No. 16-5580

In the Supreme Court of the United States

ROMELL BROOM,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did Ohio violate the Cruel and Unusual Punishments Clause of the Eighth Amendment in this case, and if so, is the appropriate remedy to bar Ohio from executing Romell Broom?

Would the execution of Romell Broom be cruel and unusual punishment?

Would the execution of Romell Broom violate his Double Jeopardy protection against multiple punishments for the same offense?

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STATEMENT OF THE CASE

Romell Broom was convicted and sentenced to death for the 1984 rape and murder of 14-year old Tryna Middleton as she was walking home from a high school football game. Eventually, Broom exhausted all of his state and federal appeals and proceeded to an execution date on September 15, 2009. However, execution team members were unable to locate a suitable vein for lethal injection on that day, and the State voluntarily called off the execution attempt before Broom ever entered the execution chamber.

For the next seven years, Broom sought to prevent the State of Ohio from executing him by claiming that any execution at that point would be both cruel and unusual punishment and double jeopardy. The trial court, state appellate court, and state supreme court all rejected Broom's arguments. The state supreme court found that the State had voluntarily decided not to proceed with Broom's execution on September 15, 2009, when it learned that suitable IV access into his veins could not be maintained. *See State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620; *see* Pet. App. A-1. This decision occurred before the State ever attempted to administer any lethal drugs to Broom, and in fact, before Broom had even entered the execution chamber. The needle insertions into Broom's arms and legs, done for the purpose of securing a working IV, were not cruel and unusual punishment, nor did they terminate jeopardy such that the State of Ohio should be barred from ever executing Broom in the future.

1. a. On the night of September 21, 1984, 14-year old Tryna Middleton attended a high school football game with two of her friends. As the three girls were walking home afterwards, at approximately 11:30 at night, Romell Broom grabbed Tryna from behind, said "[c]ome here, bitch," forced her into a car at knifepoint, and drove away. Broom drove Tryna to a parking lot a mile away, raped her vaginally and anally, and stabbed in the chest her seven times, killing her.

b. Broom, then 28 years old, had been released from prison three months earlier after serving nine years for raping his niece's 12-year old babysitter in 1975. He was arrested two-and-a-half months after Tryna's murder when he attempted to abduct another 11-year old girl who jumped out of his moving car as he drove away. Subsequent DNA testing, conducted during Broom's federal habeas appeals in 2001, identified Broom as the source of semen found in Tryna's vagina and rectum.

c. On October 3, 1985, a jury convicted Broom of aggravated murder with two felony-murder specifications (kidnapping and rape) and recommended the death penalty. The trial court adopted the jury's recommendation and sentenced Broom to death. Both the state appellate court and state supreme court affirmed his conviction and sentence on direct appeal. *See State v. Bloom* [sic], 8th Dist. No. 51237, 1987 Ohio App. LEXIS 8018 (July 23, 1987); *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988). This Court denied Broom's petition for a writ of certiorari. *Broom v. Ohio*, 490 U.S. 1075, 109 S. Ct. 2089, 104 L.Ed.2d 653 (1989).

d. In addition to his direct appeal, Broom also filed a state petition for post-conviction relief. The trial court dismissed that petition in 1997. The state appellate

court affirmed. *State v. Broom*, 8th Dist. Cuyahoga No. 72581, 1998 Ohio App. LEXIS 2110 (May 7, 1998). The Supreme Court of Ohio declined discretionary jurisdiction over Broom's attempted appeal of that decision. *State v. Broom*, 83 Ohio St.3d 1430, 699 N.E.2d 946 (1998).

d. With his state court appeals exhausted, on June 21, 1999, Broom filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C.S. § 2254. The district court held an evidentiary hearing in January 2002 and thereafter filed an opinion and order on August 28, 2002 denying Broom's petition. *Broom v. Mitchell*, N.D. Ohio No. 1:99-cv-0030, unpublished (Aug. 28, 2002). During the course of that litigation, the district court granted Broom's request for DNA testing of the semen taken from Tryna's vagina and rectum. The results of that DNA testing confirmed the presence of Broom's DNA.

e. Broom appealed the district court's denial of his habeas petition to the Sixth Circuit Court of Appeals, which unanimously affirmed. *Broom v. Mitchell*, 441 F.3d 392 (6th Cir.2006). This Court again denied Broom's petition for a writ of certiorari. *Broom v. Mitchell*, 549 U.S. 1255, 127 S. Ct. 1376, 167 L.Ed.2d 165 (2007). With Broom's state and federal appeals exhausted, the Supreme Court of Ohio scheduled Broom's execution for October 18, 2007.

f. At that point, Broom filed a second, successive post-conviction petition in the trial court raising, for the first time, a *Brady* claim based on investigative records he received in response to a public records request in 1994. This stayed Broom's

execution date. The trial court dismissed Broom's petition on March 17, 2008. Broom appealed that decision to the state appellate court. While that appeal was pending, the Supreme Court of Ohio rescheduled Broom's execution date for September 15, 2009. The state appellate court reversed the trial court's denial of Broom's petition and remanded to the trial court for reconsideration. *State v. Broom*, 8th Dist. Cuyahoga No. 91297, 2009-Ohio-3731. The State appealed that decision to the Supreme Court of Ohio, which, on September 11, 2009, reversed the appellate court's decision in a per curiam opinion and dismissed Broom's successive petition. *State v. Broom*, 123 Ohio St.3d 114, 2009-Ohio-4778, 914 N.E.2d 392.

g. On September 14, 2009, the State transported Broom to the Southern Ohio Correctional Facility in Lucasville, Ohio for his execution the next day. Ohio, like most states, relies upon lethal injection as its primary (and in fact, sole) method of execution. Upon Broom's arrival at Lucasville, a nurse and a phlebotomist conducted two separate vein assessments and found that the veins in Broom's right arm appeared accessible, but that the veins in his left arm seemed less so. Prison officials communicated this information to Edwin Voorhies, the Regional Director of the Office of Prisons, and assured him that this would not present a problem.

