NO. 16-9725

IN THE SUPREME COURT OF THE UNITED STATES

RONALD PHILLIPS
Petitioner

-vs-

THE STATE OF OHIO
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE JULY 26, 2017)

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CAPITAL CASE

QUESTION PRESENTED

1. Is the infliction of the death penalty on a person who was nineteen years old at the time of the offense cruel and unusual punishment, and thus barred by the Eighth and Fourteenth Amendments?

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 3

Arguments 7

Conclusion 16

TABLE OF AUTHORITIES

CASES CITED **PAGE(S)**

Atkins v. Virginia
122 S.Ct. 2242 (2002) 3, 14

Coleman v. Thompson
501 U.S. 722 (1991) 11

Graham v. Florida
560 U.S. 48 (2010) 12, 13, 16

Hall v. Florida
134 S.Ct. 1986 (2014) 14

Izumi Seimitsu Kogyo Kabushiki v. U.S. Phillips Corp.,
510 U.S. 27 (1993) 10

Kaeding v. Warden
2012 WL 3962793, 16 (U.S.D.C. S.D. Ohio 2012)... 11

Matsushita Elec. Co. v. Epstein
516 U.S. 367 (1996) 10

Michigan v. Long
463 U.S. 1032 (1983) 12

Miller v. Alabama
132 S.Ct. 2455 (2012) 12, 16

Moore v. Texas
137 S.Ct. 1039 (2017) 14

People v. House
2015 IL App. (1st) 110580, 410 Ill. Dec. 971,
72 N.E.3d 357 15

Phillips v. Bradshaw
607 F.3d 199 (6th Cir. 2010)................................... 6

Phillips v. Jenkins
Case No. 5:17-cvg-184 (N.D. Ohio)......................... 7

Roper v. Simmons
543 U.S. 551 (2005)...................................3, 7, 12, 14, 15, 16

State ex rel. Kimbrough v. Greene
98 Ohio St.3d 116, 2002-Ohio-7042 9

State v. Bell
2017 WL 1459674, Fn. 7 (La. 2017)........................ 13

State v. Blankenship
145 Ohio St.3d 221, 2015-Ohio-4624 7

State v. Gondor
112 Ohio St.3d 377, 2006-Ohio-6679 9

State v. Hartman
9th Dist. Summit No. 25055, 2010-Ohio-5734......... 9

State v. Hatfield
10th Dist. Franklin, 2008-Ohio-1377....................... 9

State v. Lawson
12th Dist. Clermont No. CA2013-12-093,
2014-Ohio-3554 9

State v. Owens
121 Ohio App.3d 34 (1997)..................................... 9

State v. Phillips
148 Ohio St.3d 1409, 2017-Ohio-573 1

State v. Phillips
9th Dist. Summit No. 27733, 2016-Ohio-1198......... 1

State v. Phillips
2002-Ohio-823 6

State v. Phillips
9th Dist. Summit No. 20692,
2002 WL 274637 (Feb. 27, 2002) 6

State v. Phillips
9th Dist. Summit No. 18940,
1999 WL 58961 (Feb. 3, 1999)................................ 6, 8

State v. Phillips
74 Ohio St.3d 72 (1995).. 5

State v. Smith
9th Dist. Lorain No. 04CA008546,
2005-Ohio-2571 9

State v. Tucker
181 So.3d 590 (La. 2015).. 13

United States v. Marshall
736 F.3d 492 (6th Cir. 2013).................................... 13, 14

Yee v. Escondido
503 U.S. 519 (1992) 10

CONSTITUTION, STATUTES AND RULES:

Eighth Amendment, United States Constitution...... 3, 4, 12, 15, 16
Fourteenth Amendment, United States Constitution... 3
28 U.S.C. § 1257 1
Ohio Revised Code Section 2929.023.............................. 13
Ohio Revised Code Section 2929.03................................ 13
Ohio Revised Code Section 2953.21 .... 8, 11
Ohio Revised Code Section 2953.23 .... *passim*

