**CASE NO. _____**

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER 2016 TERM**

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**ROMELL BROOM,**

Petitioner,

vs.

**STATE OF OHIO,**

Respondent.

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

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# PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE IS NOT SCHEDULED)


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## 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?

## INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Romell Broom respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

## OPINIONS BELOW

The Ohio Supreme Court decision for which Broom seeks issuance of the writ appears at State v. Broom, 146 Ohio St.3d 60, 51 N.E.3d 620 (2016). The Court of Appeals decision is at State v. Broom, 2012 Ohio 587 (2012). The trial court's April 7, 2011, decision is unreported. (All three opinions are in the Appendix).

The decisions reflecting Broom's conviction and sentence are unreported. State v. Broom, Cuyahoga County Common Pleas Court, Case No. CR-196643 (October 16, 1985). The Court of Appeals decision denying relief on direct appeal appears at State v. Broom, 1987 Ohio App. LEXIS 8018 (July 23, 1987). The Ohio Supreme Court denied relief in State v. Broom, 40 Ohio St.3d 277 (1988), cert. den. Broom v. Ohio, 490 U.S. 1075 (1989).

The post-conviction trial court decision is unreported. State v. Broom, Cuyahoga County Court of Common Pleas, Case No. CR-196643 (1996). The state court of appeals affirmance is at State v. Broom, 1998 Ohio App. LEXIS 2110 (Ohio App. May 7, 1998). The Ohio Supreme Court declined jurisdiction. State v. Broom, 83 Ohio St.3d 1430 (1998).

The United States District Court for the Northern District of Ohio's denial of habeas corpus relief is unreported. The Sixth Circuit affirmed at Broom v. Mitchell, 441 F.3d 392 (6th Cir. 2006). Certiorari and rehearing were denied at Broom v. Mitchell, 549 U.S. 1255 (2007).

The Cuyahoga County Court of Common Pleas, Case No. CR-196643 (March 17, 2009) denial of Broom's second post-conviction petition is unreported. The Court of Appeals reversed at State v. Broom, 2009 Ohio 3731, 2009 Ohio App. LEXIS 3176 (Ohio App. July 30, 2009). The Ohio Supreme Court reversed at State v. Broom, 123 Ohio St.3d 114 (2009).

## JURISDICTION

The judgment of the Ohio Supreme Court was entered on March 16, 2016. The time for filing Petitioner's petition for a writ of certiorari was extended by the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit, to August 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V, which, in pertinent part, provides:

> "No person shall be . . . twice put in jeopardy of life or limb."

U.S. Const. amend. VIII, which provides:

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

U.S. Const. amend. XIV, § 1, which, in pertinent part, provides:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Ohio Department of Rehabilitation and Correction, Execution Protocol 01-COM-11 (May 14, 2009) ("Execution Protocol") appears in the appendix.

## STATEMENT OF THE CASE

Romell Broom is a 60 year-old African-American man who was sentenced to death when he was 29 years old. Following direct appeal, state post-conviction, federal habeas corpus and additional state post-conviction proceedings, Broom's execution was scheduled to take place on September 15, 2009. On that date, the State of Ohio attempted to execute Broom using the State's lethal injection protocol.

The execution process required that the State establish access to Broom's peripheral veins with intravenous (IV) needles, install IV catheters into the accessed veins, attach receptacles to the IV's to keep the veins "open" so that the fatal drugs could be delivered to the body, and

monitor and maintain that IV access until death. Execution Protocol, VI, B. 4. b.

Ohio had a history of problems with lethal injection executions and particularly with establishing and maintaining IV access—a problem that arose in the execution of Joseph Clark in May 2006, and the execution of Christopher Newton in May 2007. The State acknowledged below that the execution protocol in effect on September 15, 2009 was "designed to correct a problem that emerged during a prior execution, the Clark execution, in which the State also had trouble running an IV line on the inmate." State's Brf., p. 14. The protocol included specific training requirements for execution team members. Even so, some members of the team had failed to attend required trainings and their supervisors excused them.

