one of identity in the first trial. The
18 jury acquitted. The only issue was identity --

19 JUSTICE BREYER: Are you --

20 MR. BLUME: -- when this Court looked at the
21 record as a whole. And then they said, okay, you can't
22 -- litigate the prior -- the nuts crimes on the issue of
23 identity. In the capital sentencing context, at least
24 here, a finding of mental retardation is a finding
25 sufficient to entitle the defendant --

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

3 MR. BLUME: Pardon me?

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

12 MR. BLUME: That's correct.

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

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

22 JUSTICE SOUTER: But if that is the
23 argument, then what is being preclusive here is not the
24 first judgment. I mean, in preclusion cases it's the
25 first judgment that precludes, and we identify a

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

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

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

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

25 JUSTICE SOUTER: No, but what your rule is,

1 as I understand it in your response to Justice Breyer's
2 question, is that if there was a subsidiary fact
3 determination in the first case, even though it was
4 entirely consistent with the judgment against your
5 client, that subsidiary fact determination can be used
6 as a defense by your client in the second case. That's
7 your rule, as I understand it, and that is not the rule
8 of *Ashe v. Swenson*, and it is not the rule of issue
9 preclusion.

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

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

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

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

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

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

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

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

5 (Laughter.)

6 MR. BLUME: I --

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

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

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

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

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

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

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

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

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

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

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

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

1 IQ of 69. It is not that there was -- we assume for the
2 sake of argument, it was not anything like a mitigating.
3 It was a finding of fact, that Mr. Bies was a person
4 with mental retardation.

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

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

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

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

24 JUSTICE ALITO: What does that have to do
25 with issue preclusion? The State can't -- it's not a --

1 that may raise a question of judicial estoppel. Is that
2 constitutionally required?

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

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

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

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

1 be taken as a concession for dispositive mental
2 retardation for Atkins purposes. So I -- I have
3 difficulty in seeing the -- any clear inconsistency in
4 the State's two positions.

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

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

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

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

23 JUSTICE GINSBURG: No, no. We're back --
24 what you called my attention to was pre-Atkins. It was
25 the application made to the State court before Atkins,

1 which put two sentences together. One was, "The record
2 reveals defendant to be mildly mentally retarded with an
3 IQ of about 69. As a matter of law, such a person may
4 be punished by execution." This is all pre-Atkins.

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

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

15 JUSTICE GINSBURG: Since Atkins? We were
16 talking about before.

17 MR. BLUME: I'm sorry. Since Penry. Since
18 Penry, there have been new developments, and I believe
19 that a new consensus exists, the one that this Court
20 subsequently embraced, and it violates the Eighth
21 Amendment and the Ohio Constitution to execute persons
22 with mental retardation.

23 And it was in response to that claim that
24 the State conceded the fact of mental retardation, and
25 it was in response to that claim that the State court

1 found again Mr. Bies to be a person with mental
2 retardation.

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

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Mizer, you have 10 minutes remaining.

14 REBUTTAL ARGUMENT OF BENJAMIN C. MIZER

15 ON BEHALF OF THE PETITIONER

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

1 But more to the point, judicial estoppel
2 shouldn't apply here also because the State, whatever it
3 was saying at the time, was not talking about the
4 three-part post-Atkins definition of mental retardation
5 in Ohio.

6 Mr. Bies also argues that 2254(d)(2) is
7 enough to give support to the Sixth Circuit's grant of
8 relief -- of relief here. But there are two problems
9 with that argument. The first problem is that the Sixth
10 Circuit disregarded the reasonable determination by the
11 State postconviction court that the Atkins standard had
12 never been applied.

13 The second problem is that we shouldn't even
14 get to 2254(d)(2), because there are legal problems with
15 the Sixth Circuit's reasoning that should have prevented
16 it from granting the writ under 2254(d)(1). Mr. Bies
17 argues that there is not a legal problem because there
18 was an acquittal in this case, because the Ohio Supreme
19 Court's statement on direct review that Mr. Bies -- that
20 Mr. Bies's mild-to-borderline mental retardation merits
21 weight in mitigation was enough to entitle him to a life
22 sentence. But that's not an acquittal, and it's a
23 severe distortion of what this Court said in Sattazahn
24 about an acquittal.

25 JUSTICE STEVENS: Mr. Mizer, can I just get

1 one clarifying question? The concession at page 160 of
2 the record, "The record reveals the defendant to be
3 mildly mentally retarded with an IQ of about 69," and
4 then they argue as a matter of law they cannot be --
5 that he may be punished. Is it your position that the
6 further proceeding in the Ohio trial court, that the
7 State intends to argue that a person who is mentally
8 retarded with an IQ of about 69 may be executed?

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

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

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

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

1 say -- to challenge the accuracy of that factual
2 statement?

3 MR. MIZER: Yes, Your Honor. As the State
4 postconviction court stated in this case, that -- the
5 record evidence pertaining to IQ is not clear; and so
6 IQ, among all of the other elements of the mental
7 retardation, will be up for determination.