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OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Phillips*, 148 Ohio St.3d 1409, 2017-Ohio-573. The opinion of the Ninth District Court of Appeals is reported at *State v. Phillips*, 9th Dist. Summit No. 27733, 2016-Ohio-1198.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Eighth Amendment to the United States Constitution, which provides in pertinent part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

B. The Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Over nine years after the decision in *Roper v. Simmons*, 543 U.S. 551 (2005) and twelve years after the decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), Ronald Phillips filed an out of time and successive petition for post-conviction relief subject to Ohio Revised Code Section 2953.23 in the Common Pleas Court of Summit County, Ohio, claiming in part that his execution would violate the Eighth and Fourteenth Amendments both under *Roper* and a mixture of *Roper* and *Atkins*, the latter claim being that he was both close to being a juvenile and intellectually disabled when he committed capital aggravated murder. Petition dated November 17, 2014, Claims 10, 12.

Since the petition was both out of time and successive, Phillips had, as a matter of state law, to satisfy the jurisdictional threshold in Section 2953.23, *infra*. The trial court held a limited hearing at which the parties presented argument on whether Phillips had done so. Finding that Phillips had not met his burden, the court granted the State's motion to dismiss. Petition for Cert., Appx. 0002, 0007.

On appeal, the Ninth District Court of Appeals affirmed the dismissal of the petition as Phillips did not meet the burden set by

Section 2953.23. Addressing the pertinent claims and related issues, the court found that Phillips did not satisfy Section 2953.23(A)(1)(a), *infra*. *Id.* Appx. 0011, 0019-0021. Phillips' arguments concerning the "adolescent brain" were foreclosed by Section 2953.23(A)(1)(b), *infra*, and the fact that expert testimony of his "'low average'" level of intelligence and general immaturity were presented at the mitigation hearing of the capital trial. *Id.*, Appx. 0018.

Phillips sought discretionary review in the Supreme Court of Ohio. He claimed in part that the Eighth Amendment barred execution of persons less than 21 years of age at the time of the offense. He conceded that no State had raised the age for death eligibility above eighteen. Memorandum in Support of Jurisdiction, 53-67. The Supreme Court of Ohio declined jurisdiction. Petition for Cert., Appx. 0001.

Phillips (a Caucasian male born October 10, 1973) was nineteen years old when he beat three year old Sheila Marie Evans to the extent that over one hundred twenty-five bruises arose on all parts of her body. Blows to the child's abdomen caused severe internal injuries to her stomach, intestine, and other organs. Phillips did not confine his

attentions to the outer parts of Sheila's body but penetrated her anus multiple times, the last on January 18, 1993. The force of the last anal penetration(s) ruptured the child's already necrotic and gangrenous duodenum (caused by Phillips' prior beatings) leading to her death.

Phillips admitted that on the morning of January 18, 1993, he looked for Sheila at breakfast time. Finding her in bed, Phillips proceeded to hit her, throw her against walls, and drag her by her hair. Her lack of underwear caused Phillips to become sexually aroused. Phillips lubricated Sheila's anus and inserted his fingers (as a matter of former state law such action would not constitute a rape). He denied inserting his penis (that would constitute a rape and grounds for a capital specification as later alleged and proved) but thought about it. Phillips did penetrate the child's anus with his penis on earlier occasions. *Id.,* Appx. 0023-0025.

Four courts have examined Phillips' case in addition to the three State courts mentioned *supra.*

The Supreme Court of Ohio affirmed the convictions and sentence. *State v. Phillips*, 74 Ohio St.3d 72 (1995). The Ninth District Court of Appeals twice dealt with the first petition for post-conviction relief,

ultimately affirming dismissal of the petition. *State v. Phillips*, 9th Dist. Summit No. 18940, 1999 WL 58961 (Feb. 3, 1999); *State v. Phillips*, 9th Dist. Summit No. 20692, 2002 WL 274637 (Feb. 27, 2002). The Sixth Circuit affirmed the denial of a petition for writ of habeas corpus. *Phillips v. Bradshaw*, 607 F.3d 199 (6th Cir. 2010).

