CASE NO. 16-5580

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2016 TERM

ROMELL BROOM,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Ohio

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE IS NOT SCHEDULED)

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CAPITAL CASE: NO EXECUTION DATE SET

QUESTIONS PRESENTED

Introduction

On September 15, 2009, the State of Ohio attempted to execute Petitioner Romell Broom using a "lethal injection" procedure which required that the lethal drugs be administered intravenously. The State failed to follow its own execution protocol and when it was found on the afternoon before execution was to take place that the veins in Broom's left arm were troublesome, a required follow-up vein assessment was not conducted. On the scheduled execution day, the State had great difficulty establishing intravenous access. When access was established on one arm, the State inadvertently pulled out the IV. As the difficulties continued, the State again veered from the requirements of its protocol and called in a physician who was not an execution team member. This physician attempted to establish access through Broom's ankle bone causing him to howl with pain. The team began again to use Broom's arms as access points. Broom's arms were swollen from previous attempts and he began to cry. This process lasted approximately two hours during which Broom suffered multiple needle jabs including the one into his ankle bone. The State of Ohio intends to again attempt to execute Broom. The questions presented are:

I.

Was the first attempt to execute Broom cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution and if so, is the appropriate remedy to bar any further execution attempt on Broom?

II.

Will a second attempt to execute Broom be a cruel and unusual punishment and denial of Due Process in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

III.

Will a second attempt to execute Broom violate Double Jeopardy protections under the Fifth and Fourteenth Amendments to the United States Constitution?

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REPLY TO STATEMENT OF THE CASE

It is necessary to correct a factual error in the State's Statement of the Case. There the State notes that "During those depositions, Edwin Voorhies, the Regional Director of the Office Prisons, stated that when Broom returned to his cell, prison staff overheard him bragging to another death row inmate named Darryl Reynolds that he had taken a box full of antihistamines the day before his execution." State's Brf. Opp., p. 6-7, 16, 33. However, the State fails to reveal that it brought this same hearsay allegation to the attention of the Ohio Supreme Court in oral argument and the court determined that "there is no evidence in the record supporting . . . [the] allegation." State v. Broom, 146 Ohio St. 3d 60, 73 n.2 (2016).

Indeed, according to the state actors who participated in or oversaw the execution, Broom was fully cooperative and compliant throughout the process, even to the point of assisting the team to access his veins. Regional Director Voorhies, the second highest ranking DRC official on site that day (after DRC Director Terry Collins), affirmed Broom's cooperation:

> Q. Was Mr. Broom to your observation throughout the entire time of the events of that day cooperative?
> A. Yes. Until, as I've testified already, toward the end he was starting to -- I would still even characterize him as cooperative. I think had we decided to continue, he would have been cooperative. But he was getting frustrated, as were the team members.

(Depo. of E. Voorhies at 207 (PageID 12389).) Voorhies noted that Broom tried to help the team access his veins that day. (Id. at 205 (PageID 12388).) The Warden of SOCF, Phillip Kerns, also agreed that Broom was fully cooperative and compliant, and did nothing to obstruct the execution. (Depo. of P. Kerns at 126-27 (PageID 12157).) DRC Director Collins, after the reprieve was granted, even went out of his way to *thank* Broom for his cooperation during the execution. (Depo. of T. Collins at 88-89 (PageID 12034).)

REPLY IN SUPPORT OF REASONS FOR GRANTING THE WRIT

I. BROOM'S EIGHTH AMENDMENT CLAIM

A. The way in which the State inflicts a punishment is part of the punishment.

The State argues that the manner in which a death sentence is carried out is not an aspect of the punishment of death and thus that the infliction of multiple needle jabs into an inmate's increasingly swollen and bruised arms and a needle jab into his bone do not count in determining whether the initial attempt to execute Broom was cruel. But where execution is required to be carried out in a particular fashion—here by lethal injection—the process of being executed is an aspect of the punishment.

