NO. 2017-1279

IN THE SUPREME COURT OF OHIO

GARY OTTE,

Plaintiff-Appellant

-vs-

STATE OF OHIO,

Defendant-Appellee

APPELLEE'S RESPONSE TO APPELLANT'S FOURTH MOTION TO STAY EXECUTION

This is a Death Penalty Case – Execution Date Set for September 13, 2017

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MEMORANDUM IN OPPOSITION

Now comes Appellee the State of Ohio, by and through Cuyahoga County Prosecuting Attorney Michael C. O'Malley and his undersigned assistant, and respectfully asks this Honorable Court to deny Plaintiff-Appellant Gary Otte's Fourth *Motion to Stay Execution Date*, filed September 12, 2017.

1. Introduction and summary of argument.

Five days ago, this Court denied Plaintiff-Appellant Gary Otte's third motion for a stay of his execution, intended to allow him to litigate his complaint for declaratory judgment seeking to invalidate his death sentence. *See State v. Otte*, Slip Opinion No. 2017-Ohio-7487 (Sep. 7, 2017). Today, the Eighth District Court of Appeals unanimously affirmed the trial court's decision to dismiss that complaint. *Otte v. State,* 8th Dist. Cuyahoga No. 106204, 2017-Ohio-7568. In response to those rulings, Otte has now refiled a new motion for a stay reasserting the same arguments. If there was no reason sufficient to justify granting a stay before the Eighth District resolved his appeal, there certainly is no reason to do so now.

In *State v. Steffen*, 70 Ohio St. 3d 399, 412, 639 N.E.2d 67 (1994), this Court recognized that:

> "When a criminal defendant has exhausted direct review, one round of postconviction relief, and one motion for delayed reconsideration under *State v. Murnahan* in the court of appeals and in the Supreme Court, any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system."

Otte's fourth motion to stay his execution date, coming to this Court mere hours beforehand, is exactly the kind of abuse of the courts that this Court warned against in *Steffen*. It adds nothing new to the material before this Court except for a challenge to one more opinion rejecting one more last-minute attempt to thwart his lawfully-imposed sentence. At some

point, there must be an end to the litigation; to the countless appeals; to the repeated requests for one do-over after another until Gary Otte gets the result that he wants. This Court did not countenance such a filing last week when Otte's appeal was still pending, and it should not countenance it now that it has been rejected. The State therefore respectfully asks this Honorable Court to deny Otte's fourth motion for a stay of execution.

2. The facts of Otte's case.

On February 12 and 13, 1992, Gary Otte murdered 61-year-old Robert Wasikowski and 45-year-old Sharon Kostura by entering their apartments at the Pleasant Lake apartment complex in Parma on consecutive days and shooting both of them in the head. Otte confessed to killing and robbing both victims. A three-judge panel found Otte guilty of aggravated murder under both R.C. 2903.01(A) and 2903.01(B) for each victim. The panel also found Otte guilty of a felony-murder specification under R.C. 2929.04(A)(7) for committing each aggravated murder while committing aggravated robbery and aggravated burglary, as well as a course-of-conduct specification under R.C. 2929.04(A)(5) for killing Kostura as part of a course-of-conduct involving the purposeful killing of two persons. The panel sentenced Otte to death. Otte has now exhausted all of his state and federal appeals. This Court has scheduled Otte's execution date for September 13, 2017.

3. Both the trial court and court of appeals rejected a last-minute complaint by Otte arguing that his sentence was unconstitutional.

On August 21, 2017, Otte filed a complaint for declaratory judgment asking the trial court to extend the Supreme Court of the United States' decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.E.d2d 1 (2005), to raise the minimum age at which an offender becomes eligible for the death penalty to 21, rather than 18. Otte, who has been on death row since 1992, delayed in bringing this action until 23 days before his execution to deny the

state courts an opportunity to adjudicate the action on a normal schedule without asking for a stay. He improperly attempted to bring this claim in the guise of a declaratory judgment action seeking to overturn a criminal sentence, rather than a petition for postconviction relief. And he failed to identify any relevant or binding case law suggesting that the Supreme Court's decision in *Roper* was no longer good law.

On September 5, 2017, the trial court granted the State's motion to dismiss Otte's complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted. Thereafter, this Court denied Otte's third motion to stay his execution based on that complaint. On September 12, 2017, a unanimous panel of the Eighth District Court of Appeals affirmed the trial court's decision to dismiss Otte's complaint. *Otte v. State,* 8th Dist. Cuyahoga No. 106204, 2017-Ohio-7568.