It is of some note that in the 2014 successive and untimely petition, Phillips claimed that original trial counsel was ineffective for not discovering and presenting mitigation evidence generally showing a dysfunctional childhood and various psychological and/or developmental impediments. This argument was raised in the first petition for post-conviction relief and in the federal courts. The claim was rejected. *State v. Phillips, supra,* 2002-Ohio-823, at 9-11; *Phillips v. Bradshaw, supra,* 607 F.3d at 205-219. Both courts found that Phillips could not have been prejudiced by the failure of the jury to hear the new mitigation evidence. *State v. Phillips, supra,* 2002-Ohio-823, 11; *Phillips v. Bradshaw, supra,* 607 F.3d at 219. The Sixth Circuit reached its conclusion after thoroughly reweighing the evidence in aggravation against the totality of the available mitigation evidence adduced at trial and in the post-conviction proceedings. *Id.* 217.

Phillips has another pending petition for writ of habeas corpus case. *Phillips v. Jenkins*, Case No. 5:17-cvg-184 (N.D. Ohio).

ARGUMENT

1. THIS COURT SHOULD DENY REVIEW BECAUSE THE CONSTITUTIONAL ISSUE WAS NOT ADDRESSED BELOW.

Phillips proceeds as if there has been a decision below on the merits of the issue whether the "Line Drawn by *Roper* is Now Ripe for Reevaluation." Petition for Cert., 34. That is not true. No court addressed the merits and decided that the "categorical restrictions," *State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624, ¶18, of *Roper* must remain in place. What the lower courts did decide was that Phillips did not, in any of his numerous claims, succeed in meeting the requirements of Section 2953.23, applicable because the 2014 petition for post-conviction relief was both successive and out of time. The sole reason for the hearing in the trial court was to judge compliance with the statute. Petition for Cert., Appx. 0002-0003, 0007, 0010-0011, 0020.

Phillips does not devote a word as to why he complied with the statute. His sole mention of Section 2953.23 is to quote the Ninth District Court of Appeals holding that he did not comply with the

statute. Petition for Cert., 29. Accordingly, Phillips presents no argument that the lower courts erred in refusing to consider his claims.

The 2014 petition was successive because Phillips filed a petition years before, *Phillips*, 1999 WL 58961, and it was out of time because it was filed more than one hundred eighty days after the trial transcript was filed in the Supreme Court of Ohio. Former Section 2953.21(A)(2) (the statute was amended in 2015 to make timely a petition filed 365 days after the filing of the trial transcript).

Section 2953.23 provides:

> Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:
> (1) Both of the following apply:
> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court 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.
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the

> offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence. ***.

An Ohio defendant must comply with R.C. 2953.23 where applicable or the trial court has no jurisdiction to consider the merits of the petition and must dismiss it. *State v. Hartman*, 9th Dist. Summit No. 25055, 2010-Ohio-5734, ¶20, ¶23; *State v. Hatfield*, 10th Dist. Franklin, 2008-Ohio-1377, ¶7; *State v. Owens*, 121 Ohio App.3d 34 (1997); *See State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002-Ohio-7042, ¶6 (a trial court has no duty to make findings of fact and conclusions of law when an untimely petition is dismissed).

Ohio's post-conviction statutes are designed to promote finality in criminal judgments. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶47, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994).

Ohio courts have upheld the constitutionality of Section 2953.23 many times. *State v. Smith*, 9th Dist. Lorain No. 04CA008546, 2005-Ohio-2571, ¶7-¶8; *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶21.

The Court "is a court of final review and not first review." *Matsushita Elec. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (GINSBURG, J., concurring in part and dissenting in part). Phillips improperly seeks a preliminary decision from the Court that the trial court erred in not addressing the merits of his constitutional claim.

