[Cite as *State v. Burke,* 2006-Ohio-1026.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	No. 04AP-1234
v.		(C.P.C. No. 89CR-12-5617B)
	:	
Mark E. Burke,		(REGULAR CALENDAR)
	:	
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on March 7, 2006

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellee/cross-appellant.

Carol A. Wright, for appellant/cross-appellee.

ON MOTIONS

BRYANT, J.

{¶1} Plaintiff-appellee and cross-appellant, the State of Ohio, filed a motion requesting (1) reconsideration pursuant to App.R. 26(A) of our opinion in this case rendered December 30, 2005, and (2) certification pursuant to App.R. 25 of an alleged conflict between our opinion and that of two other appellate districts. Our opinion held that under Sup.R. 20 a defendant, who was tried prior to the United States Supreme Court's opinion in *Atkins v. Virginia* (2002), 536 U.S. 304 and pursues through post-conviction

relief a first time *Atkins* claim within in the 180-day period established in *State v. Lott,* 97 Ohio St.3d 303, 2002-Ohio-6625, is entitled to two attorneys. Because defendant was not afforded two attorneys in the trial court, we reversed and remanded this matter to the trial court for a new evidentiary hearing on defendant's *Atkins-Lott* claim.

{¶2} We first address the state's motion for reconsideration. The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that either was not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. An application for reconsideration is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court. *State v. Owens* (1996), 112 Ohio App.3d 334.

{¶3} The state's motion reasserts many of the points it argued in the appeal. Initially, the state contends our prior opinion is erroneous in allowing defendant a new hearing due to the trial court's failure to appoint two attorneys to pursue his *Atkins* claim. The state maintains that Sup.R. 20 does not apply to post-conviction proceedings, and even if it did, the superintendence rules do not provide a basis for reversal. In support of its argument, the state cites *State v. Misch* (1995), 101 Ohio App.3d 640, *State v. Cornwell*, Mahoning App. No. 00-CA-217, 2002-Ohio-5177, and *State v. Bays* (Jan. 30, 1998), Greene App. No. 95-CA-118. The state further argues that prejudice cannot be presumed simply because a defendant did not have the benefit of two attorneys.

{¶4} For those capital defendants tried prior to *Atkins, Lott* undisputedly adopted post-conviction relief as the appropriate means for raising an *Atkins* claim. Short of

requiring a new trial for all defendants in those circumstances, the Supreme Court in *Lott* had little alternative but to determine that post-conviction proceedings provided the most reasonable avenue to address such a claim. Even so, that determination does not inevitably lead to the further conclusion that post-conviction rules apply to all aspects of an *Atkins* claim.

{¶5} For example, the 180-day window created for *Atkins* claims also includes a change in the burden of proof: the lesser standard of preponderance of the evidence applies in determining if the defendant is mentally retarded, even if the petition is untimely or a successive petition for post-conviction relief. See *State v. Carter*, 157 Ohio App.3d 689, 2004-Ohio-3372, at ¶10 (recognizing the *Lott* court's departure from R.C. 2953.23 by granting a petitioner who was sentenced to death before its decision 180 days to file a petition; "[t]he court softened the R.C. 2953.23(A)(2) requirement that a petitioner demonstrate prejudicial constitutional error by clear and convincing evidence"). We recognize that *Lott* characterized the petition there as akin to a "first petition" in "post-conviction" relief, but the court did so based on the fact that a defendant did not have the opportunity to litigate a claim of mental retardation prior to *Atkins* and to support its departure from the "clear and convincing" standard of proof in R.C. 2953.23.

{¶6} While necessarily couched in the framework of a post-conviction petition, defendant's claim in reality is a trial issue properly raised for the first time in a trial proceeding. Because defendant's trial was concluded prior to *Atkins*, defendant never had the opportunity to raise his *Atkins* defense, where he would have had the benefit of two attorneys. Given the nature of the penalty involved in this case and the substance of the

determination under an *Atkins* claim, we properly concluded defendant is entitled to two attorneys, as he would have been if he could have raised his *Atkins* defense at trial.