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

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

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

14

15

16

17

18

19

20

21

22

23

24

25

A				
above-entitled 1:11 45:13	aggravators 12:12 22:24 34:14,17,23 35:17	applies 3:17 16:17,20	19:4,6 20:8,14 20:23 22:10,16 27:16,19,21,24 28:14 30:3,7 34:20,21,24 36:3,21,24 40:2,19,22,25 41:13,15 42:20 43:11 44:25	beyond 12:3 13:8
Absolutely 19:3	aggregators 26:18	apply 19:19 25:24 30:6 32:14 43:2	40:2,19,22,25 41:13,15 42:20 43:11 44:25	Bies 1:6 3:4,13 4:2,5 5:14 10:18 12:6,15 13:25 14:11 17:7 23:19 27:14,15,18 32:11 36:8 37:10,18,25 38:3,9 39:9 42:1,19 43:6 43:16,19
absolve 29:16 30:15 33:12	agree 17:12 33:14 37:17	applying 29:10	atrocious 35:22	Bies's 3:23 13:11 16:22 23:16 29:22 35:7 42:20 43:20
accuracy 45:1	agreed 4:13,15 4:17,19	April 1:9	attaches 22:13	binding 27:11 29:12
accused 6:25	ALITO 17:8 38:24	arguably 10:21	attention 36:16 40:16,24	Blume 1:17 2:5 19:9,10,12 20:10,24 21:2 21:6,25 23:4 24:17 25:9,12 25:21,25 26:20 27:6,9 28:17 28:20 29:1,14 30:8,20 31:3 31:12,20 32:10 32:20 33:10,16 33:20,24 34:6 35:1 36:1,19 37:24 38:10,18 39:3 40:9,18 41:8,17
acquittal 3:15 4:5,9 17:6 29:4 29:5,19 31:10 43:18,22,24	allowed 7:23	argue 6:25,25 10:9,19 11:7 14:25 44:4,7 44:24	authority 28:3,4	Bob 1:3 3:4 3:11 16:22 23:16 29:22 35:7 42:20 43:20
acquitted 4:6 16:18 22:2 27:4 30:18	Amendment 13:21 14:3 41:9,21	argued 11:9	aware 21:15,22	brand 33:22 34:3
act 17:19	Amendment-r... 13:16	argues 43:6,17	a.m 1:13 3:2 45:12	brand-new 32:17 33:15,16
acting 20:23	American 6:19	argument 1:12 2:2,7 3:4,6 10:6 14:13 19:10 31:1,19 31:21,23 32:8 38:2 42:14,20 42:25 43:9		Breyer 14:13
actual 25:17 28:4	analysis 3:11,17 25:24 39:25	arguments 42:17	B	
adaptive 5:18 6:22 8:15	announced 28:19	Ashe 3:18 4:1,3 4:3,3 15:9 16:1 16:14,16,17 17:12 22:14 26:25 27:3,9 29:17 30:16 33:8	B 24:15	
additional 37:8	answer 7:6 15:6	asking 33:15	back 5:23 13:3 17:24 18:24 27:14,22 40:23	
adequate 19:2 23:5	appeal 15:1 16:24 17:14 23:17,17 27:17 29:3 31:17 36:24 37:8 38:22 41:11	assert 30:5	balance 18:4 37:3 42:3	
adequately 36:6	appeals 20:3 23:18 28:4 37:2	assistance 17:7	balancing 14:4	
adjudicate 3:23	APPEARAN... 1:14	Association 6:19	bar 8:5 37:11 42:22	
administer 4:22	appellate 9:18 9:23 10:1,3,17 12:10 23:7	assume 38:1	based 20:4 30:9	
admission 38:5 38:7	Appendix 5:11 10:18 18:9 38:10,23	assumed 30:1	bases 39:10	
admit 37:21	applicable 30:2 30:2	assuming 4:19	basis 19:15,24 21:7 35:8,12 36:23 39:5	
adopt 41:14	application 4:2 40:25	Atkin 20:12,12	beginning 4:8	
adopted 35:5	applied 28:13 43:12	Atkins 3:14,18 3:21,24 4:23 5:3,4 6:4 7:11 8:3 11:3,12 14:5,9,14 17:21 18:1	behalf 1:16,17 2:4,6,9 3:7 19:11 42:15	
adversarial 10:7 19:6			behoove 8:9	
adversary 9:24			believe 37:13 41:18	
AEDPA 3:22			bench 14:22	
affirmance 12:1			benefit 4:3,4 16:7	
affirmed 7:14			BENJAMIN 1:15 2:3,8 3:6 42:14	
affords 14:2			best 12:1	
aggravating 11:11,18 12:2 12:11 13:7 26:11 36:15 42:4				
aggravation 23:9 37:4				
aggravator 9:21				