4. A declaratory judgment action cannot be used to collaterally attack a criminal conviction or sentence.

In his declaratory judgment action, Otte asked the trial court to find that a sentence imposed 25 years earlier by a three-judge panel was unconstitutional. This was a collateral attack on the constitutionality of Otte's sentence – an "[a]n attack on a judgment in a proceeding other than a direct appeal[.]" *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 16, quoting Black's Law Dictionary (8th Ed.2004) 278. A collateral attack seeks to "defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved." *Id.* "The objective of a collateral attack is to modify a previous judgment because it is allegedly ineffective or flawed for some fundamental reason." *Id.*, ¶ 19. Because a direct appeal is the primary way to challenge a final judgment, collateral attacks "are disfavored and * * * will succeed only in certain very limited situations." *Id.*, ¶ 22.

It is well-settled that a defendant cannot use a declaratory judgment action to collaterally attack his criminal sentence. "A declaratory judgment action, however, cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. Declaratory relief 'does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies.'" *Moore v. Mason*, 8th Dist. Cuyahoga No. 84821, 2005-Ohio-1188, ¶ 14, quoting *Shannon v. Sequeechi*, 365 F.2d 827, 829 (10th Cir.1966). Such a collateral attack is not a justiciable controversy.

> "For direct and collateral attacks alike, declaratory judgment is simply not a part of the criminal appellate or postconviction review process. Ohio's Criminal Rules and statutes provide for * * * collateral attacks through postconviction petitions, habeas corpus, and motions to vacate. A declaratory judgment action cannot be used as a substitute for any of these remedies."

Lingo v. State, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 44. *See also Burge v. Ohio AG*, 10th Dist. Franklin No. 10AP-856, 2011-Ohio-3997, ¶ 10 ("[i]t is well-settled that a declaratory judgment action cannot be used to collaterally attack a conviction or sentence in a criminal case"); *Wilson v. Collins*, 10th Dist. Franklin No. 10AP-511, 2010-Ohio-6538, ¶ 9 ("[a] declaratory judgment action is not part of the criminal appellate process, and it cannot be used as a substitute for an appeal or as a collateral attack upon a conviction"); *Tootle v. Wood*, 40 Ohio App.2d 576, 578, 321 N.E.2d 623 (4th Dist.1974) ("[a]n action for a declaratory judgment cannot be used as a subterfuge for, or for the veiled purpose of, relitigating questions as to which a former judgment is conclusive"), quoting 26 Corpus Juris Secundum 93-94, Declaratory Judgments, Section 23 ("[a]n action under declaratory judgments act will not lie to determine whether rights theretofore adjudicated have been properly decided, nor will it lie to determine the propriety of judgments in prior actions between the same parties").

This is precisely what Otte sought to do through his declaratory judgment action. Otte asked the trial court to issue a declaratory judgment that his 25-year old sentence in a criminal case was unconstitutional. This was a collateral attack on his sentence – an attack brought through means other than a direct appeal. The State's research has not revealed a single instance in an Ohio appellate court has ever sanctioned such a use of the declaratory judgement statutes in O.R.C. Chapter 2721. Nor did Otte provide any such authority in either his complaint or his opposition to the State's motion to dismiss. Those statutes cannot be used in this way. As the court of appeals held, "[t]o allow Otte to pursue a declaratory judgment would set a dangerous precedent whereby common pleas courts would be asked to review the convictions and sentences of other common pleas courts. The courts would be inundated with declaratory judgment actions." *Otte v. State,* 8th Dist. Cuyahoga No. 106204, 2017-Ohio-7568, ¶ 25. That is not the law, and this Court should not break with all of the above precedent to allow it in this case.

5. Dismissal under Civ.R. 12(B)(6) is the appropriate resolution of a declaratory judgment action that seeks to collaterally attack a criminal sentence.