At the time of the State's failed attempt to execute Broom on September 15, 2009, it was a protocol-mandated component of lethal injection in Ohio for the State to access the inmate's circulatory system by physically piercing into his veins with needles and catheters. This physical access to the circulatory system is not a "preparatory step" separable from the lethal injection, but rather a necessary prerequisite to, and thus an indispensable part of, the lethal injection procedure Ohio performs. See Nelson v. Campbell, 541 U.S. 637, 646 (2004) ("That venous access is a necessary prerequisite [to lethal injection] does not imply that a particular means of gaining such access is likewise necessary."). The protocol itself *requires* venous access.

The fact that the State's intention in adopting lethal injection was to do away with what the State perceived as a less "humane" way to kill—here the electric chair—cannot and does not change the fact that the process of invading the circulatory system with needles and catheters so that lethal drugs can be put into the inmate's body is a part of the lethal injection required by the statute. Ohio Rev. Code §2949.22. And when the State fails to follow its own rules, that were designed to make the execution more "humane," the unnecessary pain inflicted in attempting to

carry out the execution is subject to analysis under the Eighth Amendment.

Viewing the insertion of needles through which execution drugs must flow as separate from the act of execution adopts reasoning already rejected by this Court in another context. In United States v. Castleman, 134 S. Ct. 1405, 1415 (2014), the Court rejected the view that pulling the trigger on a gun involves no use of force "because it is the bullet, not the trigger, that actually strikes the victim." In carrying out the state-sanctioned homicide of lethal injection, invading the circulatory system with needles and catheters that allow delivery of the lethal drugs is no more separate than pulling the trigger is from the bullet striking. In fact, it is more closely allied with the final result and more clearly a part of the punishment because once needles are pushed into the skin repeatedly, more than the psychological terror of facing execution has taken place: actual physical harm has been inflicted. And there is no doubt that, were it not a homicide with legal excuse, the repeated insertion of needles into the condemned's body for the purpose of accessing his circulatory system would constitute a battery subsumed within the homicide, Love v. City of Port Clinton, 37 Ohio St. 3d 98, 99 (1988), and, if death did not result, would be an attempted homicide. State v. Woods, 48 Ohio St. 2d 127, syl. 1 (1976), State v. Brooks, 44 Ohio St. 3d 185, 191 (1989).

The State's argument that the repeated needle insertions suffered by Broom were not a part of the execution attempt and thus not subject to Eighth Amendment analysis elevates form over substance and ignores the essential fact that a living person was being made to suffer throughout the process.

This Court has recognized that some risk of pain will be involved in the execution process and that it is "unnecessary" pain that violates the Eighth Amendment. Baze v. Rees, 553 U.S. 35, 47 (2008); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion). Broom

suffered far more pain than was "necessary" and he did so because the State failed to follow its rules that were designed to avoid such suffering. That alone was a cruel and unusual punishment. Coupled with the psychological terror of being trapped in the chaotic and lawless execution process, Broom was subjected to a punishment beyond any stretch of constitutional tolerance.

B. The pain inflicted on Broom was cruel.

The State asserts that what Broom suffered was not cruel arguing that "Thousands of patients around the world are subjected to needle sticks, and frequently multiple needle sticks, every day." State's Brf. Opp., p. 13. There is no evidence to support this claim and in fact the record refutes it. What the State did to Broom would *never* be tolerated in a health care setting. "Dr. Heath explained that what happened to Romell Broom--attempts to obtain intravenous access that spanned two hours and involved eighteen to nineteen needle 'sticks,' many of which contravened accepted practices for inserting a peripheral IV catheter-- would never be permitted in a clinical health care setting." Second Biros Inj. Order at 132, Cooey (Biros) v. Strickland, 2009 U.S. Dist. LEXIS 122025, *216 (S.D. Ohio Dec. 7, 2009).