h. The next day, September 15, 2009, was the date scheduled for Broom's execution. The Ohio Department of Rehabilitation and Correction's (ODRC's) timeline shows that Broom drank five cups of coffee that morning. Broom remained inside a holding cell where he would wait while the execution team prepared the catheter sites in his arms and read the death warrant to him aloud. There, they made

several attempts to insert a catheter into Broom's arms to establish intravenous (IV) access. Execution team members were able to identify and obtain access to the veins in both Broom's right and left arms multiple times. But in each instance, once they established access, the veins suddenly collapsed when they attempted to run saline through the line as a test.

i. Approximately 45 minutes into the process, Terry Collins, Director of the ODRC, called a break. The medical team reported that they were able to obtain IV access, but that they could not sustain it when they attempted to run saline through the line. They expressed "clear concern," but nevertheless said that there was a reasonable chance of gaining IV access to Broom's veins. Broom, sitting on the bed in the holding cell, was given a cup of water and wiped his face with tissue paper during this break. After about 20-25 minutes, the break ended and the team resumed attempting to establish and maintain IV access. This second session lasted approximately 35-40 minutes.

k. During a second break, the medical team advised that even if they were able to successfully access a vein, they were not confident that the IV would remain viable throughout the execution process. The ODRC's timeline further notes: "Medical team having problem maintaining an open vein due to past drug use[.]"

l. At that point, ODRC Director Collins contacted the Ohio Governor's Office and recommended that the Governor grant a reprieve of Broom's execution. Collins later explained that decision in a deposition by Broom's attorneys:

> "in my mind once we complete the preparatory stage and got the IV established, that once we walked him into that room and put him on

> that table and started into the actual execution process of inserting the drugs, if I lost that connection, if I lost that suitable vein at that particular time that I was in a whole 'nother ballpark."

The Governor accepted Director Collins' recommendation and issued a warrant of reprieve at 4:24 p.m. At the end of the day on September 15, Broom had needle 18 insertion sites on his body – one on each bicep, four on his left forearm, three on his right forearm, three on his left wrist, one on his left hand, three on his right hand, and one on each ankle. Each time the execution team accessed a vein, however, the vein collapsed afterward. At no point did Broom ever enter the room where the execution was to take place, nor were any drugs to be used in the execution procedure administered to him.

m. On September 21, 2009, a group of Ohio death row inmates filed a motion for a preliminary injunction in federal district court seeking to prohibit Broom's execution. *See Cooey, et al. v. Kasich*, N.D. Ohio No. 2:04-cv-1156. During subsequent litigation surrounding that injunction, Broom's lawyers were able to depose, among others, the director of the ODRC, the warden, the nurse who assisted in prepping Broom, and five separate members of the execution team.

n. 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. According to Voorhies, Broom told Reynolds, "if you want to make sure they don't execute you, you got to take a box of these antihistamines they sell at the commissary ever [sic] day and they won't be able to get your veins." Voorhies further stated that the warden ordered

prison staff to stop selling antihistamines at the commissary following this incident. Broom attached the transcript of Voorhies' deposition, and many others, to his petition for post-conviction relief filed in the trial court in 2010.

p. Broom then sought to prevent any further attempt by the State of Ohio to carry out his execution. He filed a § 1983 civil rights complaint in federal district court arguing that his execution would violate the Eighth Amendment's prohibition on cruel and unusual punishment and the Fifth Amendment's protection against double jeopardy. The district court dismissed these claims as procedurally improper. *Broom v. Strickland*, S.D. Ohio No. 2:09-cv-823, 2010 U.S. Dist. LEXIS 88811 (Aug. 27, 2010). He also filed a successive petition for a writ of habeas corpus in federal district court, which was stayed pending exhaustion of his state court appeals. *Broom v. Bobby*, N.D. Ohio No. 1:10 CV 2058, 2010 U.S. Dist. LEXIS 126263 (Nov. 18, 2010).

q. On September 15, 2010, Broom filed a third petition for post-conviction relief in the trial court asserting that any attempt to execute him at this point would be unconstitutional. Broom attached five volumes of exhibits totaling 1,747 pages to his petition. On April 7, 2011, the trial court denied Broom's petition:

> "Although certainly a set of circumstances could lead to constitutional violations, on the continuum of possible events those in the case at bar fall far short. While the Court acknowledges that repeated needle sticks are indeed unpleasant, they are not torture when performed to establish IV lines and the procedure is not such that a substantial risk of serious harm is present, especially where, as here, the procedure is halted out of an abundance of caution prior to the administration of any substance (including saline)."

See Pet. App. A-71. The state appellate court affirmed. *State v. Broom*, 8th Dist. Cuyahoga No. 96747, 2012-Ohio-587.

r. On discretionary appeal to the Supreme Court of Ohio, Broom argued (1) that the Cruel and Unusual Punishments Clause of the Eighth Amendment should now bar his execution, (2) that the state courts denied him due process by denying his successive 2010 post-conviction petition without discovery or a hearing, and (3) that the Double Jeopardy Clause of the Fifth Amendment should bar his execution.

s. The Supreme Court of Ohio affirmed. *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620; *see* Pet. App. A-1. The court held that Broom's execution would not violate the Double Jeopardy Clause because the State never imposed Broom's actual death sentence. *Id.* at 65-66. All that occurred in 2009 were the preparatory steps in the holding cell. When those actions proved unsuccessful, the State voluntarily stopped the procedure before ever attempting to administer any drugs. "The establishment of viable IV lines is a necessary preliminary step, but it does not, by itself, place the prisoner at risk of death." *Id.* at 66. Ohio law, specifically Ohio Revised Code section 2949.22(A), states that "a death sentence shall be executed *by causing the application to the person*, upon whom the sentence was imposed, of *a lethal injection of a drug or combination of drugs*." *Id.* (emphasis in original). The state supreme court held that under Ohio law, an execution does not commence until the lethal drugs enter the IV line – something all parties agree never happened in this case. *Id.* Jeopardy as to Broom's punishment therefore never attached.