Ohio courts have repeatedly held that Civ.R. 12(B)(6) is the appropriate means by which to dispose of a complaint for declaratory judgment that merely seeks to collaterally attack a sentence in a criminal case. *See Norman v. Franklin Cnty. Prosecuting Atty.*, 10th Dist. Franklin No. 16AP-191, 2016-Ohio-5499, ¶ 11 ("we find Norman is attempting to use a declaratory judgment action to collaterally attack his prior criminal conviction. As such, Norman does not present a justiciable controversy capable of resolution by declaration under the declaratory judgment act"); *Newell v. Gaul*, 8th Dist. Cuyahoga Nos. 97737 and 97738, 2012-Ohio-2395, ¶ 12-14 (upholding the trial court's dismissal of a declaratory judgment action under Civ.R. 12(B)(6) based on a claim that the defendant's prison sentence

was unlawful "because declaratory relief was not the proper vehicle for this argument"); *Gotel v. Ganshiemer*, 11th Dist. Ashtabula No. 2008-A-0070, 2009-Ohio-5423, ¶ 47 (where the plaintiff's "action is an attempt to collaterally attack his conviction[,] Appellant does not present a justiciable controversy capable of resolution by declaratory relief"); *O'Donnell v. State*, 4th Dist. Scioto No. 05CA3022, 2006-Ohio-2696, ¶ 14 (upholding the trial court's dismissal of a declaratory judgment action that sought "to attack the basis of his prior criminal conviction" because "[a] declaratory judgment action is not a part of the criminal appellate process"); *Moore v. Mason*, 8th Dist. Cuyahoga No. 84821, 2005-Ohio-1188, ¶ 16 ("appellant seeks a declaration that the sentence imposed * * * is unenforceable * * *. This is not a justiciable controversy capable of resolution by declaration under R.C. Chapter 2721. On the contrary, it is an argument properly raised by appeal, direct or delayed").

6. The postconviction process is the exclusive remedy for Otte to collaterally attack the constitutionality of his conviction or sentence.

Ohio law contains a mechanism for convicted defendants to challenge the constitutionality of their sentences on the basis of a new constitutional decision: the postconviction process. In fact, in Ohio, the postconviction process is "the *exclusive* remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case[.]" R.C. 2953.21(K) (emphasis added). "Accordingly, a postconviction proceeding may fairly be viewed as the exclusive complement to a direct appeal[.]" *State v. Fuller*, 171 Ohio App.3d 260, 2007-Ohio-2018, 870 N.E.2d 255, ¶ 23 (1st Dist.).

Otte therefore had three separate opportunities to raise his claim that the death penalty was unconstitutional as applied to anyone under the age of 21 at the time of their offenses. Otte could have brought this claim (1) in a pretrial motion, (2) on direct appeal, or (3) in a timely postconviction petition (assuming that Otte could support his claim with

evidence outside the record). Otte did none of these. Once Otte failed to take advantage of any of these three avenues, Ohio's statute governing successive postconviction petitions, R.C. 2953.23, became the exclusive means by which Otte could collaterally attack the constitutionality of his sentence.

R.C. 2953.23(A)(1) allows convicted defendants to file a successive postconviction petition at any time more than 365 days after the filing of the record in the direct appeal where 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.

"Unless the above exceptions apply, the trial court has no jurisdiction to consider an untimely filed petition for postconviction relief." *State v. Halliwell*, 134 Ohio App.3d 730, 734, 732 N.E.2d 405 (8th Dist.1999). *See also State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶ 24 ("it is well-established that unless a petitioner satisfies R.C. 2953.23(A), a trial court lacks jurisdiction to hear an untimely or successive petition for postconviction relief").

Once again, however, Otte, failed to take advantage of the postconviction process. This is likely because R.C. 2953.23(A)(1)(a) is limited to instances in which "the United States Supreme Court [has] recognized a new federal or state right that applies retroactively to

persons in the petitioner's situation[.]" As the court of appeals recognized, however, "[t]he problem for Otte is that his newly claimed Eighth Amendment right, as defined by *Bredhold*, has not been recognized by the United States Supreme Court as required by R.C. 2953.23(A)(1)(a). *Bredhold* is a state court decision from Kentucky and is not binding on Ohio courts." *Otte v. State,* 8th Dist. Cuyahoga No. 106204, 2017-Ohio-7568, ¶ 19. This would have rendered Otte's claim barred by res judicata if he had brought it in a successive postconviction petition. To "attempt to circumvent the requirements of R.C. 2953.23(A) for postconviction relief because he cannot meet those requirements[,]" Otte impermissibly chose to pursue a declaratory judgment action instead. *Id.*, ¶ 25.

7. Otte cannot evade the bar of res judicata by pointing to a single Kentucky state court judge's non-binding opinion 25 years after-the-fact.