<p>15:16 28:1,18 28:23 30:19 31:1,4,13 32:2 Breyer's 33:1 brief 40:12 42:24 briefs 10:17,18 broad 20:14 brother 25:14 Bullington 4:8 burden 35:9 burdens 35:9</p> <hr/> <p style="text-align: center;">C</p> <p>C 1:15 2:1,3,8 3:1,6 42:14 call 36:16 called 5:14 40:16,24 capital 30:13,23 care 24:24 35:18 careful 8:6 carefully 5:6 6:22 carry 15:10 case 3:16,25 4:12,13,24 5:25 6:21 8:18 8:19,21 12:17 14:9,17,19 16:1,8,10,20 16:23 17:4,16 17:18,23,24 18:2,19 19:16 21:1,15 22:23 25:7 27:20 28:21,23 31:8 33:3,6,25 35:2 35:21 36:5,12 36:14,17 43:18 45:4,11,12 cases 15:12 23:23 26:1,5,7 29:2,2 30:12 31:24 36:21 37:6 catch-all 12:24</p>	<p>categorical 8:5 37:11 42:22 categorically 40:20 category 22:17 centers 3:25 certain 7:20 certainly 20:19 36:3 challenge 40:13 45:1 chance 3:23 change 15:12,13 changed 37:13 40:22 42:20 characterizati... 24:6 25:18 charge 12:12 charged 12:13 12:18 Chief 3:3,8 19:8 19:12 29:9,14 29:24 36:11,20 42:12 45:10 Circuit 13:10,25 17:17 21:8 43:10 45:9 Circuit's 43:7 43:15 circumstances 23:11,13 24:10 26:11 42:4 claim 3:24 17:12 17:15,21 37:11 39:18 40:10,10 40:18,19,19 41:8,9,23,25 42:4 claimed 38:7 claiming 16:15 clarifying 44:1 clause 3:12 17:4 26:21 30:7,10 31:11 clear 6:17 40:3 45:5 clearly 21:25</p>	<p>22:5 42:9 client 33:5,6 clinical 8:4,7,8 8:11,13 14:10 19:19 20:1,5,5 20:19 21:10 clinicians 6:19 close 6:21 Code 12:20 collateral 3:17 4:3 16:7,9,12 16:16 28:7 30:9,12 31:5 31:17 Columbus 1:15 combination 32:10,20 combined 22:16 29:6 come 5:23 8:21 8:24 10:5 25:6 44:25 comes 9:22 27:20 coming 32:16 commits 3:12 committed 35:22 common 16:6 29:17 compelling 36:15 completely 7:8 conceded 37:17 38:16 41:24 conception 20:14 concerns 25:2 concession 38:22 39:20,24 40:1,11 44:1 concessions 37:9 39:8 42:18 concluded 5:8 conclusion 3:11 9:8 22:20 24:8 37:3</p>	<p>conclusions 19:21 36:9 conclusive 6:5 21:5 41:7 condition 36:17 conduct 22:13 conflicting 5:16 consensus 41:19 consequences 15:13 22:13 consequential 42:21 consider 25:15 considerations 24:22 considered 18:22 considering 7:25 consistent 3:22 18:11,13 19:4 33:4 Constitution 31:7,9,16 37:15 41:21 constitutional... 8:3 16:15 constitutionally 16:10 19:4 39:2 contained 5:3 contending 17:11 contest 9:24 36:4,6 37:1 contesting 36:25 context 4:10 7:8 7:9 14:8 15:20 22:1,2 29:25 30:3,13,16,23 34:13,13,22 42:10 continuing 9:24 contrary 28:3 convict 14:20 31:7 convicting 17:1</p>	<p>correct 9:9,13 10:12 20:9 31:12 counsel 19:8 42:12 45:10 course 23:16 court 1:1,12 3:9 3:13,21 4:8,14 4:15 5:2,7,11 6:17 7:13,14 7:24 10:14 11:3,4,22,24 12:10 13:1,11 13:14,17 14:20 14:24 15:11 16:8 17:23,25 17:25 18:8,18 18:23 19:13,23 19:24 20:3,4 20:23 21:1 22:23 23:6,18 23:18 24:3,15 24:15,18 25:4 25:5 27:15,18 27:20 28:8 29:11 30:20 33:19 34:15 36:20 37:1,2,6 37:19,23 38:11 39:13 40:25 41:19,25 43:11 43:23 44:6 45:4 courts 3:23 7:17 7:19 9:18 10:3 11:1 17:13,19 23:19 26:12 court's 3:20 5:3 12:1 18:21 19:17 22:9,9 22:16 36:24 37:12 40:21 43:19 crack 17:1 creates 22:10 credible 29:12 crime 35:17,22</p>
---	--	---	---	---

<p>crimes 30:22 criminal 22:2 29:16 30:15 33:12</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 daily 5:19 dangerousness 11:8 DAVID 1:3 de 10:4 deal 10:13 dealing 21:3 36:14 dealt 17:22 death 4:6,10,11 4:11,13,15,22 6:3 9:22 11:15 21:5,14,18,22 22:21,22 23:3 25:20 26:13 29:18 31:15 33:13 35:20 36:23 37:5,14 40:13,20 decided 3:19 19:16 24:24,24 27:17,19 34:21 35:12 39:12 decision 3:20 5:3 11:15 18:19 19:16,18 21:1,9 22:9,9 22:16 29:6 36:24 37:13 40:21 declined 16:9 defect 12:23 defendant 6:1 6:25 16:8,11 16:14,18,21 28:4 29:16,21 30:16,25 33:12 38:13,16,20 41:2 44:2,22 defendants 4:4</p>	<p>defendant's 27:11 defense 33:6 defined 4:9 defining 8:4 definition 5:4,4 6:13,16 7:17 7:19 14:12 19:19 20:1,5 20:13,21 21:10 22:6 29:19 32:12 35:4,5 43:4 definitional 42:23 definitively 18:14 demonstrated 5:6 denied 17:15 Denno 31:5 depending 32:6 describe 23:7 24:19 25:19 described 15:23 23:20 describes 23:6 describing 32:2 designed 24:23 determination 5:9 8:21,22,24 9:7 12:2 19:22 21:19 22:25 23:3 26:12,15 32:11,21 33:3 33:5 35:2,8 43:10 45:7 determinations 21:20 determinative 26:17,17 determine 3:13 5:14 6:18 12:10 14:10 20:13,17 24:23 44:17 determined 13:7</p>	<p>19:17,25 22:15 24:5 27:10 developments 41:18 difference 7:10 7:10 24:3,14 35:19 different 6:15 7:8 8:3 9:1 15:20 25:6 34:13,18 35:14 36:13 37:3 40:8 44:20 difficulty 40:3 direct 10:5,17 10:19 13:11 16:24 37:8 41:11 43:19 disagree 44:21 disagreement 4:1 discover 31:17 discretion 13:24 discussion 19:14 disease 12:23 dismissed 39:7 dispositive 8:19 8:23 9:11 40:1 disproportion... 37:5,14 dispute 3:25 disregarded 43:10 distortion 43:23 doctrine 15:9,15 doing 7:24 13:1 13:2 24:3 34:8 34:19,20 double 3:10,12 15:8,15,17,18 15:21 16:1 17:4,15,19 30:6,9,13 31:11 32:18 doubt 12:3 13:9 27:4 Dr 5:6,12,19</p>	<p>12:16 18:9 19:18 20:1 35:6 drawn 20:17,19 drugs 14:21 due 15:21 16:3,4 16:9 36:6,7 D.C 1:8</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 4:5 8:18 8:21 easiest 11:21 effect 14:2 15:11 22:7 23:1 32:13 effectively 8:3 Eighth 13:16,21 14:3 41:9,20 either 8:9 17:4 24:10 29:15 30:14 33:12 elements 5:4,5 34:12 44:16 45:6 elevate 26:14 embraced 41:20 embracing 21:10 enacting 42:21 engage 10:4 23:8 ensure 19:2 enters 37:19 entirely 33:4 34:18 entitle 29:21 30:25 43:21 entitled 16:15 16:17 entitles 31:10 equivalent 29:3 ESQ 1:15,17 2:3 2:5,8 essence 22:12 essential 23:21</p>	<p>essentially 29:2 establishing 29:7 35:10 estoppel 3:17 4:4 16:7,10,12 16:16 30:9,12 39:1,4,10,16 39:17 42:8,17 42:25 43:1 evaluated 36:8 Everything's 28:9 evidence 5:12,16 7:19,22 8:1 10:5,20,22 11:5,8,10 12:14,21 13:19 18:11,17,20 19:22,25 23:14 29:3 31:7,8,14 35:16 36:7,21 36:25 44:12 45:5 exactly 20:17 25:7 28:21 example 23:24 28:16 excerpts 10:18 excluded 7:19 execute 34:9 41:9,21 42:5 executed 22:12 44:8 executing 8:5 execution 40:7 41:4 exhausted 17:13 exhaustion 17:9 17:9,10 existence 12:6 exists 9:25 21:21 23:15 41:19 expansive 16:5 16:12 expert 14:10 29:12 experts 5:13</p>
--	--	--	---	--