The state supreme court found that Broom had no right to a hearing on his successive post-conviction petition. *Id.* at 66-67. The court first noted that Ohio law does not provide inmates with a right to discovery in post-conviction proceedings,

which are statutory in nature. *Id.* Broom never filed a discovery request in the trial court on his post-conviction petition. *Id.* at 67. He never identified what discovery he sought or what evidence he intended to present at a hearing. *Id.* He had already attached five volumes of exhibits totaling 1,747 pages to his petition. There were no factual disputes left at the time the state supreme court decided the case that were dispositive of any constitutional issues. *Id.* Moreover, Broom had already enjoyed the benefit of compulsory process in federal court, where he was able to depose the witnesses he believed relevant to his claim.

The state supreme court rejected Broom's Eighth Amendment claim, finding that multiple needle sticks fell far short of the "torture or a lingering death" standard this Court has used to define what is cruel. *Id.* at 69, quoting *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L.Ed.519 (1890). Nor did it "involve the unnecessary and wanton infliction of pain[.]" *Id.*, quoting *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 69 L.Ed.2d 59 (1981). The court found that any pain Broom may have experienced from the needle sticks "do[es] not equate with the type of torture prohibited by the Eight Amendment." *Id.* at 71.

The court also found that allowing the State to carry out Broom's sentence now would not be cruel and unusual punishment. The court noted that a method-of-execution challenge requires the prisoner to show a substantial risk of serious harm that is objectively intolerable and prevents prison officials from claiming that they were subjectively blameless. *Id.*, citing *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2737, 192 L.Ed.2d 761 (2015). Broom was not challenging lethal injection *per se*, nor

was he challenging the legality of his own death sentence. Instead, he argued that what he experienced in 2009 was "emotional anguish" sufficient to prohibit his execution. The court found that this was not sufficient to meet the burden of establishing that he was "likely to suffer severe pain if required to undergo a second execution." *Id.* at 72.

Glossip also requires an inmate to identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip* at 2737, quoting *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L.Ed.2d 420 (2008). Broom made no attempt to do so. In fact, Broom made no attempt to show that the State of Ohio was "likely to violate its execution protocol in the future." *Broom*, 146 Ohio St.3d at 72. Significant in this case was the fact that Broom's counsel conceded in the state supreme court, both in the briefing and at oral argument, that "what happened to Romell Broom is never going to happen again" and that it "could not possibly happen to another inmate[.]" With no risk that his execution would cause him any pain whatsoever beyond that inherent in the method of execution itself, Broom could not establish an Eighth Amendment violation.

The court noted that following September 15, 2009, Ohio amended its execution protocol, "adding a new command structure and forms that were required to be filled out as each step of the protocol was completed to ensure compliance." *Id.* at 72. Since that time, Ohio "has executed 21 death-row inmates[,]" and in none of those cases did the state have difficulty maintaining IV access. *Id.* at 73. The court also quoted findings made by the federal district court in extensive and prolonged

litigation surrounding a challenge to lethal injection in Ohio that "Ohio does not have a perfect execution system, but it has a constitutional system that it appears to be following." *In re Ohio Execution Protocol Litig.*, 906 F.Supp. 2d 759, 791 (S.D.Ohio 2012).

t. Justices French and Pfeifer dissented, believing that "[w]e should remand Broom's case to the trial court for an evidentiary hearing[,]" and that "it is unnecessary and premature for the court to address any other legal questions." *Broom*, 146 Ohio St.3d at 80. Justice O'Neill dissented "on the theory that capital punishment violates the Eighth Amendment to the Constitution of the United States and Article I, Section 9 of the Ohio Constitution." *Id.*

SUMMARY OF THE ARGUMENT

The Supreme Court of Ohio properly found that Broom's execution would violate neither the Fifth Amendment protection against double jeopardy nor the Eighth Amendment ban on cruel and unusual punishments. It was undisputed at all levels of this case that Broom was never inside the execution chamber and never received any lethal drugs. As such, jeopardy never attached because Broom had no legitimate expectation of finality in his sentence. Assuming Broom had such an expectation, his double jeopardy claim would still fail because there has been no increase in his sentence.

The needle insertions that the execution team members made to establish a working IV were not cruel and unusual. They were the preparatory steps of a constitutional execution procedure that this Court has repeatedly upheld as one that

is designed to minimize pain. This Court confronted a similar set of facts in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L.Ed.2d 422 (1947) and held that a prior unsuccessful execution – even where the inmate was placed in the electric chair and the switch was thrown – posed no bar to a later execution. Broom's case did not advance even that far. Moreover, there is evidence in the record from Broom himself that he was responsible for the execution team's inability to maintain a suitable vein, and Broom cannot take advantage of a delay that he caused.

Broom's petition eschews every standard this Court has ever created for Eighth Amendment challenges to an execution. Broom insists that this is not a method-of-execution claim (which would require him to show both an objectively intolerable risk of harm and a feasible alternative), nor is it a condition-of-confinement claim (which would require him to show deliberate indifference on the part of the State). Instead, Broom asks this Court to accept that his claim exists in some nebulous, undefined category in the middle in which there is no standard and where Broom rejects this Court's only precedent, *Resweber*. Broom does not tell this Court what that standard should be other than that he should not be required to prove anything that any other inmate is required to prove in either a method-of-execution or condition-of-confinement claim. In essence, Broom is asking this Court to recognize a new class of individuals who are categorically exempt from the death penalty – a class of one that includes only him. There is no legal basis for such a claim and this Court should allow the Supreme Court of Ohio's well-reasoned opinion to stand as the final word on Broom's appeal.

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Ohio correctly held that the preparatory steps of lethal injection are not cruel and unusual punishment under the Eighth Amendment.

a. Needle insertions made for the purpose of preparing an inmate for intravenous lethal injection are not cruel and unusual.

This Court has held that punishments are cruel "when they involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L.Ed.519 (1890), or when they "involve the unnecessary and wanton infliction of pain." *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 69 L.Ed.2d 59 (1981), quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976). The preparatory steps that Ohio undertook in 2009, which essentially consisted of making multiple needle insertions into Broom's arms and legs to establish an IV while he waited in the holding cell, do not meet that standard.