Otte justifies his attempt to bring this claim in a declaratory judgment action rather than in a postconviction petition solely by relying upon a recent opinion by a state court judge in Kentucky as new, intervening authority. It is not the subsequent developments in case law that matter for purposes of res judicata, however; rather, it is solely a question of the facts and the evidence known to the defendant at the time of his conviction and direct appeal. "[R]es judicata applies even if there has been a subsequent change in decisional law." *State v. Banks*, 8th Dist. Cuyahoga No. 93880, 2010-Ohio-3206, ¶ 24.

Here, the alleged constitutional defect – Otte's age of 20 at the time of the murders – was in existence and known to Otte (1) prior to trial, (2) during his direct appeal, (3) during his first, timely postconviction petition. But knowing that, Otte never pursued a claim that his age rendered the death sentence in this case cruel and unusual punishment under the Eighth Amendment. His failure to do so rendered that claim res judicata in any subsequent appeal – including a declaratory judgment action. As the court of appeals found, "nothing

prevented Otte from making that argument with scientific evidence in a successive petition for habeas corpus at some earlier point in time." *Otte v. State,* 8th Dist. Cuyahoga No. 106204, 2017-Ohio-7568, ¶ 22.

The only circumstance in which Ohio law ever allows subsequent case law to be used as the basis for a new constitutional claim is where "the United States Supreme Court [has] recognized a new federal or state right that applies retroactively to persons in the petitioner's situation[.]" R.C. 2953.23(A)(1)(a). Otte does not have a claim that the Supreme Court has recognized any such new right. Instead, Otte has a claim that a state court judge in Kentucky has recognized a new constitutional right. This does not allow Otte to bring a new constitutional claim this late in the process, and it is wholly irrelevant to Ohio's declaratory judgment statutes. Chapter 2721 simply does not allow a common pleas court to invalidate another court's criminal sentence.

8. This Court should deny Otte's motion where the balance of equities weighs against the last-minute granting of a stay to allow Otte to litigate a delayed claim that he could have brought years ago.

A stay is an equitable remedy, and equity overwhelmingly weighs against a stay where Otte delayed in bringing his claim for nearly 25 years until his execution date was three weeks away. The untimeliness of Otte's last-minute claim alone warrants denial of his request for a stay.

> "A stay is an equitable remedy, and '[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.' *Ibid.* Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, * * * there is a strong equitable presumption against the grant of a stay [of execution] where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay."

Nelson v. Campbell, 541 U.S. 637, 649-650, 124 S. Ct. 2117, 158 L.Ed.2d 924 (2004). At the time Otte filed his declaratory judgment action on August 21, 2017, his execution date was just 23 days away. That timing guaranteed that Otte would ask this Court for a stay (or two) so that the lower courts could adjudicate the action that he delayed in bringing. Despite that extreme delay, the lower courts worked diligently to resolve Otte's declaratory judgment action in a short span of time, relying upon well-established law to conclude that his declaratory judgment claim was not justiciable

The Supreme Court has recognized that the State "sustain[s] severe prejudice" from a stay of execution resulting from a capital defendant's appeal from the denial of a successive habeas petition. *In re Blodgett*, 502 U.S. 236, 239, 112 S. Ct. 674, 116 L.Ed.2d 669 (1992). Such a stay prevents the State "from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in *McCleskey* * * *." *Id.*, citing *McCleskey v. Zant*, 499 U.S. 467, 491, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991).

It is not only the State, but also the victims, who "have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584, 126 S. Ct. 2096, 165 L.Ed.2d 44 (2006). The families of Robert Wasikowski and Sharon Kostura have waited nearly 25 years now for Otte's execution, in a case in which the defendant immediately confessed and has never disputed his guilt. This Court has scheduled an execution date. Ohio's Governor has reset it twice. The families have attended a parole board hearing and spoken against any clemency for Otte, and the parole board has unanimously voted to deny such clemency. They are, at this moment, already on their way to the Southern Ohio Correctional Facility in Lucasville to witness the execution. The victims in this case have an

interest in seeing this process come to an end; a legitimate interest that has been frustrated until now by Otte's numerous appeals over the past 25 years.