18:23 36:8 44:16 explains 13:13 exposure 17:19 express 23:24 expressly 34:9 extending 4:9 extensive 12:15 extent 12:17	final 22:15 find 5:25 10:10 26:5 finding 4:10 6:5 7:1 8:12 9:19 12:9 14:22 15:10 18:21 20:4,8 22:4,19 23:24 24:11,11 25:10,16,17 29:6,20,22 30:14,17,24,24 37:20,22 38:3 38:6,12 39:20 40:11 findings 5:17 23:1 37:8,9 38:12 fine 17:17 first 3:15,23 6:16 12:14 13:3 14:9 15:7 17:22 18:2 23:9 24:17 25:5 30:17 31:14,24,25 32:3,4,7 33:3 39:19 42:16 43:9 focused 19:14 followed 39:21 Ford 14:7 form 19:15 formed 21:7 forming 19:20 forth 5:1 forward 3:20 fought 21:17 found 11:12,15 12:19 13:4 14:2 22:22 23:19 25:5,5 26:10,10 28:2 34:23 37:23 42:1 frankly 26:6 function 23:21	26:1 further 18:3 44:6 45:8 future 11:8	<hr/> G <hr/> G 3:1 general 1:15 20:15 generally 30:1,6 getting 31:2 Ginsburg 4:17 9:16 10:8 12:8 13:3 20:22,25 21:3,12 22:18 23:4 26:4 27:3 27:7 34:7 35:13 36:2,13 37:21 38:5,15 40:5,15,23 41:15 42:18 Ginsburg's 24:2 give 3:22 23:5 28:6,9,14,20 31:15 43:7 given 7:2 14:6,8 14:10 25:1 go 3:20 11:21 13:3 15:17 17:24 26:15,16 28:7 29:10 35:20 39:24 goals 26:2 goes 18:24 27:14 27:17,22 37:10 41:12 going 14:18 15:1 15:17 34:10 35:18 grabs 28:10 grant 8:17 39:6 43:7 granted 39:7 granting 43:16 great 10:13 grounds 39:12 guidepost 13:17	13:17,21 gun 14:19,21,23 15:10	<hr/> H <hr/> H 1:17 2:5 19:10 habeas 16:2 17:19 39:6 hand 4:5 27:16 happens 22:1 hat 13:10 hear 3:3 hearing 3:13,21 4:23 5:13 18:2 19:6 27:15 heinous 6:2 held 17:23 33:18 33:19 helps 12:25 highlighted 7:10 hinge 44:15 history 10:23 Hoag 16:8 hold 3:13 18:1 holds 14:24 17:18 Honor 5:1 6:8 7:7 8:14,26 9:13 10:12 11:20 12:14 13:6 15:24 17:11 18:7 19:3 44:9 45:3 hope 16:11 hung 13:10 hypothetical 8:20 32:2	<hr/> I <hr/> identical 36:2,9 identification 23:10 identify 23:13 31:25 identity 30:17 30:18,23 ignores 42:20	illuminate 12:25 imagine 27:2,14 implement 14:9 implementing 5:2 important 15:25 21:7 35:14 impose 11:15 25:20 36:22 imposing 17:1 improvidently 39:7 inaccurate 44:13 incentive 10:13 35:13,14,23 36:4 incentives 36:2 36:7,12 includes 5:16,17 including 5:12 inconsistency 40:3 incorporate 16:9 independent 19:1 23:8 independently 3:11 9:19 individual 23:25 ineligible 29:18 33:13 40:20,21 inquiry 8:2 insanity 14:7 insofar 44:21 instance 25:5 28:11 instructs 13:25 insufficient 29:3 intellectual 5:15 intend 44:25 intends 44:7 intent 44:21 interlocutory 17:14 intermediate 21:19 22:19
---	--	--	--	---	--	---	---