First, any physical pain Broom may have experienced in 2009 was insufficient to constitute cruel and unusual punishment. Thousands of patients around the world are subjected to needle sticks, and frequently multiple needle sticks, every day. This is neither cruel nor unusual. Just as some degree of pain is inherent in every insertion of a needle into a person's body, "[s]ome risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure." *Baze v. Rees*, 553 U.S. at 47, 128 S. Ct. 1520, 170 L.Ed.2d 420. "It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id.*

For an inmate to prevail in a method-of-execution challenge, he or she must show that the method presents a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50, quoting *Farmer v. Brennan*, 511 U.S. 825, 846, n. 9, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994). The possibility of pain as the result of an accidental deviation from an otherwise lawful procedure is not enough to meet this standard. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual.'" *Id.*, quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L.Ed.2d 422 (1947).

Ohio adopted lethal injection as a safer, more humane alternative to the electric chair because lethal injection minimizes the risk of pain to the inmate through a minimally invasive procedure. The reason lethal injection is preferable is because even when the execution is not carried out – as it was not here – the state is able to stop the process before ever placing the inmate at risk of life-threatening harm. And the minute amount of pain involved in inserting a needle into an inmate's body has long been considered within the confines of the Eighth Amendment. "On the rare occasion when there is difficulty in locating a vein, more than a single needle insertion may be necessary. This is hardly the cruel and unusual punishment contemplated by the Eighth Amendment." *State v. Webb*, 252 Conn. 128, 143, 750

A.2d 448 (2000), quoting *Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D.Ark. 1992); *cert. denied*, 531 U.S. 835, 121 S. Ct. 93, 148 L.Ed.2d 53 (2000).

Other courts have consistently rejected claims that needle sticks, even multiple needle sticks, could constitute cruel and unusual punishment. "While being stuck with a needle during multiple blood draw attempts can be painful, such conduct is not the type of unnecessary and wanton infliction of pain that constitutes cruel and unusual punishment." *Guinn v. McEldowney*, E.D. Mich. No. 2:14-CV-13085, 2014 U.S. Dist. LEXIS 126219, *8 (Sep. 10, 2014). *See also Schwab v. State*, 995 So. 2d 922, 927 (Fla.2008), *cert. denied*, 552 U.S. 932, 128 S. Ct. 2996, 171 L.Ed.2d 911 (2008) ("the critical Eighth Amendment concern is whether the prisoner has, in fact, been rendered unconscious by the first drug, not whether there are 'irregular IV placements,' 'surgical incisions,' 'multiple needle punctures' or even 'subcutaneous IV insertion'"); *Boreland v. Vaughn*, E.D. Pa. No. 92-0172, 1993 U.S. Dist. LEXIS 2941, *19 (March 4, 1993) ("Even assuming that Boreland's injuries are real, the conduct in question is not sufficient to constitute a violation of the Eighth Amendment. The use of a needle to draw blood is hardly the cruel and unusual punishment contemplated by the Eighth Amendment").

Nor was any psychological strain that Broom may have experienced cruel and unusual. Broom did not attach any medical or psychiatric evidence to his post-conviction petition as part of the record that would give either the state courts or this Court something to consider here. Broom attached only his own affidavit, and that affidavit simply claimed that he was "very upset," that he cried, and that it was "very

stressful" to believe that he was going to be executed. In fact, Edwin Voorhies, the Regional Director of the Office Prisons, testified in a deposition in federal court (that Broom made part of the record in his post-conviction petition) that prison staff overheard Broom bragging when he returned to his cell about defeating the lethal injection procedure by ingesting an entire box of antihistamines the day before. To grant Broom relief on this claim would cause the constitutionality of an execution to turn on how much the inmate is upset about it, and where there is conflicting evidence in the record as to whether he was actually upset at all.

b. This Court held in *Resweber* that a subsequent execution following a prior unsuccessful and incomplete attempt was no different under the Eighth Amendment from any other execution.

In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L.Ed.2d 422 (1947), this Court confronted the case of Louisiana inmate, Willie Francis, who had previously been placed in the electric chair and survived an electrocution attempt because of mechanical failure. The parties in *Resweber* disputed whether any electricity had ever touched Francis' body. *Id.* at 472-473. Francis objected to a second electrocution, arguing that once he underwent "the psychological strain of preparation for electrocution," to require him to undergo the preparation a second time would be cruel and unusual. *Id.* at 464.

A plurality of this Court rejected Francis' argument that allowing his execution at that point would be cruel and unusual punishment, finding that the "psychological strain of preparation for execution" was irrelevant to whether Louisiana could execute Francis in the future. *Id.* at 464. Assuming that Francis had already been subjected to a current of electricity, this:

> "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."

Id. This Court analogized Francis' situation to an inmate who had lived through "a fire in the cell block[,]" finding that "he had suffered the identical amount of mental anguish and physical pain in any other occurrence[.]" *Id.* Under *Resweber*, the incomplete and unsuccessful procedure in 2009, stopped well-before any lethal drugs were administered, does not affect the constitutionality of Broom's execution.

c. Because the State never administered any lethal drugs to Broom, his claim would fail even under the view of the dissenting justices in *Resweber*.

Broom, however, has misread the dissenting opinion in *Resweber*, and has premised his appeal to this Court in significant part on that misreading. The four dissenting justices in *Resweber* did not find that Willie Francis' execution was unconstitutional. Instead, they argued that Francis' case should be remanded for an evidentiary hearing to determine "the extent, if any, to which electric current was applied to the relator during his attempted electrocution[.]" *Id.* at 473. The Eighth Amendment, according to the dissenting justices, prohibited "repeated applications of an electric current separated by intervals of days or hours until finally death shall result." *Id.* at 474. "The contrast is that between instantaneous death and death by installments – caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim." *Id.*

The dissenting justices noted that Louisiana law required "a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead[.]" *Id.* at 475, quoting La. Code of Criminal Procedure (1928), Act No. 2, Art. 569, as amended by § 1, Act. No. 14, 1940. The Louisiana statute:

> "does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death. It prescribes expressly and solely for the application of a current of sufficient intensity to cause death and for the *continuance* of that application until death results."