Moreover, common sense dictates that the State's claim is not true. If patients were undergoing what Broom went through—18-19 needle jabs including one in the ankle bone, blood spurting into the air from unsuccessful tries, a successfully established IV pulled *from* the vein - thus requiring more needle sticks—on a daily basis all over the world, patients would seek care in only the most dire of circumstances and elective surgeries would rarely if ever be performed. And, even were such conduct commonplace in medical practice, the patients would know that their suffering was to alleviate pain, cure an illness, or improve their lives. Suffering to achieve a desired health benefit is not the same in terms of physical tolerance or mental ability to cope as is suffering inflicted to cause the sufferer's imminent death against his will. The State's claim that

what happened to Broom was not cruel because patients suffer the same pain is plainly not supported by the record or common sense.

The State also fails to take account of the unnecessary psychological suffering Broom endured during the two hours of lawless chaos on September 15, 2009. The Eighth Amendment prohibits the infliction of unnecessary "fear and distress." Trop v. Dulles, 365 U.S. 86, 101-02 (1958). Broom was trapped in the holding cell not knowing how long the painful process would continue and having no confidence and no reason to have confidence that the State of Ohio would comply with its own law. Moreover, the State's repeated disregard of the rules and processes required by Ohio's execution protocol specifically to make the execution process humane, shows a willingness, even perhaps intention, to inflict suffering.

C. Broom experienced trauma.

The State argues that there is no evidence, other than his own affidavit, that Broom suffered "psychological strain" that was cruel and unusual. State's Brf. Opp., p. 15. What Broom went through is well documented in the record not only from his own reaction but also from the accounts and observations of the state actors involved, the bruises and puncture wounds to his body, and common sense. Moreover, the "[e]xposure to or threatened death" is a psychiatrically recognized trauma with mental and emotional consequences. Diagnostic and Statistical Manual of Mental Disorders, DSM-5, (5th Ed.) American Psychiatric Association (2013), Sec. 309.81. Even the State does not dispute that Broom faced the threat of death that day. But whether or not what happened on September 15, 2009 was cruel and unusual, forcing Broom to undergo a second execution attempt would be. Broom will never experience another execution attempt as if it were his first, free of the emotional and physical consequences of what he has already suffered.

D. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), in light of evolving standards of decency, no longer sets the constitutional standard for evaluating the cruel and unusual nature of a failed execution attempt.

The State argues that Resweber resolves Broom's situation because the majority, presuming that Francis had received some electric shock, said that,

> "does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. **The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution.** There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution."

State's Brf. Opp., p. 16-17 quoting 329 U.S. at 464 (emphasis added). Even assuming Resweber to be applicable, what happened to Broom was not an "unforeseeable accident." Ohio's prior history of problems establishing IV access in executions made the possibility foreseeable. The State's repeated failure to comply with the rules it adopted to avoid such problems, including skipping a required vein check after problem's with Broom's left arm had already been noted, takes this situation out of the realm of accident.

The State next argues that the Resweber dissent supports its view that Broom's execution never started and thus is not subject to Eighth Amendment analysis. The State relies on the comment that "an instance where a prisoner was placed in the electric chair and released before being subjected to the electric current" would present a claim based on mental anguish alone, and says that is Broom's situation. State's Brf. Opp., p. 18; Resweber, 329 U.S. at 476. The State's comparison sets up a false analogy. A fair comparison might be one where Broom was placed in the death cell and never subjected to multiple ineffectual needle jabs. But that is not what happened here. The Resweber dissent did not engage in a hairsplitting analysis of when the

execution process began: its concern was whether Francis had endured pain. Broom suffered physical pain. His execution was started and unnecessary pain and physical injuries were inflicted upon him.

E. Even if the State would do a better job next time, a second execution attempt on Broom would be cruel and unusual.

The State says it will do better next time because it has "updated its execution protocol to require more in-depth examinations of prisoners prior to execution, an additional check of the inmate's veins, and expanding the warden's authority to voluntarily halt the procedure if suitable veins are not accessible." State's Brf. Opp., p. 21-22. But adopting new rules is no guarantee. Ohio did not follow its own rules the last time. As District Judge Gregory Frost observed: "It is the policy of the State of Ohio that the State follows its written execution protocol, except when it does not. This is nonsense." Cooey v. Kasich, 801 F. Supp. 2d 623, 624 (S.D. Ohio 2011).