23:1,17 26:15 interpret 11:14 interpretations 16:6 interpreted 31:16 interrupt 11:13 introduced 12:15,16 18:12 18:18,21 IQ 5:16,16,20 6:1,5,17,20,21 7:1,5 8:12,15 8:18,22 18:6,9 19:2 25:6 38:1 38:14,21 39:22 41:3 44:3,8,16 44:16,18,23 45:5,6 issue 3:18 4:20 7:4,7,8 9:3 14:15,16 15:7 15:9 16:22,23 16:24 17:2 18:19 21:13,15 21:16,23 22:15 22:19,21,23 24:5,24 25:15 26:3,3,6,7 27:10 29:10 30:3,10,18,22 32:8,19 33:8 35:15,24 38:25 39:13,16 42:9 issued 18:19 issues 6:15 14:14 19:15 Ithaca 1:17 i.e 7:4	16:1,21 17:4,5 17:15,20,21 30:7,10,14 31:11 32:18 JOHN 1:17 2:5 19:10 Joint 10:17 38:10,23 judge 4:13 10:1 10:1 12:12,13 28:8,12 31:6 judgment 8:4,7 8:8,12,13 14:10 21:16,22 21:23 26:8,9 27:24 31:24,25 32:1,4,4,6 33:4 35:25 37:19 38:20 judicial 39:1,4 39:16,17 42:8 42:17,24 43:1 jurors 11:6 jury 4:12 5:25 5:25,25 6:5 7:13,20 9:22 11:2,5,12,22 12:12,13,18 13:1,4,4,7 30:18 36:22 jury's 11:14,25 Justice 3:3,8 4:17 5:22 6:7 6:10,24 7:4 8:11,17,20 9:5 9:10,14,16 10:8 11:13 12:8 13:3 14:13,17 15:16 17:8 18:5,15 18:25 19:8,12 20:7,12,22,25 21:3,12 22:18 23:4 24:1,2 25:4,10,13,22 26:4 27:3,7 28:1,18,23	29:9,14,24 30:19 31:1,4 31:13,22 32:2 32:16,25 33:1 33:14,18,22 34:1,7 35:13 36:1,11,13,20 37:21 38:5,15 38:24 39:14 40:5,15,23 41:15 42:8,12 42:18 43:25 44:12,19 45:10	9:23 25:6 liability 29:16 30:15,16 33:13 life 5:19 22:20 29:21 43:21 light 6:1 19:22 41:5 limitation 8:16 limitations 5:15 5:18 line 6:21 20:17 20:18 lines 3:10 litigate 10:14 30:22 35:23 litigated 14:16 litigation 20:16 27:12 look 6:22 35:3 41:12 looked 30:20 looking 10:1 28:15 looks 5:11 8:15 loser 26:9 30:5 loses 28:4 lost 15:4 24:9 Lott 5:2,9 6:17 8:15 21:8,9 23:15 32:14	mean 4:24 8:12 8:19 22:9 23:20 24:18 25:13 26:20 28:20 29:12 31:24 32:22 39:15 meaning 4:1 meanings 9:1 means 4:21 9:12 33:11 meant 20:3 mental 4:21 5:5 5:21 6:13,18 6:19 7:15,17 8:1 9:17,20 10:10,15,20,25 11:4,9,23 12:4 12:9,21,23 13:4,11,19,22 14:1,15 19:20 20:1,4,5 21:10 21:21 22:4,6 22:11 23:19,25 24:6 27:14 28:13 29:22 30:24 32:11 35:4,6,10,18 36:4,9,17,21 37:12,17,18,22 37:25 38:4 39:21,24 40:1 41:10,22,24 42:1,5 43:4,20 45:6 mentally 3:14 4:18 8:5 11:16 12:7 14:11 27:16,18 34:10 38:9,13,17,21 41:2 44:3,7,23 merited 10:15 merits 13:12 43:20 MICHAEL 1:6 mild 39:21,24 mildly 38:13,21
<hr/> J <hr/> JA 18:17 38:18 38:19 Jackson 31:5 jeopardy 3:10 3:12,16 15:9 15:15,17,18,21	<hr/> K <hr/> Kennedy 5:22 6:7,10,24 7:4 14:17 18:5,25 Kennedy's 8:20 kind 15:21 25:16,23 kinds 42:25 know 13:4,7,9 20:18,20 24:20 25:16 27:23 33:19 36:16	<hr/> L <hr/> lack 10:22,23 36:6,7 land 27:21 Laughter 28:25 34:5 law 16:6,6 27:21 40:6,6,14 41:3 44:4 laws 41:14 lead 3:11 31:18 leave 34:10 left 16:11 20:16 legal 15:12 22:13 29:3 33:11 43:14,17 legally 29:20,21 let's 14:16 27:2 27:13 29:10 level 7:5,20 9:20	<hr/> M <hr/> magistrate 17:22 maintain 17:20 maintained 39:18 making 8:4 manner 24:12 35:22 marked 13:18 marking 13:16 13:21 matter 1:11 28:6 40:6,14 41:3 44:4 45:13 matters 24:18	