Id. at 475 (emphasis in original). If Francis had in fact suffered a non-lethal dose of electricity, this would have been an illegal punishment not provided for under Louisiana law.

Implicit in the dissenting justices' demand for an evidentiary hearing on that issue was that they believed that fact to be outcome-determinative. In fact, the dissent explicitly distinguished the facts of *Resweber* from "an instance where a prisoner was placed in the electric chair and released before being subjected to the electric current." *Id.* at 477. The dissenting justices thus found that, if the State of Louisiana had in fact subjected Francis to a non-lethal dose of electricity, such an attempt would have violated both the Louisiana statute and the Eighth Amendment. If Francis had not received a non-lethal dose of electricity, however, he would not have suffered "death by installments," the Louisiana statute would not have been violated, and his execution would not offend the Eighth Amendment. *Id.* at 474.

The problem for Broom is that his claim fails under both the *Resweber* plurality and the dissent. Unlike in *Resweber*, where the parties disputed whether any electricity had ever touched the inmate's body, here, it is undisputed that no lethal drugs ever entered the IV line, much less were administered to Broom. The drugs used in Ohio's lethal injection process in Broom's case are the equivalent, for purposes of this analogy, to the electricity used in Louisiana in the *Resweber* case. They are the method of execution itself; the instrument the state uses to cause the inmate's death. Ohio adopted intravenous lethal injection as a safer and more humane alternative to the electric chair. *See Baze v. Rees*, 553 U.S. at 62, 128 S. Ct. 1520, 170 L.Ed.2d 420 ("[o]ur society has nonetheless steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection").

Much like the Louisiana statute in *Resweber*, Ohio law requires the state to execute a death sentence "by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. *The application of the drug or combination of drugs shall be continued until the person is dead*." Ohio Revised Code § 2949.22(A) (emphasis added). If the process on September 15, 2009 had proceeded to the point where the State had administered any lethal drugs to Broom, only to stop partway through, such a procedure would have violated the Ohio statute and would have constituted the "death by installments" criticized by the dissenting

justices in *Resweber*. It would have been, as ODRC Director Terry Collins stated during his deposition, "a whole 'nother ballpark." But it did not proceed that far, and the reason that it did not is because the State voluntarily postponed Broom's execution before he was ever placed at risk of life-threatening harm.

Broom is thus more similarly-situated to the inmate "placed in the electric chair and released before being subjected to the electric current" than to an inmate who suffers "repeated applications of an electric current separated by intervals of days or hours until finally death shall result." *Resweber* at 474. It was undisputed that Broom never entered the execution chamber and that nothing happened to Broom on September 15, 2009 that could possibly have caused his death. As such, Broom's execution will not be "death by installments" even under the view of the dissenting justices in *Resweber*.

d. Ohio had no reason to know Broom's veins would collapse, and has taken significant steps since then proven to remedy any issue.

Broom attempts to distinguish his case from *Resweber* by claiming that, while the *Resweber* plurality assumed that Louisiana state officials had acted "in a careful and humane manner[,]" Ohio should have been on notice that there were problems with its lethal injection procedure as a result of prior experience. *See* Petition for Writ of Certiorari, at p. 14, quoting *Resweber* at 462. But the warden of the Southern Ohio Correctional Facility, Phillip Kerns, testified that his staff had experienced no problems in any of the preceding six executions he had overseen prior to September 15, 2009. Broom's own expert in his federal litigation, Dr. Mark Heath, testified that Broom's veins "should be easily accessible[.]" *Broom*, 146 Ohio St.3d at 77, 2016-

Ohio-1028, 51 N.E.3d 620. The execution team members therefore had no reason to know that Broom's veins would suddenly and inexplicably begin collapsing once they established IV access.

This Court held in *Baze* that "a series of abortive attempts" was required to "demonstrate an 'objectively intolerable risk of harm' that officials may not ignore." *Baze*, 50, quoting *Farmer v. Brennan*, 511 U.S. 825, 846, n. 9, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994). Ohio had not seen even one abortive attempt prior to September 15, 2009, and never attempted to administer any lethal drugs to Broom on that date. "[A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Baze* at 50, quoting *Farmer* at 842. This does not demonstrate an objectively intolerable risk of harm.

It is also important to note that Broom repeatedly conceded in the state courts that the problem maintaining IV access would never happen again. In this Court, Broom has attempted to walk that concession back, claiming that he "still has the same veins and Ohio still uses the same non-doctor medical team members to access them." *See* Petition for Writ of Certiorari, at p. 24. This inconsistency aside, Broom ignores all of the steps Ohio has taken to ensure that its executions are carried out in a safe manner that minimizes any risk of pain. Ohio 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. It is for this reason that Ohio did not experience any difficulties in establishing IV access in any of its 21 executions after September 15, 2009. Broom has thus failed to demonstrate an Eighth Amendment violation.

e. The state supreme court properly applied the "objectively intolerable risk" standard of *Glossip* and *Baze* to Broom's claim.

Perhaps recognizing that he cannot satisfy the "objectively intolerable risk" standard of *Glossip* and *Baze*, Broom argues that the state supreme court erred by applying *Glossip* and *Baze* to his case at all. Instead, Broom argues, this Court should craft an entirely new standard specific to inmates who have "suffered the mental trauma of undergoing an execution attempt." *See* Petition for Writ of Certiorari, at p. 20. But this Court's opinion in *Baze* specifically held that "a series of abortive attempts" at execution would, "unlike an 'innocent misadventure,' * * * demonstrate an 'objectively intolerable risk of harm' that officials may not ignore." *Baze* at 50, quoting *Resweber,* 329 U.S. at 470, 67 S. Ct. 374, 91 L.Ed.2d 422 (Frankfurther, J., concurring). This Court has therefore already decided what standard applies to Broom's case. Broom simply cannot meet that standard.