{¶7} Further, while the state contends the Superintendence Rules are generally considered internal housekeeping rules that do not create substantive rights, the state does not suggest a capital defendant is not entitled under Sup.R. 20 to two trial attorneys for his or her trial. *Atkins* announced a constitutional protection, prohibiting execution of mentally retarded individuals, that will be exercised at future trials where, in connection with Sup.R. 20, defendants will have two attorneys. To render the *Atkins* claim equally accessible to defendants already tried, Sup.R. 20 properly is applied to *Atkins* claims pursued under *Lott.* Indeed, on December 28, 2005, the Ohio Supreme Court declined to review *State v. Lorraine*, Trumbull App. No. 2003-T-0159, 2005-Ohio-2529, appeal not allowed, 107 Ohio St.3d 1697, 2005-Ohio-6763, the case on which the majority relied in our prior opinion. *Lorraine* similarly concluded two attorneys were necessary in circumstances such as those present in this case. While Sup.R. 20 has been amended since *Lorraine*, defendant would be entitled to two attorneys because he was "charged with" a capital crime.

{¶8} The state's argument that defendant has not demonstrated any prejudice from being appointed only one attorney was raised in the state's appellate brief and does not provide a basis for reconsideration. The state does not cite any cases that require a showing of prejudice in these specific circumstances; nor does the state suggest how a defendant would demonstrate such prejudice on direct appeal. In the absence of such factors, we cannot discern any obvious error in our prior opinion.

{¶9} The state's motion for reconsideration also asserts we should reconsider our holding that a trial court must consider evidence of measurement error; the state contends nothing in *Atkins* or *Lott* requires such consideration in determining whether a defendant is intellectually deficient under the first prong of the three-part *Lott* test. The state thus asserts that our use of the phrase "must adjust" is inconsistent with the AAMR and DSM-IV.

{¶10} In the event our prior opinion is unclear, we reiterate that a trial court cannot simply reject measurement error as a concept. In determining whether an individual is intellectually deficient, the AAMR and DSM-IV-TR include an assessment of measurement error in the test itself due to the potential for error in psychological testing. The appropriate measurement error in a given case may be based on a variety of factors, but if the undisputed, credible evidence supports some measurement error, the court must adjust the score, however nominally. If the evidence diverges on the degree on measurement error, then the trial court must determine the evidence it deems more credible, as it ordinarily does in the face of conflicting evidence. Further, our opinion does not, as the state suggests, differentiate between adjusting the score upward or downward.

{¶11} Here, the trial court heard undisputed expert testimony regarding measurement error and rejected it as a concept. The trial court erred in refusing to consider Dr. Reardon's testimony, given the lack of any contrary evidence or any aspect of cross-examination that undermined Dr. Reardon's testimony in that regard.

{¶12} Because the state does not raise any issue not previously considered and does not set forth an obvious error in our prior opinion, the state's motion for reconsideration on all grounds is denied.

{¶13} In its motion to certify a conflict, the state requests this court to certify the following two questions of law:

> (1) Whether a violation of a Superintendence Rule 20 (formerly Superintendence Rule 65) results in an automatic finding of prejudice warranting reversal.
>
> (2) Whether a trial court must consider and adjust for the margin of error in determining whether a defendant satisfies the IQ prong of the MR definition under *Atkins* and *Lott*.

To support certification, the state cites as conflicting authority *Misch*, supra, for the first question, and *State v. Elmore*, Licking App. No. 2005-CA-32, 2005-Ohio-5940, for the second question.

{¶14} Pursuant to Section 3(B)(4), Article V, Ohio Constitution, a court of appeals is required to certify a conflict when its judgment is in conflict with the judgment pronounced upon the same question by any other courts of appeals in the state of Ohio. An actual conflict must exist between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594. It is not enough that the reasoning expressed in the opinions in the two courts of appeals is inconsistent; the judgment of the two courts must be in conflict. Further, the alleged conflict must be on a rule of law and not based on facts, as factual distinctions between cases do not serve as a basis for certifying a conflict. *Whitelock,* at 599.

{¶15} Relying on *Misch*, the state maintains that we must certify the question of whether a defendant raising an *Atkins* claim for the first time, within 180 days of the *Lott* decision, is entitled to two attorneys. *Misch* involved a failure to certify one of the two attorneys appointed to a defendant pursuant to Sup.R. 65, the predecessor to Sup.R. 20. The court found that lack of certification of defense counsel as "experienced" did not automatically result in prejudicial error for purposes of an ineffective assistance of counsel claim where defendant did not allege that counsel's performance was deficient. *Misch*, supra, at 651.

{¶16} Unlike *Misch*, this case addresses a new constitutional protection to potentially mentally retarded defendants facing the death penalty. Moreover, it does not involve an ineffective assistance of counsel claim based on lack of "certification" under Sup.R. 20, but the complete absence of one of the two attorneys required under Sup.R. 20. *Misch* does not support certification.