<p>41:2 44:3,23 mild-to-borde... 43:20 minimizes 23:5 mini-verdict 12:5 13:15,22 minutes 42:13 mistake 28:5,8 28:13 mitigating 6:2 7:16,23,25 10:22 11:17,18 12:3,4,14,19 12:22 13:15,18 23:10,13 34:16 36:16 38:2 mitigation 7:8 10:16 11:5 12:18 13:12 22:20 23:9 37:4 39:25 40:12 43:21 mitigator 4:18 9:18,20,25 10:11 11:24 12:10 13:5 21:4,21 34:24 35:19 37:23 mitigators 12:12 13:8 22:24 26:19 34:14,23 Mizer 1:15 2:3,8 3:5,6,8 4:25 6:6,8,11 7:3,6 8:13,26 9:9,13 9:15 10:3,12 11:14,20 12:13 13:6 15:6,24 17:11 18:7,17 19:3 42:13,14 42:16 43:25 44:9,14 45:3 Monday 1:9 motion 38:19 41:7 moving 29:7 multiple 39:8,10</p>	<hr/> N <hr/>	<p>N 2:1,1 3:1 narrowing 29:25 narrowly 44:15 nature 6:2 35:17 necessarily 3:19 15:18 20:8 24:18 necessary 8:6,20 8:23 9:1,2,3,5 9:7 24:20,21 24:22 25:11,15 25:19 26:1,2 26:21,24 necessity 25:23 need 6:22 needed 5:19 needs 5:13 17:24 18:13,22 never 4:6 5:19 33:18 34:3 43:12 new 10:4,4 22:10,12,13 28:6,9,10,14 29:7 31:9,10 32:22,23 33:23 34:3 41:14,18 41:19 normal 28:5 normally 22:1 25:23 28:10 noted 42:18 novo 10:4 number 7:5 24:4 24:8 25:18,19 26:3 35:3 36:20 37:3,4 37:16 nuts 30:22 N.Y 1:17</p> <hr/> O <hr/>	<p>O 2:1 3:1 objections 24:4 24:16</p>	<p>obligation 19:1 occurred 19:7 offense 6:2 9:3 offer 17:6 44:12 oh 34:22 Ohio 1:16 3:12 3:20,22 4:14 5:2,7 6:17 7:13 7:16,16,24 10:14 11:9,22 11:24 12:1,19 12:20 13:1,10 13:14 14:6 17:13,25 18:7 18:18,21 20:3 20:3,22,25 21:9 22:7,9,23 23:6,18 25:2,4 26:9 27:17 32:13 34:8,13 34:14,20,22 35:4 36:25 37:1,2,5,14,23 41:21 43:5,18 44:6 Ohio's 44:20 okay 8:17 9:14 30:21 operated 20:14 operates 4:4 operating 21:16 operation 15:14 34:18 opinion 20:2 21:8 opinions 19:20 opportunity 14:7,8 oral 1:11 2:2 3:6 19:10 order 5:14 19:3 25:19 38:11 originally 14:20 ought 20:17,18 outcome 26:17 26:17 27:1 outside 5:23</p>	<p>29:8 32:24 outweigh 12:2 22:24 outweighed 11:11,19 13:8 26:18 overcome 9:21 overwhelmed 12:11 26:11 34:16 overwhelming 35:16</p> <hr/> P <hr/>	<p>P 3:1 page 2:2 38:23 40:16 44:1 pages 5:10 18:8 42:24 panel 19:16,17 22:5 30:11 31:21 32:13 35:2,3 39:11 panel's 19:15 Pardon 20:24 31:3 part 18:20 24:20 36:23,23 particular 4:12 9:6 29:11,25 30:2 40:10 42:10 particularly 6:20 parties 4:1 10:6 10:24 party 8:9 21:17 26:16 passages 39:19 penalty 4:6,10 4:22 11:15 21:5 22:22 25:20 29:18 31:15 35:20 40:20 Penry 7:11,15 7:22,25 11:4</p>	<p>13:18 37:13 41:17,18 people 14:20 22:11,17 29:7 41:10 perceive 11:7 perfectly 18:11 permissible 17:14 person 32:11 37:12,18,25 38:3 40:7 41:3 42:1 44:7 persons 41:21 persuasive 10:21 11:1,2 11:10 pertaining 45:5 Petition 5:10 18:9 Petitioner 1:4 1:16 2:4,9 3:7 42:15 place 32:24 placing 22:16 42:21 plays 26:22 please 3:9 19:12 point 20:19 21:7 24:17 26:23 43:1 44:10 pointed 25:14 points 42:19 Poland 12:25 13:13,20,24 position 18:6 29:22 44:5 positions 40:4 possess 15:3 possessed 14:23 possession 14:21 possible 16:5 post 7:21 postconviction 3:12 5:7,11 17:25 18:8,12 18:22,23 37:9</p>
--	----------------------	---	--	--	--	---	---