The protocol required that three vein checks be conducted in the twenty-four hours before execution was scheduled. The first of these vein checks was conducted and showed that it was uncertain that IV access could be established in Broom's left arm. A second check was conducted with no indication of the results. The third check was omitted. Without regard to these omissions, the execution attempt went forward. The Ohio Supreme Court found the following facts regarding the events that took place once the execution began with the reading of the death warrant:

> At 1:59 p.m. on September 15, the warden finished reading the death warrant to Broom. One minute later, Team Members 9 (a female) and 21 (a male) entered the holding cell to prepare the catheter sites.
>
> Team Member 9 made three attempts to insert a catheter into Broom's left arm but was unable to access a vein. At the same time, Team Member 21 made three unsuccessful stabs into Broom's right arm. After a short break, Member 9 made two more insertions, the second of which caused Broom to scream aloud from the pain.
>
> Member 21 managed to insert the IV catheter into a vein, but then he lost the vein and blood began running down Broom's arm. When that occurred, Member 9 rushed out of the room, saying "no" when a security officer asked if she was okay.
>
> Director Voorhies testified that he could tell there was a problem in the

first 10 to 15 minutes. Warden Phillip Kerns saw the team make six or seven attempts on Broom's veins during the same 10- to-15-minute period. According to Kerns, the team members did hit veins, but as soon as they started the saline drip, the vein would bulge, making it unusable.

About 15 minutes into the process, Kerns and Voorhies saw Member 9 leave the holding cell. Voorhies described her as sweating "profusely" and heard her say that she and Member 21 had both accessed veins, but the veins "blew." Member 17 then entered the holding cell and made "several attempts" to access a vein in Broom's left arm. Simultaneously, Member 21 continued his attempts on Broom's right arm.

Terry Collins, who was then the director of the ODRC, called a break about 45 minutes into the process to consult with the medical team. The break lasted 20 to 25 minutes. The medical team reported that they were gaining IV access but could not sustain it when they tried to run saline through the line. They expressed "clear concern" about whether they would get usable veins. But because they said that there was a reasonable chance of establishing venous access, the decision was made to continue.

By this time, Broom was in a great deal of pain from the puncture wounds, which made it difficult for him to move or stretch his arms. The second session commenced with three medical team members—9, 17, and 21—examining Broom's arms and hands for possible injection sites. For the first time, they also began examining areas around and above his elbow as well as his legs. They also reused previous insertion sites, and as they continued inserting catheter needles into already swollen and bruised sites, Broom covered his eyes and began to cry from the pain. Director Voorhies remarked that he had never before seen an inmate cry during the process of venous access.

After another ten minutes or so, Warden Kerns asked a nurse to contact the Lucasville physician to see if she would assess Broom's veins and offer advice about finding a suitable vein. Broom later stated that he saw "an Asian woman," whom he erroneously identified as "the head nurse," enter the chamber. Someone handed her a needle, and when she inserted it, she struck bone, and Broom screamed from the pain. At the same time, another team member was attempting to access a vein in Broom's right ankle.

The Lucasville physician confirmed that she came to Broom's cell, examined his foot, and made one unsuccessful attempt to insert a needle but quickly concluded that the effort would not work. By doing so, she disobeyed the warden's express instructions to observe only and not get involved. The physician examined Broom's foot but could see no other vein.

After the physician departed, the medical team continued trying to establish an IV line for another five to ten minutes. In all, the second session lasted approximately 35 to 40 minutes.

During the second break, the medical team advised that even if they successfully accessed a vein, they were not confident that the site would remain viable throughout the execution process. The governor's office had signaled its

> willingness to grant a reprieve, and so the decision was made to halt the execution for the day.
>
> Dr. Jonathan Groner examined and photographed Broom three or four days afterward. The photographs show 18 injection sites: one on each bicep, four on his left antecupital (forearm), three on his right antecupital, three on his left wrist, one on the back of his left hand, three on the back of his right hand, and one on each ankle. Prison officials later confirmed that he was stuck at least 18 times.
>
> Dr. Mark Heath met with Broom one week after the event. Dr. Heath observed "considerable bruising" and a lot of "deep and superficial" tissue damage consistent with multiple probing. Dr. Heath also posited that the actual number of catheter insertions was much higher than the number of needle marks, because according to what Broom told him, the medical team would withdraw the catheter partway and then reinsert it at a different angle, a procedure known as "fishing."

State v. Broom, 146 Ohio St.3d at 61-63.