The State is incorrect when it says Broom has conceded that "the problem maintaining IV access would never happen again." State's Brf. Opp., p. 21. What Broom has said is that he will never survive another execution attempt to be able to vindicate his constitutional rights. As is clear from the State's brief, Ohio has changed nothing that provides reassurance that the same problems that arose in Broom's first execution attempt will not arise if a second is allowed.

But all of this ignores the fact that Broom's claim is that even a properly conducted second execution attempt would be cruel and unusual. Broom cannot ignore the suffering he has already endured. Broom faces a unique and uncalled for psychological terror if he is put through the execution process another time. And the needle insertions he would endure in a second attempt would not be the first or second needle wounds he suffers but the nineteenth or twentieth. Evolving standards of decency and modern understanding of the effects of trauma preclude putting Broom through the execution trauma a second time.

F. Broom did not raise a "method of execution" claim. His claims here challenge his death sentence, not its method.

Contrary to the State's position, Broom's claim is not a method of execution challenge subject to analysis under Glossip v. Gross, 135 S. Ct. 2726 (2015) and Baze v. Rees, 553 U.S. 35 (2008). State's Brf. Opp., p. 22-23. The Ohio Supreme Court recognized that Broom did not make a "method of execution" claim in the Ohio state courts, State v. Broom, 146 Ohio St. 3d 60, 70 (2016), and he is not making one here. His claim, in *this* litigation, is that—because he has already been subjected to a painful and prolonged execution attempt that failed through no fault of his own—the constitutional prohibition against cruel and unusual punishments bars any further execution attempts on him, *by any method*. His is a challenge to the continued constitutional viability of his *death sentence*, not the method of achieving that sentence. Even assuming Ohio was capable of devising a perfectly constitutional execution process, that process cannot constitutionally be used *on Broom* because of the experience through which he already passed on September 15, 2009. The State does not get two tries, or three, or four. Death by installments—even if the installments are by different methods—is constitutionally intolerable.

Not only is Broom's challenge to his death sentence in *this* litigation not properly characterized as a "method of execution" claim, but the Ohio state courts do not provide a forum for such claims as the Ohio Supreme Court expressly held in response to a certified question on that precise issue from the federal court. Scott v. Houk, 127 Ohio St. 3d 317, 318-19 (2010). It is because of the absence of any state-law vehicle for litigating method-of-execution claims that all such claims, in Ohio, are required to proceed in *federal court*, in the Section 1983 litigation that has, since 2004, been pending in the Southern District of Ohio, and is now captioned In re: Ohio

Execution Protocol Litigation, Case No. 2:11-cv-01016 (S.D. Ohio, Judge E. Sargus).[1]

Broom is a plaintiff in that Section 1983 action and has been since June 2007. To the extent that he has a "method of execution" claim, *that* claim is still being litigated in that action, in that federal court. After Broom's botched execution on September 15, 2009, Broom commenced a *separate* Section 1983 action in the Southern District of Ohio (Broom v. Strickland, Case No. 09-cv-00823, S.D. Ohio), in which he asserted the no-multiple-attempts claims at issue here. On August 27, 2010, the district court dismissed without prejudice Broom's no-multiple-attempts claims in Case No. 09-cv-00823 on the ground that those claims—because they seek to bar the State from proceeding with Broom's execution by any means or methods—are not properly brought under Section 1983 and must, instead, be pursued in habeas corpus, as explained by the decision in Nelson v. Campbell, 541 U.S. 637 (2004). See Broom v. Strickland, No. 2:09-cv-823, 2010 U.S. Dist. LEXIS 88811 (S.D. Ohio Aug. 27, 2010). [2] Thus the courts that have already assessed the issue have found that Broom's is not a method of execution claim. Broom's claim is instead, that any further attempt to execute him, regardless of methodology, would violate the Eighth Amendment.

[1]The earlier principal case, filed in 2004—Cooey v. Kasich, Case No. 2:04-cv-1156—is now consolidated in the district court, with other related lethal injection cases, under the 2011 case number, 2:11-cv-01016.