First, Broom could not show an objectively intolerable risk of serious harm. In fact, Broom conceded that there is no risk of harm to him at all in a future execution because what happened on September 15, 2009 would never happen to anyone again. Second, he has never offered a feasible alternative or acknowledged that one might potentially exist. Broom's claim is an all-or-nothing, categorical demand that he be permanently exempted from any form of execution at all, be it lethal injection or

otherwise. Broom's entire argument is that that there is no feasible alternative in his case because he can never be constitutionally executed. He is, in essence, claiming to be a class of one wholly exempt from the death penalty. That is not the standard this Court articulated in *Baze* to claims involving a "series of abortive attempts," which is precisely what Broom is claiming here. The state courts all properly applied *Resweber* and *Baze* to deny Broom's claim that the preparatory steps taken in 2009 were "cruel and unusual" under the Eighth Amendment.

II. The Supreme Court of Ohio correctly held that executing Broom now would not be cruel and unusual punishment under the Eighth Amendment.

a. Broom's prospective Eighth Amendment claim is indistinct from his retrospective Eighth Amendment claim.

If the State did not violate the Eighth Amendment by calling off Broom's execution in 2009 after attempting to establish IV access, Broom offers little reason why his future execution would itself be a constitutional violation. This Court held in *Resweber* that "[t]he 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." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 464, 67 S. Ct. 374, 91 L.Ed.2d 422. Only a "series of abortive attempts" may violate the Eighth Amendment, and the facts of this case as established by Broom do not approach that level. *Baze* at 50.

b. Broom's claim fails regardless of whether this Court treats it as a method-of-execution claim or a condition-of-confinement claim.

Broom argues that the state courts should not have analyzed his claim as a method-of-execution claim under *Glossip* and *Baze*. The reason for this, Broom argues, is that he "has already suffered severe pain," thereby distinguishing him from "a condemned prisoner *who has not yet faced the challenged method*." *See* Petition for Writ of Certiorari, at p. 20 (emphasis in original). Even assuming that this was such a case, and that this did somehow distinguish Broom's claim from the method-of-execution challenges at issue in *Glossip* and *Baze*, this Court has already established a governing legal standard in those cases as well.

This Court has held that, when confronted with an inmate who claims to have already suffered severe pain at the hands of state actors, "[t]hese cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." *Wilson v. Seiter*, 501 U.S. 294, 299, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991). "If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* (emphasis in original). Broom makes no attempt to address this requirement. Any pain he suffered in 2009 was not part of his formal punishment under either the Ohio statute or his sentence. At the time Broom was sentenced to death in 1985, Ohio did not yet have lethal injection as a method of execution. As a result – and if this Court accepted his invitation to disregard *Resweber* and *Baze* in this context – he would then be required to show a culpable mental state on the part of his execution team.

In conditions-of-confinement cases, that culpable mental state is "deliberate indifference" to the inmate's needs. *Id.* at 302-304. Once again, however, Broom conceded in state court that this standard was inapplicable to his case:

> "Broom's case is not a conditions of confinement case. The state actors at issue here were not charged with a responsibility to keep Broom safe, healthy, and alive on September 15, 2009, but, instead, their job was to take his life against his will as per the death warrant issued by this Court. By definition, they had to be as 'indifferent' as a human being can possibly be about another human being's health and safety."

See Merit Brief of Appellant, Supreme Court of Ohio, filed Aug. 11, 2014, at p. 36. The Supreme Court of Ohio agreed with Broom that this was not the correct standard to apply to Broom's claim. "The process of carrying out an execution is more analogous to the method-of-execution cases than to conditions-of-confinement cases." *Broom*, 146 Ohio St.3d at 68.

The state supreme court thus relied upon the standards set forth by this Court in *Baze* and *Resweber* requiring Broom to show that his execution at this point would present an "objectively intolerable risk of harm[.]" *Baze v. Rees*, 553 U.S. at 50, 128 S. Ct. 1520, 170 L.Ed.2d 420. Under that standard, Broom's claim must fail. "*Baze* left no room for doubt that a single instance of mistake does not suffice to demonstrate a substantial risk of serious harm." *Jackson v. Danberg*, 594 F.3d 210, 225-226 (3d Cir.2010) (*Baze* does not incorporated the deliberate indifference standard into method-of-execution cases). Broom, however, seeks to distance himself from both the "objectively intolerable risk" standard used in method-of-execution challenges and the "deliberate indifference" standard applied to conditions-of-confinement claims. It

was not clear in state court what standard Broom believed should apply to his case. It is still unclear.

Even if this Court were to apply the lower "deliberate indifference" standard to Broom's claim, Broom did not show any culpable mental state on the part of any state actors. At the time of September 15, 2009, Ohio's execution protocol read as follows:

> "The team members who establish the IV sites shall be allowed as much time as is necessary to establish two sites. If the passage of time and the difficulty of the undertaking cause the team members to question the feasibility of two or even one site, the team will consult with the warden. The warden, upon consultation with the Director and others as necessary, will make the decision whether or how long to continue efforts to establish an IV site. The Director shall consult with legal counsel, the office of the Governor or any others as necessary to discuss the issues and alternatives."

Ohio Dep't of Rehabilitation and Correction Policy Directive No. 01-COM-11, ¶ VI.B.7.f (Effective May 14, 2009). This protocol was "designed to correct a problem that emerged during a prior execution, the Clark execution [in 2006], in which the State also had trouble running an IV line on the inmate." *Reynolds v. Strickland*, 583 F.3d 956, 960 (6th Cir.2009) (Sutton, J., dissenting).

> "Viewed from this perspective, the Broom execution may have 'failed' by one measure because Broom was not executed. But, by another measure, the Governor's decision not to proceed with the execution of Broom, after two hours of attempting to run IV lines on him, confirms the virtue of the procedure and the Governor's responsible behavior in implementing it. The postponement option is designed to avoid 'cruel and unusual' punishment, not to further it."

Id. These actions show that Ohio was not deliberately indifferent to Broom's needs, and that he did not face, or ever will face, an objectively intolerable risk of harm from a future execution. Broom's claim fails under either standard.

c. Broom has made no attempt to show that society's evolving standards of decency would in any way prohibit his execution.