While execution team members individually were allowed to leave the room at will (as did Team Member 9) and took two group "breaks" during the attempt, Broom got no "break." Even when the execution team stopped the needle jabs for their breaks, Broom was left in the holding cell, under guard, in pain, and knowing the team would return sooner or later. Broom never got a break from the relentless reality that he was confined in a room where every person with whom he could have contact was there for the specific purpose of killing him and the expectation that by the end of the day he would be dead. In the ten years preceding Broom's September 2009 attempt, and beginning with Ohio's first lethal injection execution in 1999, Ohio had executed 32 of Broom's fellow death-row prisoners; none survived the day alive after the warrant had been read and the process begun.[1]

During the second staff break, Director Collins contacted Ohio Governor Ted Strickland and recommended that the Governor grant a reprieve to stop Broom's execution. The reprieve was granted for one week. Collins testified that he did not recommend stopping the execution out

[1]And it has executed 21 more since Broom's failed attempt, and none of those inmates survived either. Broom, 146 Ohio St. 3d at 73.

of concern for the physical and mental anguish that Broom was suffering. Instead, the decision was made based on three factors: (1) concern for the execution team; (2) his belief, informed by discussions with the execution team members, that further attempts to gain venous access that day would be fruitless; and (3) his concern that he would be "in a whole 'nother ballpark" of legal trouble if the team managed to establish two viable IV sites and started injecting the lethal drugs only to suffer yet another venous failure when they had no back-up plan. (T. Collins Depo. at 30-38, 60-72 (Exh. 11); E. Voorhies Depo. at 138 (Exh.12).)

Once it was granted, counsel met with Broom and delivered a copy of the governor's reprieve. Broom's personal property was returned to him. Broom was still in pain. Facing a new execution date in a week, Broom was traumatized and in anguish from concern about the next execution attempt. (Broom Execution Timeline, Broom First Submission, Exh. 20.)

Broom filed a civil rights action under 42 U.S.C. §1983 in the federal district court for the Southern District of Ohio on September 18, 2009. That court granted a preliminary injunction staying Broom's second execution then scheduled for September 22, 2009. On August 27, 2010, the federal district court dismissed without prejudice Broom's claims under the Fifth, Eighth, and Fourteenth Amendments that the State could not attempt to execute him a second time, holding that those claims were more properly raised in a habeas corpus action. Broom v. Strickland, 2010 U.S. Dist. LEXIS 88811, *9-12 (S.D. Ohio Aug. 27, 2010). The district court retained jurisdiction of Broom's claims based on the unconstitutionality of Ohio's lethal injection protocol in his §1983 action and those claims are still pending in that action.

The appropriate vehicle for seeking relief in the Ohio courts was unclear and Broom therefore pursued several different remedies in different courts. Broom filed a petition for state habeas corpus relief in the Ohio Supreme Court. The case was voluntarily dismissed without prejudice on November 9, 2009.

Broom also filed a habeas corpus petition in the federal district court for the Northern District of Ohio. That case has been stayed and held in abeyance pending resolution of the state proceedings. Broom v. Bobby, Case No, 1:10 CV 2058, Order Nov. 18, 2010.

Broom again sought state habeas review in the Ohio Supreme Court but his petition was dismissed *sua sponte* by the court. In re Broom, 127 Ohio St.3d 1450 (2011). This Court denied review. Broom v. Bobby, 563 U.S. 977 (2011).

Broom filed, in the state trial court, a petition for state post-conviction relief and declaratory judgment, to prevent any further execution attempts on him, arguing that (1) he had been subjected to a cruel and unusual punishment on September 15, 2009, and that as a result the State could not try again to execute him, (2) a second execution attempt would violate the Double Jeopardy Clause, and (3) that regardless of whether the first execution attempt was cruel and unusual, a second attempt would be. The trial court in an unreported decision, denied relief on April 7, 2011. The Ohio Court of Appeals affirmed on February 16, 2012, in a two to one decision. State v. Broom, 2012 Ohio 587 (2012). The Ohio Supreme Court granted discretionary review, and in a four to three decision, denied relief on March 16, 2016. State v. Broom, 146 Ohio St.3d 60 (2016).

The Ohio Supreme Court majority found that nothing that happened in the September 2009 execution attempt had any impact on whether a second execution attempt would be unconstitutional and held that (1) "the pain and emotional trauma Broom already experienced [in the September 2009 attempt] do not equate with the type of torture prohibited by the Eighth Amendment," (2) Broom had not been placed in jeopardy during the first execution attempt because no drugs had begun to flow and therefore a second attempt would not violate the Double Jeopardy clause, (3) "Based on [Louisiana ex rel. Francis v.] Resweber, [329 U.S. 459 (1947)] . . . there is no per se prohibition against a second execution attempt based on the Cruel and

Unusual Punishments Clause of the Eighth Amendment, and, (4) acknowledging "that the state failed to follow the protocol in 2009," and applying by analogy the method-of-execution analysis developed in Baze v. Rees, 553 U.S. 35, 49 (2008) and Glossip v. Gross, 135 S. Ct. 2726 (2015), Broom had not established that the State in "a second attempt is likely to violate its protocol and cause severe pain" and thus that there was no Due Process violation in denying Broom a hearing and discovery to meet the Baze standard.