<p>37:10,19 38:8 38:22 40:13 41:12 43:11 44:17 45:4 posture 10:7 22:3 33:25 34:2 post-Atkins 5:8 6:14 7:9 8:2,6 21:9 43:4 44:11,15 precedent 17:18 precise 25:16 precisely 34:2 preclude 34:8 precluded 21:24 precludes 31:25 preclusion 4:20 8:25 15:8,9 21:14,15,16,23 25:24 26:7,8 29:10 30:3 31:24 32:7,9 32:19 33:9 35:15 38:25 preclusive 6:12 7:7 9:3,12 14:2 15:11,14 23:1 24:11,12 31:23 32:1,3 preponderance 23:14 35:11 presented 11:5 19:23 prevent 15:13 17:19 prevented 43:15 previously 15:4 16:18 pre-Atkins 5:25 7:12,18 9:17 21:1 22:5 37:11 40:17,18 40:19,24 41:4 42:19 primarily 39:3 prior 10:22,23</p>	<p>22:4,13 24:5,8 30:22 36:3 problem 7:22 15:22,22 28:2 43:9,13,17 problems 43:8 43:14 procedural 22:1 22:3 33:25 34:2 procedure 28:22 32:23 34:11,19 34:20,24 35:4 proceed 28:18 proceeding 6:4 15:1 19:23 22:15 23:15 24:5,9,25 28:7 29:13 31:6 32:14 38:8 44:6 proceedings 18:12 process 15:21 16:4,4,9 19:6 prong 26:2 proof 35:9 properly 32:4 prosecution 16:25 36:3 prosecutor 10:9 11:7 35:15,17 35:20 protection 16:17 proven 23:25 psychiatrist 19:19 psychologists 20:20 punished 40:7 41:4 44:5 purported 42:17 purposes 3:14 7:7 39:25 40:2 put 17:5 41:1</p> <hr/> <p style="text-align: center;">Q</p>	<p>question 5:24 10:14 12:6 16:3 18:9 22:18 24:2 26:3 30:4,11 33:2 35:24 36:4 39:1,4 42:3,8 44:1,10 44:14,15 questions 18:3 45:8 quite 14:14,15 40:8</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 39:1,3,13 39:15 raised 24:4 39:4 39:9 raises 37:10 ran 37:1 reach 9:6,7 37:2 reached 9:8 reaching 35:25 read 12:1,5 13:16 26:1 30:12 41:5 reading 25:25 really 39:18 42:7 reason 4:25 33:20 34:2 39:6 reasonable 3:21 12:3 13:8 43:10 reasoning 31:18 43:15 reasons 6:9,13 11:3 15:7 36:19 42:23,25 REBUTTAL 2:7 42:14 recites 44:22 recognize 4:21 recognized</p>	<p>36:20 record 4:24 5:7 5:17,23 8:7,9 10:2,4,5,22 11:21 18:11,20 30:21 37:17,24 38:13,20 39:17 41:1 44:2,2,22 45:5 refer 8:14 reference 6:5 39:21,22 referred 39:19 regard 40:9 regardless 20:20 relating 6:13,14 15:7,8 relevance 13:18 relevant 12:21 15:19 relief 43:8,8 relitigated 7:5 remaining 42:13 remains 18:9 remarks 11:23 remedy 28:5 remember 15:25 render 29:18 rendering 19:21 20:2 reopen 27:24 28:1 reopened 6:7,10 6:12 repeated 38:22 required 8:14 39:2 requirement 17:6 research 15:23 reserve 18:4 resolved 30:11 respect 6:16 15:10 16:3 30:4 42:16 Respondent</p>	<p>1:18 2:6 19:11 responding 42:7 response 24:1 24:16 33:1 37:16 38:20 41:23,25 result 8:23 9:11 25:11 31:18 retardation 4:21 5:5,21 6:14,18 6:20 7:15,17 8:1 9:17,21,24 10:10,15,20,25 11:5,9,23 12:4 12:9,21 13:5 13:12,19,22 14:1,15 19:20 20:2,4,6,13,15 21:4,4,11,21 22:4,6,11,21 23:19,25 24:6 26:10 27:15 28:14 29:23 30:24 32:12 34:12,15 35:4 35:6,10,19 36:4,22 37:12 37:17,18,22,25 38:4 39:22,25 40:2 41:10,22 41:24 42:2,6 43:4,20 45:7 retarded 3:14 4:18 8:5 11:16 12:7 14:11 27:16,19 34:10 38:9,14,17,21 41:2 44:3,8,23 retroactive 22:10,12 29:7 32:22,23 return 16:14 reveals 37:18,24 38:20 41:2 44:2,22 reverse 27:20 45:9</p>
---	---	--	---	--

review 9:19 10:4 10:5,17,19 13:11 18:22 23:7 25:2 43:19 44:17	40:14 43:3 says 4:20 5:12 5:25 13:20 22:11,14 26:25 27:15 28:5 37:11 38:12 41:12	shown 38:13 shows 3:20 Shuffling 31:8 significance 23:5 24:25 33:11 41:6	16:25 18:6,25 19:1,17,23 23:23 24:6 32:13 34:11,19 34:25 36:10,25 37:9,10,16 38:7,8,8,11,16 38:25 40:25 41:24,25 43:2 43:11 44:7 45:3	16:21 17:3 suffers 5:15,17 suffice 5:8 8:7 sufficient 29:20 30:25 44:24 suggest 8:9 suggested 36:13 summarily 27:20
reviewing 4:15 23:16	second 3:16 15:2 15:5,8 17:20 32:5 33:6 36:24 42:22 43:13	significant 5:15 similar 31:17,18 simple 14:21 simply 11:10 14:22 15:3 17:6,20	stated 27:9 42:23 45:4	Sunen 15:11 support 43:7 supports 28:16 suppose 5:24 14:19 27:8
Revised 12:20	secure 35:21	Sixth 13:9,25 17:17 21:8 43:7,9,15 45:9	statement 12:16 13:10,13 41:5 42:18 43:19 44:10,13,21 45:2	Supreme 1:1,12 4:14 5:2 6:17 7:13,24 10:14 11:22,24 12:1 13:1,11,14 14:19,24 18:18 18:21 20:4,22 21:1 22:23 23:6,18 27:18 34:15 37:2,6 37:23 43:18
reweighing 23:8	see 15:16 24:2 24:14 26:14 30:5	skills 5:18,18 6:23 8:16	States 1:1,12 14:6 20:16 37:15 41:13 42:22	sure 32:16 39:14 39:16
right 4:19 11:13 26:6 27:2,13 31:11,13 37:7	seeing 40:3	sole 35:8	statements 28:3	surely 16:22
rise 7:20	sell 14:21	Solicitor 1:15	State's 38:19 39:19 40:4 42:17	Swenson 3:18 4:2 26:25 33:8
risk 37:1	sense 4:6 9:2 14:2 16:23 25:22	somebody 27:4	statute 14:25	sword 11:6
ROBERTS 3:3 19:8 29:9,24 36:11 42:12 45:10	sentence 4:11 9:22 16:22 17:2,2 21:14 21:18 23:17 25:2 29:21 36:23 37:5,14 40:5,14 43:22	sorry 6:11 38:18 41:17	statutory 12:19 12:22	
role 23:6,7,21 26:21	sentenced 6:3	sort 16:21 29:17 36:12 41:13	step 23:9	
rule 4:4 20:15 22:10,12,14 27:9 28:14 29:7,17 32:6 32:17,17,18,19 32:21,22,25 33:7,7,8,15,17 34:2,9,19	sentencer 4:10 7:12 13:24	SOUTER 8:11 8:17 9:5,10,14 20:7,12 24:1 25:4,10,13,22 31:22 32:16,25 33:14,18,22 34:1 39:14	STEVENSON 11:13 18:15 43:25 44:12,19	
rules 15:14 16:4 16:7,10,13 32:23	sentences 41:1	Souter's 42:8	statute 14:25	
ruling 29:11 33:11	sentencing 30:13,23	specific 8:12 11:23 39:22	statutory 12:19 12:22	
run 7:21 15:19 15:22	separate 3:10	specifically 5:20	statute 14:25	
	serious 27:23	spoke 5:20,20	statutory 12:19 12:22	
S	serve 26:2	stage 30:15	step 23:9	
S 2:1 3:1	serves 26:2	stakes 40:8	STEVENSON 11:13 18:15 43:25 44:12,19	
sake 38:2	set 5:1	stand 32:5	straight 42:4	
Sam 31:8	severe 43:23	standard 5:1 23:15 43:11	stretch 39:23,23	
satisfied 25:3	severity 7:21	stands 32:4	strikes 36:11	
Sattazahn 4:9 29:19 43:23	shape 34:11,24	starting 20:16	submitted 45:11 45:13	
saying 9:10 24:9 24:19 28:12 31:4,14 32:5 34:22 39:24	shot 15:2,5 27:25	state 4:20,22 5:11 7:16 11:9 14:6,25 15:3,4 15:6 16:5,6,12	subsequent 6:4 22:8 27:11 29:13 32:21	
	show 4:23 15:2 44:13		subsequently 41:20	
			subsidiary 24:7 24:10 33:2,5	
			substantial 5:18	
			successive 3:16	
				T
				T 2:1,1
				take 5:22 17:10 17:14 34:12
				taken 17:1 23:12 40:1
				talk 7:14
				talking 5:21 7:12,15 24:15 24:21 40:10 41:16 43:3
				technical 39:5
				technically 29:4
				tells 14:5
				Tennard 7:22