This Court's analysis is not affected any way by Broom's vague references to evolving standards of decency. It is true, as Broom points out, that this Court generally relies upon "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L.Ed.2d 630 (1958). But the fact that the Eighth Amendment draws its meaning from those evolving standards does not mean that this Court writes on a blank slate with each Eighth Amendment claim that comes before it. To rely on this Court's holdings drawing from society's "evolving standards of decency," the inmate must show that those standards have evolved in such a way as to preclude this particular execution. For example, in *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002) and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.E.d2d 1 (2005), this Court found that evidence in the existence of an emerging "national consensus" among the states "sufficient to label a particular punishment cruel and unusual." *Roper* at 562, quoting *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L.Ed.2d 306 (1989).

Here, there is no such evidence either in the petition for a writ of certiorari or anywhere in the record. Broom has not shown, or ever claimed, that there is a single jurisdiction in the United States with or without the death penalty that would treat the question of Romell Broom's eligibility for execution any differently than it would any other inmate. Not one state would have allowed Broom's execution under the

circumstances in existence on September 15, 2009 but prohibit it today. There is thus no indication that our society's standards have evolved in any way that would affect Broom's execution at all. Without any such evidence, the state courts properly rejected Broom's claim that his execution would violate the Eighth Amendment.

III. The Supreme Court of Ohio correctly held that Broom's execution will not violate the Fifth Amendment protection against double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969). To that end, "[t]he Double Jeopardy Clause generally prohibits courts from enhancing a defendant's sentence once the defendant has developed a legitimate 'expectation of finality in the original sentence.'" *United States v. Tristman*, 178 F.3d 624, 630 (2d Cir.1999), quoting *United States v. DiFrancesco*, 449 U.S. 117, 139, 101 S. Ct. 426, 166 L.Ed.2d 328 (1980). But where no such expectation of finality exists, double jeopardy does not bar a court from modifying a sentence. The problem with Broom's Fifth Amendment claim is twofold: he did not have a legitimate expectation of finality in his sentence, and that sentence has not been enhanced.

a. Broom had no legitimate expectation of finality in a death sentence that the State had not yet carried out.

This Court did not decide in *DiFrancesco* at exactly what point during the service of a prison sentence a legitimate expectation of finality arises. *DiFrancesco*, 449 U.S. at 136, 101 S. Ct. 426, 166 L.Ed.2d 328. This Court did, however, go "beyond the specific facts of the case, undercutting the basis for any general rule that the

Double Jeopardy Clause precludes a sentence increase once the defendant has *commenced* serving the sentence." *United States v. Bello*, 767 F.2d 1065, 1069 (4th Cir. 1985) (emphasis added).

Since *DiFrancesco*, other federal courts have generally held that such an expectation arises "once the defendant completed service of a sentence of incarceration." *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir.1993); *see also United States v. Silvers*, 90 F.3d 95, 101 (4th Cir.1996) (holding that "reimposition of sentence on counts upon which [the defendant] had fully satisfied his sentence violated the Double Jeopardy Clause"); *United States v. Arrellano-Rios*, 799 F.2d 520, 524 (9th Cir.1986) (declining to "decide at what point, in the service of a defendant's legal sentence, a reasonable expectation of finality arises," but holding that it is "certain" that such an "expectation has arisen, and jeopardy has attached, upon its completion"). In the context of capital punishment, this would mean that Broom did not have a legitimate expectation of finality in his sentence until that sentence had been carried out. He certainly did not have such an expectation at the time as the State undertook the preparatory steps in the holding cell.

This interpretation would align with this Court's plurality opinion in *Resweber*. There, this Court found that double jeopardy was not implicated when the state executed an inmate subsequent to a prior, unsuccessful attempt that proceeded significantly further than the events of September 15, 2009:

> "For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment. When an accident, with no suggestion of

> malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution."

Id. at 463. Just as in *Resweber*, there is no suggestion of "malevolence" in this case. Broom has no more right to avoid execution because the State could not maintain a suitable IV than a convicted defendant has to avoid a new trial following an appellate reversal. To the contrary, "a successful appeal of a conviction precludes a subsequent plea of double jeopardy." *United States v. Scott*, 437 U.S. 82, 89, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).

The Supreme Court of Ohio, in its decision, did not go so far as to hold that Broom's legitimate expectation of finality attached only once his sentenced was carried out to reject Broom's claim. Rather, the court chose to follow the approach of the dissenting justice justices in *Resweber*, drawing the line of a reasonable expectation of finality at whether the State had begun to administer the lethal means of execution to the inmate. The *Resweber* dissenters "distinguished the application of electricity to the inmate from merely placing the inmate in the electric chair with no application of electricity." *Broom*, 146 Ohio St.3d at 66, 2016-Ohio-1028, 51 N.E.3d 620, quoting *Resweber* at 477. In Broom's case, however, it was undisputed that he never left the holding cell, was never inside the execution chamber, was never strapped to a gurney, and never received any part of the three-drug protocol. If Willie Francis did not have a legitimate expectation of finality in his sentence when he was

placed in the electric chair with a hood over his head and the switch thrown, then Romell Broom certainly did not have one while he waited in the holding cell.

Broom argues that he had a "legitimate expectation of finality in the completion of his death sentence that day" because he "had no hope of leaving the death house alive[.]" *See* Petition for Writ of Certiorari, at p. 26. This is wrong. Death row inmates frequently receive last-minute stays after they have entered the death house. Under Broom's interpretation, every one of those stays was actually a legal event that terminated jeopardy and prevented any subsequent execution. Neither this Court nor any other has held that a last minute stay once an inmate has entered the death house terminates jeopardy such that the state is barred from any future execution attempt. Broom also does not satisfy his own test in this area because he never entered the execution chamber.

Moreover, any subjective belief Broom had that he would be executed that day is irrelevant to whether that expectation was legitimate under the law. "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *DiFrancesco* at 137. That is precisely the right that Broom demands this Court create for him and the harm that he relies upon in his petition.

b. The execution of Broom's sentence, following the State's voluntary decision to postpone an earlier execution date, is not an increase in Broom's sentence.