Dissenting Justice O'Neill found that "Any fair reading of the record of the first execution attempt shows that Broom was actually tortured the first time." O'Neill rejected the majority's reliance on Resweber, saying that, "Despite the quirk of constitutional theory that the judgment of the Resweber court rests on, five of the justices were able to recognize the second execution attempt for what it was: torture." O'Neill found a second execution attempt to be "precisely the sort of 'lingering death' that the United States Supreme Court recognized as cruel and unusual within the meaning of the Eighth Amendment 125 years ago."

Dissenting Justices French and Pfeifer rejected the majority's conclusion, under Baze and Glossip, that Broom had failed to establish that there is substantial risk that a second execution attempt presents an "objectively intolerable risk of harm," and said the record evidence shows that "the state has repeatedly and predictably had problems establishing and maintaining access to inmates' veins, that these problems are the result of medical incompetence on the part of the execution team members . . . and that the incompetence of the execution staff makes it more likely that these problems will recur in future executions." Justices French and Pfeifer criticized the majority's reliance on information from outside the record, found the outside evidence unpersuasive, said "[t]he majority is effectively shifting the burden of proof by faulting Broom for not rebutting evidence that the state did not even introduce into the record," and would have ordered a remand for an evidentiary hearing.

## REASONS FOR GRANTING THE WRIT

### I. THE OHIO SUPREME COURT'S DECISION THAT THE SEPTEMBER 15, 2009 ATTEMPT TO EXECUTE BROOM WAS NOT CRUEL AND UNUSUAL IGNORED FUNDAMENTAL TENETS OF EIGHT AMENDMENT LAW THAT REQUIRE CONSIDERATION NOT ONLY OF PHYSICAL PAIN BUT ALSO THE EMOTIONAL TRAUMA AND CONDUCT OF THE EXECUTION THAT COMPORTS WITH THE DIGNITY OF MAN.

#### A. What happened to Broom is unconstitutionally cruel under modern Eighth Amendment standards.

What Romell Broom suffered at the hands of the State was cruel and unusual punishment under any present day conception of the government's Eighth Amendment obligation not to impose unnecessary pain and suffering even on those who are legally subject to execution. Past conceptions of cruelty do not dictate the parameters of modern day Eighth Amendment prohibitions. Weems v. United States, 217 U.S. 349, 350 (1910). Evolving standards of decency illuminate and expand perceptions of what is cruel and unusual as well as the government's duty not to inflict such punishments. Trop v. Dulles, 356 U.S. 86, 101 (1958). For that reason, comparison of what happened to Broom with any other case or situation is unnecessary for purposes of recognizing the cruelty and indignity that was inflicted on him. What happened to Broom was cruel and unusual in the here-and-now understanding of the Eighth Amendment's protections.

Romell Broom went into a room fully believing that he was going to die that day. He spent two hours there being repeatedly stabbed and jabbed with needles. The physical pain he suffered was ever increasing as his skin and the tissue below bruised and swelled and, despite those injuries, more and more needles were pushed into his injured flesh. Then, as the execution team grew frustrated, a stranger to the process and the team – untrained in executions and not allowed into the cell under Ohio's execution protocol – came in at the warden's request and stabbed a needle into Broom's ankle bone causing a new and excruciating pain. As this process

unfolded, the execution team members individually and in groups took breaks and left the room, but Broom was always confined in that room where he expected to die and the only people with whom he could communicate were those trying to kill him.

What Broom suffered physically was torturous. The use of needles to induce pain is a recognized torture method. See Marta Soniewicka, "How Dangerous Can the Sterilized Needle Be? Torture, Terrorism, and the Self-Refutation of the Liberal-Democratic State," http://ssrn.com/abstract=2358993, citing Alan M. Dershowitz, WHY TERRORISM WORKS, UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGES, Yale University Press, 2002 (explaining the justification for the use of non-lethal torture). Moreover, just plain common sense says that repeatedly stabbing needles into injured skin and tissue is painful and cruel. While the intention may not have been to impose unnecessary pain, the result was just that.