{¶17} The state also requests certification of whether a trial court must consider and adjust for measurement error. The state cites *Elmore*, supra, as being in conflict with our holding and quotes the following language from *Elmore*: "Dr. Rheinscheld does not dispute that appellant's IQ is above 70; rather he relies on the five-point margin of error which was not adopted by the Supreme Court in *Lott*. Without this five-point margin of error, appellant would not meet the first prong of the *Atkins-Lott* test. Accordingly, Dr. Rheinscheld's affidavit adds nothing new to the record and is based upon an assumption that, while it may be valid in the field of psychology, is not a valid factor in assessing mental retardation for an *Atkins-Lott* claim." *Elmore*, at ¶49.

{¶18} In *Elmore*, the defendant raised a post-conviction claim of ineffective assistance of counsel. The trial court dismissed defendant's petition without an evidentiary hearing; defendant appealed. In support of his ineffective assistance of counsel claim, the defendant contended that because his defense expert was not qualified to diagnose mental retardation, defendant's trial counsel erred in failing to present testimony from a qualified mental retardation expert. As relevant here, the record demonstrated that trial counsel never intended to make an *Atkins* claim; trial counsel investigated the possibility and concluded the claim could not be supported. Instead, trial counsel chose to rely on brain impairment as a factor in mitigation. The *Elmore* court found no ineffective assistance of counsel based on the tactical decision not to pursue an *Atkins* defense to the death penalty. *Elmore*, at ¶50. Although the court in *Elmore* suggested that measurement error was not a valid factor to support an *Atkins-Lott* claim, such language is merely dicta, as the defendant never raised an *Atkins-Lott* claim. *Elmore* therefore does not support certification.

{¶19} Accordingly, the state's motion to certify a conflict is denied.

{¶20} Because the state does not raise any issue not previously considered and does not point to any obvious error in our prior opinion, the state's motion for reconsideration is denied. Further, because the authority the state relies on fails to support certification, the state's motion to certify a conflict is denied.

Application for reconsideration denied;
motion to certify conflict denied.

BROWN, J., concurs.
McGRATH, dissents.

MCGRATH, J., dissenting.

{¶21} Clearly, before *State v. Lorraine*, Trumbull App. No. 2003-T-0159, 2005-Ohio-2529, the law of Ohio has been that Sup.R. 20 does not create a substantive right for a defendant to use to achieve a reversal of an adverse verdict or judgment. Indeed, as the state has argued throughout, the Supreme Court of Ohio has labeled these rules of superintendence as housekeeping rules, *not* substantive rights. The majority has relied upon Sup.R. 20 and *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, for the creation of a new right, which has not existed or hereto been recognized. For the reasons stated in my original dissent, which I have elaborated on herein, I respectfully disagree with the majority's conclusion. Because I find the same to be error, I would sustain the state's motion for reconsideration.

{¶22} The majority concluded that defendant is entitled to two attorneys because, had he been able to raise an *Atkins* defense at trial, he would have been represented by two attorneys at that time. That rationale, however, likens defendant's post-conviction petition to a trial, which it is not. In *Lott*, at ¶17, the Supreme Court explained that "[b]ecause *Lott's* claim is in the nature of a postconviction relief claim filed for the first time since *Atkins* established the new standard for mental retardation, Lott's petition is more *akin to a first petition* than a successive petition for postconviction." (Emphasis added.) The Supreme Court could have analogized Lott's *Atkins* claim as being akin to "a trial issue," but instead, it chose to equate Lott's claim with "a first petition." Id. So, while I am cognizant of the majority's underlying rationale, I find *Lott* does not support it.

{¶23} As for the majority's application of Sup.R. 20, the majority has, in essence, converted Sup.R. 20 from a housekeeping rule into one conferring a substantive right.

This is inconsistent with the long held view that "[t]he Rules of Superintendence are not designed to alter basic substantive rights of criminal defendants." *State v. Singer* (1977), 50 Ohio St.2d 103, 110. See, also, *State v. Cornwell*, Mahoning App. No. 00-CA-217, 2002-Ohio-5177, at ¶35 ("the Rules of Superintendence for Courts of Common Pleas are guidelines for judges only and do not create substantive rights on the part of individual litigants"), citing *State v. Mahoney* (1986), 34 Ohio App.3d 114, 116-117; *State v. Gettys* (1976), 49 Ohio App.2d 241, 243. In *Singer*, supra, the defendant pitted the outer limits of a speedy trial as defined in R.C. 2945.71, which was 90 days, against the 60-day time limit found in Sup.R. 8. The Supreme Court held that because R.C. 2945.71 through 2945.73 rationally attempted to define speedy trial, Sup.R. 8 was "immaterial to the disposition of [that] case." *Singer,* at 110.