Second, Broom's sentence has never been increased since 1985. If Broom could show that he had a "legitimate expectation of finality" in his death sentence at the time the execution team began to prepare the IV lines, the Double Jeopardy Clause

of the Fifth Amendment would prohibit "an increase in that sentence[.]" *Jones v. Thomas*, 491 U.S. 376, 394, 109 S. Ct. 2522, 105 L.Ed.2d 322 (1989) (Brennan, J., dissenting). The State's decision to voluntarily postpone Broom's execution is not somehow an "increase" in Broom's sentence. It is merely the same sentence, delayed.

The double jeopardy prohibition against multiple punishments for the same offenses focuses on "the actual sanctions imposed on the individual[.]" *United States v. Halper*, 490 U.S. 435, 447, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989). In this case, the actual sanction imposed on Broom was the death penalty, a sentence he did not receive on September 15, 2009. The means by which the State undertakes to effectuate a sentence are not the same thing as the actual sentence itself. The attempts by the State to establish IV lines in Broom's arms were not the "actual sanction" Broom received for the rape and murder of Tryna Middleton. As the state appellate court found: "An inmate can only be put to death once, and that process legislatively begins with the application of the lethal drugs." *State v. Broom*, 8th Dist. Cuyahoga No. 96747, 2012-Ohio-587, ¶ 23, citing Ohio Revised Code 2949.22(A).

"In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *Halper* at 450. Broom's sentence in 1985 was the death penalty. That is still his sentence today. At no point has that sentence ever exceeded the penalty authorized by the Ohio General Assembly. When a lawfully-imposed sentence is not carried out, it cannot be said that the execution of that sentence at some point in the future results in multiple punishments for the same offense. To hold otherwise would be to say that

every appellate bond results in a double jeopardy violation. This is particularly true where there is no evidence that the State maliciously or intentionally chose to postpone or prolong Broom's execution in any way.

c. Broom's attempt to thwart his own execution deprived him of any legitimate expectation of finality on September 15, 2009.

There is, however, evidence in the record that Broom maliciously interfered with his own execution. The evidence that Broom attached to his post-conviction petition indicated that Broom bragged to another death row inmate that he caused his veins to become unusable by purposely ingesting a box of antihistamines one day earlier. Broom cannot claim a legitimate expectation of finality in a sentence that he unlawfully obstructed. *See United States v. Jones*, 722 F.2d 632, 638 (11th Cir.1983) (a defendant who "thwarts the sentencing process * * * will have purposely created any error on the sentencer's part and thus can have no *legitimate* expectation regarding the sentence thereby procured") (emphasis in original).

Broom concedes that "[a]n inmate who physically obstructs the process while underway, thereby intentionally causing its failure, would ordinarily be unable to demonstrate a legitimate expectation of imminent death." *See* Petition for Writ of Certiorari, at p. 34. In that circumstance, Broom, by his own hand, would have defeated his expectation of finality. "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott*, 437 U.S. at 99, 98 S. Ct. 2187, 57 L. Ed. 2d 65.

d. The absolute rule Broom proposes would heighten the risk of pain to inmates by depriving states of the flexibility to postpone an execution if a suitable vein cannot be found.

Finally, it is worth noting that Broom's argument would create a terrible policy incentive to the states, pressuring them to push through with execution attempts without knowing whether it is possible to conduct the execution in a humane manner. As the state court of appeals noted:

> "For us to find that attempting to establish IV catheters constitutes the execution attempt would place the state in an untenable position. The state must be afforded discretion to determine whether the IV access will allow the lethal drugs to flow until the inmate's death prior to starting the actual lethal injection.
>
> * * *
>
> "The state needs discretion in fulfilling Ohio's death penalty statutes. To hold to the contrary could invite the sort of needless pain and suffering that Broom seeks to avoid and would likely create a self-fulfilling prophecy. If the state were permitted only one chance at fulfilling its duty to execute an inmate, the pressure to complete the task could lead to violations of the Eighth Amendment."

State v. Broom, 8th Dist. Cuyahoga No. 96747, 2012-Ohio-587, ¶¶ 22-24. *See Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. at 2734, 192 L.Ed.2d 761 (discussing the execution of Clayton Lockett in Oklahoma in 2014 where an improperly-inserted IV leaked into the tissue surrounding the IV access point in Lockett's leg).

The execution team in Broom's case had no way of knowing that his veins would collapse until after they made the initial needle insertions into his arms. At that point, Broom would have this Court force states into an all-or-nothing choice: either complete the execution then, or never at all. If jeopardy attaches, as Broom suggests, at the first moment that the state has "actually started to invade his body

with the instruments of execution[,]" any decision to postpone the execution for legitimate medical reasons would constitute a double jeopardy violation. *See* Petition for Writ of Certiorari, at p. 35. This would be equally true regardless of whether the execution team made 18 needle insertions or only one.

Such an absolute rule would encourage states seeking finality in their lawfully-imposed death sentences to forge ahead with executions regardless of what happens after the first needle insertion. The states must have discretion to call off an execution if maintaining a suitable vein is not possible before administering any lethal drugs to the inmate. Broom's interpretation of the Fifth Amendment would limit, rather than enhance, that flexibility. Far from an alternative that "significantly reduce[s] a substantial risk of severe pain[,]" this would actually increase that risk. *Glossip* at 2737. This Court should reject that limitation.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 16-5580

In the Supreme Court of the United States

ROMELL BROOM,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Christopher D. Schroeder, counsel of record for Respondent and a member of the Bar of this Court, hereby certifies that on September 16, 2016, he served S. Adele Shank, counsel of record for Romell Broom, and Timothy F. Sweeney, by placing in the United States Mail, postage pre-paid, properly addressed to Attorney Shank at 3380 Tremont Road, Suite 270, Upper Arlington, Ohio 43221, and to Attorney Sweeney at The 820 Building, Suite 430, 820 West Superior Avenue, Cleveland, Ohio 44113, with a copy of the Brief in Opposition to Petition for Writ of Certiorari.

All parties required to be served in this case have been served.

Respectfully submitted,

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