2. THIS COURT SHOULD DENY REVIEW BECAUSE PHILLIPS' COMPLIANCE WITH SECTION 2953.23 IS NOT IN THE QUESTION PRESENTED.

Rule 14.1(a) provides that "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." The rule "creates a heavy presumption" against the Court's consideration of an issue not in the question presented by the petition. *Yee v. Escondido*, 503 U.S. 519, 537 (1992). The Rule is disregarded "'only in the most exceptional cases.'" *Id.*, 535, quoting *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976). As stated above, Phillips does not devote any argument to his burden under Section 2953.23.

Compliance with that statute involves examination of the nature of the claim, the prior history of the litigation, the defendant's ability to raise the issue sooner, and the effect of a successful claim on the decision of the finder of fact. There are legal issues to be sure, but the

issue of compliance by any particular defendant is "relatively factbound," *Izumi Seimitsu Kogyo Kabushiki v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993), and unlikely to announce "any new principle of law." *Id.* 33. Resolution of the issue would affect Phillips only and is by no means an "important question." *Id.* 32, quoting *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation,* 402 U.S. 313, 320 n.6 (1971).

3. THIS COURT SHOULD DENY REVIEW BECAUSE THE RULING THAT PHILLIPS DID NOT COMPLY WITH SECTION 2953.23 CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). Ohio post-conviction remedies in Sections 2953.21 and 2953.23 "are completely independent of the federal law content of the questions being raised." *Kaeding v. Warden,* 2012 WL 3962793, 16 (U.S.D.C. S.D. Ohio 2012).

The sole reason for dismissal of Phillips' petition for post-conviction relief was his non-compliance with Section 2953.23. Petition for Cert., Appx. 0002, 0007, 0019-0020. The independence and

adequacy of the statutory bar is clear from the decisions of both the trial and appellate courts. *Id.*; *Michigan v. Long,* 463 U.S. 1032, 1040-1041 (1983).

4. THIS COURT SHOULD DENY REVIEW BECAUSE THE SMORGASBORD OF REMEDIES OFFERED BY PHILLIPS DOES NOT OVERCOME THE CLEAR RULE OF *ROPER.*

The Court has set the age of eighteen as the cutoff point for several sanctions under the Eighth Amendment. These categorical prohibitions of punishment are *Miller v. Alabama,* 132 S.Ct. 2455, (2012) (a life sentence without possibility of parole is unconstitutional for juveniles convicted of a homicide offense); *Roper v. Simmons,* 543 U.S. 551, (2005) (capital punishment is unconstitutional for juveniles); and *Graham v. Florida,* 560 U.S. 48, (2010) (a life sentence without possibility of parole is unconstitutional for juveniles convicted of a nonhomicide offense).

What Phillips wants is unclear, other than he is spared execution. His Question Presented seeks to expand *Roper* to the age of nineteen. His claim in the body of the Petition seeks expansion to the age of twenty-one. Petition for Cert., 2, 20, 37.

Ohio sets the chronological bar for the death penalty at eighteen. Sections 2929.023 and 2929.03(D)(1). Phillips does not claim that any State sets it higher. Accordingly, Phillips cannot point to any national consensus in favor of raising the bar past eighteen. *Graham*, 560 U.S. at 61-62.

Phillips' other claim pivots in the opposite direction and seeks to replace a fixed chronological age ban with a vague rule that persons who are "slightly over" eighteen and who "share the exact same characteristic vulnerabilities and weaknesses" as those under 18 should be spared a death sentence. Petition for Cert., 32.

Concerning the latter claim, such a rule will result in a "legal system that *** would be essentially unmanageable." *United States v. Marshall*, 736 F.3d 492, 499 (6th Cir. 2013). Who indeed, besides Phillips and those younger than him but older than eighteen at the time of the offense, will be "slightly over" eighteen? One twenty-five year old defendant has tried essentially this approach. *State v. Bell*, 2017 WL 1459674, Fn. 7 (La. 2017); *See State v. Tucker*, 181 So.3d 590, 627 (La. 2015) (eighteen years of age but immature).