Those interests will be significantly frustrated if this Court issues a stay mere hours before the execution. It is solely because of Otte's delay in filing his declaratory judgment action that he is now asking this Court to stay his execution to consider this claim. Otte offers no justification in either his declaratory judgment action or his motion for a stay in this Court for this extreme delay. And even assuming that Otte's claim was not yet ripe on direct appeal, Otte still could have brought this claim at any point within the past few years, or at the very least, at any time since the Supreme Court decided *Roper* in March of 2005. Had he done so, this Court could have considered his claim without requiring a stay. The fact that Otte waited nearly 25 years after his conviction to raise this claim just three weeks before his execution date renders any stay inequitable under these circumstances.

9. Otte's modified-*Roper* claim has no probability of success on the merits where *Roper* itself expressly established the minimum age for eligibility for the death penalty at 18.

Even if this Court were to reach the potential merits, the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.E.d2d 1 (2005) expressly establishes that the constitutional cutoff for eligibility for the death penalty is 18, not 21.

> "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. * * * The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."

Id. at 574. Otte has provided this Court with no authority suggesting that the Supreme Court has retracted its explicit holding in *Roper* that it is only juveniles under the age of 18 that are constitutionally ineligible for the death penalty based on their age.

"Under the Supreme Court's jurisprudence concerning juveniles and the Eighth Amendment, the only type of 'age' that matters is chronological age. The Supreme Court's decisions limiting the types of sentences that can be imposed upon juveniles all presuppose that a juvenile is an individual with a chronological age under 18." *U.S. v. Marshall*, 736 F.3d 492, 498 (6th Cir.2013). Otte "has ignored the crucial role that chronological age plays in our legal system and in the Supreme Court's jurisprudence. The reasons for according special protections to offenders under 18 cannot be used to extend the same protections to offenders over 18." *Id.* "In almost every state, [Otte] could vote, serve on a jury, or marry without his parents' consent when he committed the crime. His immaturity did not render him ineligible for these benefits the law granted him by virtue of his chronological age. Nor does his immaturity excuse him from the punishment the law imposes upon him as a consequence of that age." *Id.* (citation omitted).

In *Roper*, the Court relied on "evidence of national consensus against the death penalty for juveniles" to find that the Eighth Amendment prohibited the execution of any person who was under 18 at the time of the offense. *Roper* at 564. There is no such national consensus in favor of extending *Roper* to 21 year-olds. According to the State's research, not a single state draws the line of eligibility for the death penalty at the age of 21. All 31 states with the death penalty follow *Roper* and draw that line at the age of 18. The remaining 19 states and the District of Columbia do not have the death penalty at all, regardless of age. In *Roper*, the Court noted that 18 states with the death penalty either "by express provision or

judicial interpretation, exclude[d] juveniles from its reach." *Id.* at 564. By contrast, there are zero states that exclude 18 to 20-year-olds.

It is true that, in *Roper*, the Court also considered the fact that it was "infrequent" to execute juveniles as well as the number of states that formally banned the practice. *Id.* But here too, Otte's claim finds little support. From 2001 to 2015, 130 inmates between the ages of 18-20 at the time of their offenses were executed over 15 different states. *See* Eschels, *Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults*, 40 N.Y.U. Rev. L. & Soc. Change Harbringer 147, 152 (2016). This number accounted for approximately 18% of the 730 total executions in the United States over that time. *Id.* This is neither "infrequent" nor "unusual." It certainly does not establish a "national consensus" in favor of extending *Roper* up to the age of 21. The fact that the last inmate to be executed in Ohio – Ronald Phillips – was 19 at the time of his offense, and failed at litigating this same claim, is further evidence that the Eighth Amendment does not dictate the result that Otte seeks in this case.

10. Conclusion.

Based on all of the foregoing, the State respectfully submits that any further stay in this case is unnecessary and unjustified where Otte's declaratory judgment action has already been dismissed and that dismissal has already been upheld. Ohio law is abundantly clear that a convicted defendant cannot use a declaratory judgment action to collaterally attack his sentence. The court of appeals correctly applied the numerous precedents establishing this rule to this case to uphold the trial court's decision to dismiss this action. This case adds nothing new to that well-established landscape. The State therefore

respectfully and strongly asks this Honorable Court to deny Otte's fourth and final motion for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Appellee's Response to Appellant's Fourth Motion to Stay Execution* was served by email this 12th day of August, 2017 to Joseph E. Wilhelm (joseph_wilhelm@fd.org) and Vicki Werneke (vicki_werneke@fd.org), counsel for Plaintiff-Appellant Gary Otte.

/s/ Christopher Schroeder
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