[2]After the district court dismissed Broom's no-multiple attempts claims from the Section 1983 action, Broom immediately filed those claims again as part of a habeas corpus action in the United States District Court for the Northern District of Ohio. Broom v. Bobby, Case No. 1:10-cv-2058 (N.D. Ohio, ECF No. 1). The federal habeas court held his habeas action in abeyance while Broom exhausted state remedies as to the no-multiple-attempts claims, and the habeas action remains in that stay-and-abeyance status pending the outcome of this proceeding. Broom v. Bobby, No. 1:10 CV 2058, 2010 U.S. Dist. LEXIS 126263, at *1 (N.D. Ohio Nov. 18, 2010).

II. BROOM'S DOUBLE JEOPARDY CLAIM.

It is significant that the State—like the Court in Resweber and the Ohio Supreme Court below—acknowledges that double jeopardy principles barring multiple punishments can be applicable in the context of a failed execution attempt. The State's dispute, instead, is over details of whether, on Broom's facts, he had an expectation in the finality of his death sentence, whether that expectation was "legitimate," and whether forcing him to endure a second attempt increases his sentence. All of these double jeopardy issues should be resolved in Broom's favor.

A. Broom had an expectation in finality on September 15, 2009.

As addressed in Broom's main brief, and not refuted by the State, the touchstone of double jeopardy's application in the multiple punishments context is whether the defendant has a legitimate expectation of finality in his sentence, because, if he does, the sentence may not be increased or augmented once that expectation has been legitimately formed. United States v. Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987).

An expectation of finality is formed over time, and becomes "crystallized" by circumstances: "[Once] a defendant's expectation of finality in his initial sentence has 'crystallized,'" increasing that sentence "would undermine the notion of finality, which animates our common law protections against double jeopardy and prevents the [government] from 'shatter[ing] the defendant's repose and threaten[ing] him with grievous harm.'" Commonwealth v. Selavka, 469 Mass. 502, 14 N.E.3d 933, 944 (2014) (quoting United States v. Lundien, 769 F.2d 981, 987 (4th Cir. 1985)) (other citations and quotations omitted).

The State is wrong in suggesting that such an expectation can only be formed after a sentence has been completely served or, in the context of a death sentence, "carried out." State's Brf. Opp., p. 29. An expectation of finality certainly will have been formed with a fully served

sentence, but it can also be formed earlier in the service of a sentence, as the case law makes clear. See, e.g., Fogel, 829 F.2d at 86-88; Selavka, 14 N.E.3d at 943-44; Meyer v. Frakes, 294 Neb. 668, 884 N.W.2d 131 (2016); State v. Hardesty, 129 Wash. 2d 303, 312, 915 P.2d 1080, 1085 (1996) ("defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served"). And, as applied to a sentence of death, it *must* be capable of formation *before* the sentence is "carried out," because otherwise double jeopardy's protections would be available only when the inmate is dead, and thus not available at all.

The principles that animate double jeopardy's prohibition against multiple punishments—all of which are ignored by the State—make it especially appropriate to apply an "expectation of finality" framework in assessing double jeopardy's impact on a failed execution attempt. In that unique setting, those principles—against being subjected to the gauntlet twice; avoiding forced continuation of anxiety, insecurity, and fear; and not increasing or augmenting a punishment's severity after much of it had already been served—are more directly implicated than anywhere else in our law. An assessment of the inmate's expectation of finality, as addressed by Broom, properly directs the focus to the facts and circumstances of the uniquely human experience through which the inmate has passed during the first attempt. The "expectation" is based on the facts, and whether finality of the sentence has become crystallized by circumstances, not on artificial line-drawing such as whether something is characterized as "preparatory" or not.