{¶24} As explained in my original dissent, Sup.R. 20 is "immaterial" to the disposition of this case because R.C. 2953.21(I), which governs post-conviction in capital cases, does not require the appointment of two attorneys. On its face, Sup.R. 20 does not fall within the purview of post-conviction relief.[1] This point was made by S. Adele Shank, a criminal defense attorney whose practice is primarily death penalty defense, and former chair of the Death Penalty Sub-Committee of the Ohio State Bar Association Criminal Justice Committee. In a law review article published in the Ohio State Law Journal, Shank noted that Sup.R. 20 did not provide for the certification of capital post-conviction counsel, and the rule "applie[d] only to trial and appellate counsel." Shank, The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk—A Report on Reforms in Ohio's Use of the

[1] It is worth noting that while several states require the appointment of two trial and appellate counsel to indigent capital defendants, independent research has not disclosed any state, except for Ohio, that has required the appointment of two attorneys in raising an *Atkins* claim on post-conviction relief.

Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made (2002), 63 Ohio St.L.J. 371, 406. To that end, Shank makes clear that the role Sup.R. 20 plays in post-conviction proceedings is limited to its reference contained in R.C. 2953.21(I)(2), which merely requires post-conviction counsel be certified under Sup.R. 20.

{¶25} There is no mistaking the fact that, if not for R.C. 2953.21, capital defendants would have no right to counsel in post-conviction proceedings in Ohio. *State v. Spirko* (1998), 127 Ohio App.3d 421, 429; see, also, *Murray v. Giarratano* (1989), 492 U.S. 1, 109 S.Ct. 2765 (no constitutional right to post-conviction counsel in capital cases). As noted in my original dissent, R.C. 2953.21(I)(2) does not mandate the appointment of two attorneys. Rather, the statute provides for the appointment of "only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio," and makes references to the word "attorney" in the singular. The statute also does not give any special consideration to a capital defendant raising a new constitutional right for the first time on post-conviction relief. There is simply no need to "resort to judicial default rules," such as Sup.R. 20, when the legislature's intent is "manifest on its face." *Lockheed Corp. v. Spink* (1996), 517 U.S. 882, 896-897, 116 S.Ct. 1783, quoting *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 280, 114 S.Ct. 1483.

{¶26} To reverse the judgment of the trial court on the basis that it failed to appoint two attorneys to represent defendant in his post-conviction proceeding, when neither Sup.R. 20 nor R.C. 2953.21(I)(2) require the appointment of two attorneys, contravenes the well-established rule that an appellate court must make every reasonable presumption in favor of the trial court's judgment and findings of fact. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 9-10. Thus, based upon the plain language of

R.C. 2953.21(I), I respectfully disagree with the majority's conclusion that the trial court committed reversible error when it failed to appoint two attorneys to represent defendant in his post-conviction proceeding. I also find the fact defendant is asserting a new constitutional right for the first time is irrelevant until the legislature states otherwise.

{¶27} With respect to the majority's reliance upon *Lorraine*, such reliance is misplaced. In reaching its conclusion, the *Lorraine* court noted that Sup.R. 20(A) provided for the appointment of counsel for indigent defendants in capital cases. At that time, Sup.R. 20(A) read, "[t]his rule shall apply in cases where an indigent defendant has been charged with or convicted of an offense for which the death penalty can be or has been imposed." The court seized upon the phrase, "can be or has been imposed," as mandating the appointment of two attorneys for an indigent capital defendant in a post-conviction proceeding. The amendment history of Sup.R. 20, however, discloses that same language has been deleted from the current version of Sup.R. 20, effective March 7, 2005. Although the amendment to the rule became effective after the trial court rendered its decision, courts have construed Civ.R. 86 to permit the application of a newly enacted or amended Rule of Superintendence even though the decision appealed from preceded the adoption or amendment. See, e.g., *In re Brandt* (Mar. 1, 1988), Clark App. No. 2383; *Drinkard v. Drinkard* (Jan. 11, 1989), Summit App. No. 13656. Given that the language relied upon by the *Lorraine* court to reach its conclusion has been deleted from Sup.R. 20, its authoritative value is completely diminished.