And how can it be determined as a matter of federal constitutional law that an over eighteen year old defendant, who knows what age, shares "the exact same characteristic vulnerabilities" as one under eighteen? *See Marshall, supra* (a court "would first have to wade through tedious expert testimony to determine whether the defendant's mental age was commensurate with his chronological age."); *Roper*, 543 U.S. at 573 (noting the difficulty for expert psychologists to differentiate between juveniles acting out of transient immaturity and those acting out of irreparable corruption). Phillips' unprincipled rule offers nothing except confusion and wildly varying results.

Hall v. Florida, 134 S.Ct. 1986 (2014), does not support a rule that, in construing *Roper,* mental age must be considered apart from chronological age. In *Hall,* the Court applied *Atkins* and struck down a Florida law that made an IQ score above 70 conclusive of a lack of intellectual disability. More evidence of intellectual disability, including adaptive deficits had to be considered. *Hall* at 1995, 2000-2001; *Moore v. Texas,* 137 S.Ct. 1039, 1053 (2017) (the court must be informed of the "'medical community's diagnostic framework'" concerning intellectual disability, quoting *Hall* at 2000). The Court in

Roper relied on and did not discount expert understanding of the differences in juveniles and adults. *Roper*, 543 U.S. at 569-571.

Phillips cites *People v. House*, 2015 IL App. (1st) 110580, 410 Ill. Dec. 971, 72 N.E.3d 357, but that court found that this Court's "line for death eligibility," *Roper*, 543 U.S. at 574, was "somewhat arbitrary," *House,* 72 N.E.3d at 387; it cited with approval sentencing regimes in Germany, Sweden, and the Netherlands *Id.*; it relied on the State's "proportionate penalties clause" *Id.* 382, 389; and it held that the mandatory life sentence was unconstitutional as applied to the defendant who acted as a lookout. *Id.* 389. The court did not address the Eighth Amendment argument. *Id.* 389.

Phillips' argument for a new categorical rule is likewise too vague. Is the new ban to be set at nineteen or twenty-one? The *Roper* court surveyed extensive material and determined that "The age of 18 is the point *** at which the line for death eligibility ought to rest." *Id.* 543 U.S. at 574.

Phillips offers the age of nineteen in his Question Presented but prefers the age of twenty-one in his argument. Petition for Cert., 15, 19-20. No doubt there are arguments that immaturity, etc., are present

in many persons under twenty-one (and many over to be sure), but the line drawn by *Roper* has been adhered to by the Court both in 2010 (*Graham*) and in 2012 (*Miller*). In particular, the *Miller* court adhered to the age of eighteen, 132 S.Ct. at 2460, 2469, reasoning that "The evidence presented*** indicates that the science and social science supporting *Roper's* and *Graham's* conclusions have become even stronger." *Miller*, 132 S.Ct. at 2464, n.5.

That the Court has continued to adhere to the age of eighteen in this aspect of Eighth Amendment jurisprudence implies that the state of scientific evidence still favors the current ban. Moreover a new rule for death penalty cases will certainly cause inexorable pressure to replace both *Graham* and *Miller* with the new rule. Phillips' arguments are simply too vague and inconsistent to start down that road, especially since the Court has so recently adhered to the line set by *Roper*.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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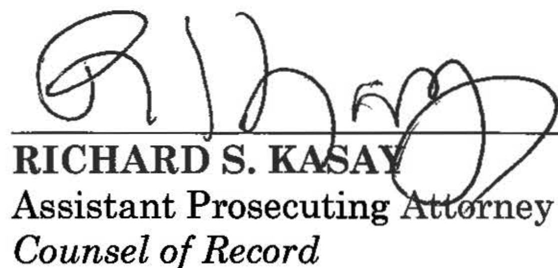
CERTIFICATE OF SERVICE

I, Richard S. Kasay, hereby certify that on this 7th day of July 2017, a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was sent by first class U.S. Mail, as required by Supreme Court Rule 29, and also by email, to Attorney Timothy F. Sweeney, Law Office of Timothy Farrell Sweeney, The 820 Building, Suite 430, 820 West Superior Avenue, Cleveland, Ohio 44113.



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