<p>terms 27:10 test 18:16 testified 12:17 18:10 testifying 19:18 testimony 5:12 18:16 35:7 text 17:5 Thank 19:8 42:11,12 45:10 theory 28:19 30:1,6,8 things 29:15 37:13 40:22 41:13 42:20 think 7:9,18 8:8 8:8,26 11:20 12:24 13:20 14:1,17 15:17 20:10 21:7 23:4 25:1 26:6 26:24 27:16,19 28:7,10,21 29:1,14 30:11 31:4 33:16,20 35:1 36:1,15 36:19 39:3,23 42:9 thinks 35:16,21 third 3:17 thought 10:24 13:23 14:20 three 3:10 5:3,3 5:5 36:8,19 44:16 three-part 14:12 43:4 time 10:13 14:9 18:2,4 31:14 41:7 42:10 43:3 told 7:14,25 9:18 11:12 38:15 tomorrow 32:15 tracking 41:13 traditional</p>	<p>32:19 treat 11:1,2 treated 7:23 13:14 29:5 trial 4:13 9:19 10:2 14:22 18:10 28:6,9,9 28:10,14 30:17 31:9,11 35:7 44:6 true 21:6 try 14:16 trying 24:19 26:2 turns 24:21 32:7 two 6:8,12 9:1 12:22 15:7 24:4,8,16,22 24:24 26:2 29:15 37:4 40:4 41:1 42:21 43:8 two-edged 11:6 typical 22:1</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate 21:19 21:22 22:20,22 22:25 23:2 24:7 26:12 27:1 35:24,25 uncritically 23:22 underlying 30:4 underscored 11:3 understand 14:13 24:23 27:6 33:1,7 44:19,24 understanding 26:21 unexhausted 17:12,22,24 unique 22:3 25:1 33:24 34:1,3</p>	<p>United 1:1,12 37:15 unreasonable 10:9 19:21 unsworn 12:16 unusual 32:22 urging 21:13 use 14:23 15:20 16:9 24:12 uses 26:8 usually 24:20</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4,18 4:1 14:7 23:23 26:25 33:8 vaguely 28:24 various 12:18 vastly 35:14 verdict 11:25 version 16:16 versus 21:8 vigorously 10:19 violates 40:14 41:9,20 violent 10:23 virtually 36:9</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wainwright 14:7 waiving 17:10 want 5:22 15:2,2 27:24,24 28:23 wants 14:25 35:20 Warden 1:3 27:13,22 39:11 39:12 warranted 4:12 4:14,16 Washington 1:8 wasn't 9:3,4,5 10:13 18:11,15 20:25 31:6 36:6 40:12,12</p>	<p>41:6 42:3 way 17:7 21:20 22:20 23:2 25:1,7 32:1 35:24 ways 24:20 42:21 weighed 26:10 weighing 34:14 34:23 weight 10:16 13:12 43:21 went 11:8 12:23 19:24 25:13 we're 17:11 21:10 24:15,21 31:2 40:10,23 we've 32:1 34:3 White 23:23 win 26:25 27:1,8 winner 21:14,16 21:23 26:8,23 Winter 5:6,19 12:17 19:18 20:1 35:6 Winters 18:10 Winter's 5:12 wishes 24:12 won 21:17 27:4 27:5 36:17 word 4:7 15:20 words 9:6 10:21 worked 9:17 wouldn't 15:20 30:5 writ 39:6 43:16 wrong 13:20,25 wrongly 27:17 27:19</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years 20:23 yellow 42:24</p> <hr/> <p style="text-align: center;">0</p>	<p>08-598 1:5</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10 42:13 101 18:8 101a 5:10 104a 5:10 18:8 11:02 1:13 3:2 11:54 45:12 143 38:19,19 153 38:11 16 42:24 160 38:23 44:1 18 42:24 19 2:6 1992 10:25 1996 10:25</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2009 1:9 2254(d)(1) 43:16 2254(d)(2) 19:16 39:12,13 43:6 43:14 27 1:9 2929.04 12:20</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 12:23</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>42 2:9</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 18:16</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>65 6:1 7:1 8:12 8:18 9:7 68 18:10 69 18:10 38:1,14 38:21 39:22 41:3 44:3,8,23</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 12:24</p>
--	---	---	--	--