{¶28} The majority herein also has implied that the Supreme Court's denial of certiorari in *Lorraine* is an affirmance of the merits. I believe that position reads too much into the denial of certiorari, as denial of certiorari "imports no expression of opinion upon

the merits of a case." *Alabama v. Evans* (1983), 461 U.S. 230, 236, 103 S.Ct. 1736 (citations omitted). This is *especially* true of *Lorraine*, in which the main point of error was the trial court's refusal to provide Lorraine with a *Lott* hearing, and the issue of two attorneys was gratuitously addressed as an afterthought.

{¶29} I am also persuaded by the state's position that the majority's opinion, which presupposed prejudice in the failure to follow Sup.R. 20 (which, I have made clear, was not controlling in this instance), is in direct conflict with the judgment rendered by the Sixth District Court of Appeals in *State v. Misch* (1995), 101 Ohio App.3d 640. *Misch* held that the failure to follow C.P.Sup.R. 65, the predecessor to Sup.R. 20, does not create reversible error absent a demonstration of prejudice. The majority herein did not find a conflict existed because this case addressed Sup.R. 20 in relation to raising a new constitutional right on post-conviction, whereas *Misch* involved a claim for ineffective assistance of counsel based on the fact one of his trial attorneys lacked Sup.R. 20 certification. In my view, these factual differences are irrelevant to the certification analysis; both courts addressed the issue of whether noncompliance with Sup.R. 20 is grounds for automatic reversal, and the judgments of both courts are at odds.

{¶30} With respect to the state's argument that the majority's opinion failed to address the issue of prejudice, I agree, and find this also serves as a basis for sustaining its motion for reconsideration. As previously stated, the majority's opinion has presumed reversible prejudice. Indeed, the record is void of any evidence that defendant was prejudiced, let alone, materially prejudiced, by the trial court's failure to appoint two attorneys. Nor has defendant claimed that his attorney has somehow been deficient. To the contrary, defendant was appointed an attorney who, single-handedly, has provided

him with excellent legal representation, and it is hard to imagine how defendant could benefit from the appointment of a second attorney.

{¶31} The state has also argued that the majority's direction on remand, that the trial court must adjust defendant's IQ for the standard margin of error, conflicts with the Fifth District Court of Appeals in *State v. Elmore*, Licking App. No. 2005-CA-32, 2005-Ohio-5940. In considering the issue of margin of error on IQ assessment, the *Elmore* court acknowledged that the Supreme Court of Ohio in *Lott* did not require any adjustment be made, and found that such theory is "based upon an assumption that, while it may be valid in the field of psychology, is not a valid factor in assessing mental retardation for an *Atkins-Lott* claim." Id. at ¶49. The majority declined to certify a conflict based upon the factual differences between this case and *Elmore*. Specifically, that Elmore did not intend to raise an *Atkins* claim during trial. While that is correct, the basis of Elmore's argument on post-conviction was that he was not provided with effective assistance of counsel because his attorneys declined to develop an *Atkins* defense based upon the report of a physician who was not aware of the diagnostic criteria for mental retardation. To support his argument, Elmore proffered the report of another physician, who opined that the five-point margin of error in Elmore's IQ assessment must be taken into consideration. The court discounted that factor in assessing an *Atkins-Lott* claim, and ultimately, found Elmore's trial counsel made a tactical decision. As such, I believe this is enough to certify a conflict.

{¶32} With respect to the majority's reversal and remand concerning the standard margin of error issue, I believe this, too, is in error. The trial court held an evidentiary hearing, considered all the evidence proffered by defendant, including the testimony of

Dr. Reardon, of whom the trial court even asked questions. While the trial court did state it did not find evidence relating to the margin of error issue to be "authoritative," it is clear, based on the record, that the trial court meant that it did not find the evidence proffered by defendant to be "persuasive." To that end, I would not reverse the trial court based on semantics.

{¶33} In its final analysis, the fear of this dissent is that the majority has elevated a Rule of Superintendence above a statute. If the Supreme Court has acknowledged that its own rules are subservient to the Ohio Revised Code, then is not the same true here? Though the instant matter may be addressing Sup.R. 20 in terms of an *Atkins-Lott* claim, as society changes, and the law evolves, new rights will be created. Nor are the ramifications of the majority's opinion confined to criminal law. It is difficult to estimate the full impact of the majority's opinion, but its potential may be far from trivial.

{¶34} Accordingly, I would sustain the motion for reconsideration, overrule the assignments of error, and affirm the judgment of the common pleas court. I also find the judgment of the majority, relating to the two issues discussed herein, conflicts with the judgment in *Misch* and *Elmore*, supra, and would sustain the motion to certify conflicts to the Supreme Court of Ohio for resolution.
