

# The Supreme Court of Ohio

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## CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

September 6, 2002

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### MOTION AND PROCEDURAL RULINGS

#### **1989-0846. State v. Lott.**

Cuyahoga App. No. 54537. On June 26, 2002, appellant's counsel filed a motion seeking to vacate appellant's death sentence pursuant to *Atkins v. Virginia* (2002), 536 U.S. \_\_\_, 122 S.Ct. 2242, 153 L.E.2d 335, claiming that appellant is mentally retarded. In the alternative, appellant moved that his August 27 execution be stayed and that he be provided the assistance of psychiatric experts and an evidentiary hearing. On August 14, 2002, this court granted appellant's motion for a stay of execution. Upon consideration of appellant's motion,

IT IS ORDERED by the court, sua sponte, that oral argument shall be held in this matter on September 25, 2002, on the following issues:

(a) The appropriate procedures to enforce the constitutional restrictions established under *Atkins*, including the procedure to be followed when a defendant such as appellant has completed postconviction proceedings.

(b) The appropriate substantive standard to be applied in adjudicating claims that a defendant in a capital case is mentally retarded.

IT IS FURTHER ORDERED by the court that time allowed for oral argument shall be 15 minutes per side and counsel for appellant shall argue first.

Moyer, C.J., Douglas, Resnick, F.E. Sweeney, Pfeifer and Lundberg Stratton, JJ., concur.

Cook, J., dissents.

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**COOK, J. , dissenting.**

On August 14, 2002, a majority of this court appropriately granted a stay of execution in this case. I dissented in part on the grounds that the court should have also ordered this cause remanded to the trial court for consideration of Lott's claim as a petition for postconviction relief. R.C. 2953.23(A)(1)(b) permits a petitioner to file an otherwise untimely postconviction relief petition in instances where "the United States Supreme Court [has] recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right." Further, R.C. 2953.23(A)(2) permits claims challenging a sentence of death where "[t]he petitioner shows by clear and convincing evidence that, \* \* \* but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence." Lott's alleged constitutional claim fits squarely into this statutory scheme.

A majority of this court nevertheless orders oral argument for purposes of determining "[t]he appropriate procedures to enforce the constitutional restrictions established under *Atkins*, including the procedure to be followed when a defendant such as appellant has completed postconviction proceedings." Given that R.C. 2953.23 addresses the procedures to follow for consideration of *Atkins* issues and that R.C. 2953.23(A) governs second or successive petitions available to Lott after conviction, I must disagree with entertaining arguments regarding issues set forth in Part (a) of the court's order.

Argument regarding the issue in Part (b) is equally unnecessary in that the court seeks guidance regarding the "appropriate substantive standard to be applied in adjudicating claims that a defendant in a capital case is mentally retarded." To the extent that existing decisional law does not already provide courts with the appropriate guidance on this issue, the law ought to develop through the traditional appellate process. A trial court should first produce a decision that a court of appeals can then review, followed by possible review by this court. Instead, the majority short-circuits the process and undertakes an inquiry without a case or controversy that can only result in an advisory opinion on an issue that is not yet ripe.

For the foregoing reasons, I respectfully dissent.

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