Broom had an expectation of finality under these principles, which crystallized at least by the time the executioners had inflicted substantial physical pain and suffering upon him in the process of attempting to accomplish their task on September 15, and regardless of whether that pain and suffering rises to the level of an Eighth Amendment violation. The Ohio Supreme Court

did not discuss, much less apply, an expectation-of-finality analysis. Instead, in reliance on its state-law interpretation of when the execution commenced, it held that jeopardy had not even attached. But attachment is an issue of federal law, and expectation of finality is the touchstone. The state court's approach is thus contrary to federal law.

B. Broom's expectation was legitimate by any objective measure.

The standard of whether an expectation of finality is legitimate under the circumstances is an objective one. See, e.g., Smith v. United States, 687 A.2d 581, 587 (D.C. 1996) (Farrell, J., concurring)("The legitimate expectation of finality that controls must be an objective standard.").

Any reasonable person in Broom's circumstances would have formed an expectation of finality in the death sentence being completed on September 15, 2009, and, thus, Broom's expectation was legitimate for all relevant purposes. The bare facts that the warrant was read, the public viewing began, the team took custody of Broom to begin the process, Broom surrendered to his fate, and pain was inflicted in efforts toward completion would have raised a legitimate expectation of finality in a reasonable person. But the circumstances for *Broom* went much farther than that, fully crystalizing an expectation of finality that the sentence would be completed that day: the infliction of pain proceeded for almost two hours, with no expectation that it would end short of death; the pain was substantial, and it caused swelling, bruising, and bleeding to multiple locations on Broom's body; and no inmate's execution in living memory had ever been stopped once substantial pain had been inflicted in the process of carrying it out.

Contrary to the State's suggestion, State's Brf. Opp., p. 31, Broom has never argued that merely entering the death house is enough. Nor has the point of legitimate expectation of finality *ever* been reached in the case of those inmates, referenced by the State, who, while in the death

house,[3] received "last minute" stays at their own request. If such a hypothetical inmate, in the future, *did* allege an expectation of finality merely by virtue of being in the death house when a stay was allowed, that claim would properly be rejected because any such expectation was not "legitimate" in any objective sense. But that is not Broom's case.

Broom did nothing to "thwart" the completion of his death sentence on September 15, as addressed above. A hypothetical inmate, whose actions obstruct his own execution, would generally not be able to establish the *legitimacy* of any expectation of finality. But that is, again, not Broom's case. He was cooperative and did not obstruct the process in any way.

C. Subjecting Broom to a second attempt increases his sentence.

Broom's sentence was that he suffer death by lethal injection on the date set in the warrant. Admittedly the State fell short of inflicting the full punishment on September 15, 2009. But the sentence was *not* that Broom shall suffer death by installments, and under multiple death warrants, and in multiple runs of the gauntlet, and with ever-increasing pain as the installments progress, and as many times as needed until the State succeeds. The Ohio statute, indeed, says the method shall "quickly and painlessly cause death." Ohio Rev. Code Ann. § 2949.22. That certainly did not happen, and will not happen, for Broom.

There should not be any reasonable dispute that subjecting Broom to a second, or third, or fourth attempt, after what he's already endured up to and including on September 15, constitutes an increase in his punishment, in the relevant sense of that term for double jeopardy purposes. His sentence has been "augmented," made greater than what was originally imposed and intended. Because, what *was* originally imposed and intended is that which every other condemned inmate receives: the death sentence to be carried out on the designated date by means

[3]In Ohio, inmates are moved to the death house, at the Southern Ohio Correctional Facility, approximately 24 hours before their execution is scheduled to occur.

of the authorized method—an order that the condemned shall face death once. But for Broom that sentence was increased to require him to endure it not once, but twice, and to appear for execution not only on one designated date, but a second date too. That is unquestionably a harsher sentence than originally imposed, and harsher than the penalty imposed on everybody else who receives death. Having once already faced the "maximum permissible punishment"—having already faced death once for their crime—that risk "need not be faced again." North Carolina v. Pearce, 395 U.S. 711, 727 (1969) (Douglas, J., concurring).

CONCLUSION

For all of the reasons set out in this reply and in his petition for a writ of certiorari, and in the interest of justice, Romell Broom's petition for a writ of certiorari should be granted.

Respectfully Submitted,

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