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. There is no question that Broom faced the threat of death. The fact that Ohio's execution attempt failed did not negate the torturous effect of that threat. Mock executions are a cruel punishment. See, e.g., U.S. Army Field Manual FM 2-22.3 (FM 34-52), Human Intelligence Collector Operations at 5-74, 5-75 (Department of the Army, September 2006) (available at http://fas.org/irp/doddir/army/fm2-22-3.pdf); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, 1465 U.N.T.S. 85 (1988) (entered into force on Nov. 20, 1994), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx; D. Miller, Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action, 17 Geo. Immigr. L.J. 299, 320 (2003) ("Psychological torture [under U.N. Convention Against Torture] includes mock executions."). The suffering

Broom endured, because it included intense physical pain in addition to prolonged psychological torment, was even worse than a "mock execution."

An important aspect of the Eighth Amendment is that it limits what the government is allowed to do to any person even in the name of justice. When carrying out an execution the government has a duty to do the job well. The attempted execution of Romell Broom was not "good enough for government work." The rules, in place to avoid the exact problems that arose, were ignored. Execution team training sessions were missed. Required vein checks were skipped. A non-team member was allowed to participate and inflict even more pain. The attempt was not conducted with the respect for human dignity that is required in and during the execution process. Roper v. Simmons, 543 U.S. 551, 560 (2005).

Describe the facts of what happened to Broom to anyone and the cruelty of it is apparent. It was not an unforeseeable accident. Ohio uses lethal injection as its only means of execution. It was known from problems in earlier executions that there are problems with establishing the required IV lines that did and will result in the condemned prisoner suffering. Using a method of execution that predictably, but arbitrarily as to which victim, will result in the cruelty Broom suffered does not meet the requirements of the Eighth Amendment or Due Process. The random selection of those who will receive death was rejected in Furman v. Georgia, 408 U.S. 238 (1972). So too should the random imposition of the cruelty Broom suffered be rejected.

The Ohio Supreme Court failed to recognize and apply modern Eighth Amendment standards as applicable in this unique context, and by placing improper reliance on the archaic Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947), failed to afford Broom the protection modern day standards of decency require.

**B. The Ohio decision rests on the plurality opinion in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) even though changes in the reach of the Eighth Amendment have since been recognized by this Court and standards of decency have evolved such that Resweber no longer sets the constitutional standard for evaluating the cruel and unusual nature of a failed execution attempt.**

The Ohio Supreme Court relied on Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947), to hold that what was done to Broom on September 15, 2009 was not cruel and unusual and that "the pain and emotional trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment." Broom, 146 Ohio St. 3d at 71.

Resweber addressed the failed execution by electrocution of 17 year-old Willie Francis and Louisiana's plan to try again to carry out the execution. [2] The Resweber plurality agreed that the Eighth Amendment was not applicable to the states, 392 U.S. at 462, n.2, but assumed applicability for purposes of discussion. Id. at 462. They also assumed that "the state officials carried out their duties under the death warrant in a careful and humane manner," found "no suggestion of malevolence" and said that "nothing in what took place [in the first attempt to execute Willie Francis] . . . amounts to cruel and unusual punishment in the constitutional sense." Id. at 463. They held that the electric chair malfunction that caused the failed execution attempt was an "unforeseeable accident" and that Francis's situation was "just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block," id, and allowed Willie Francis's execution to go forward.

The four dissenters, also assuming the Eighth Amendment to be applicable, found that a

[2]For informative history on the Willie Francis case, see: A. Miller and J. Bowman, Death by Installments: The Ordeal of Willie Francis (Greenwood Press 1988) and G. King, The Execution of Willie Francis: Race, Murder, and the Search for Justice in the American South (Basic *Civitas* 2009).

second execution attempt would violate the Eighth Amendment. Id. at 473-74, 476, 477 (Burton, J., dissenting, joined by Douglas, J., Murphy, J., and Rutledge, J.). They condemned the "death by installments" that would be perpetrated with a second execution attempt. Id. at 474-75. They rejected the plurality's view that cruelty must be intentional, purposeful or malevolent to invoke the Eighth Amendment's protection, saying, "The intent of the executioner cannot lessen the torture or excuse the result." Id. at 477.

Francis's fate was decided by the single vote of Justice Felix Frankfurter. Justice Frankfurter did not decide the constitutional questions presented but voted not to grant relief because the Eighth Amendment was not then applicable to the states. Id. at 469, 470. He believed that "the penological policy of a State is not to be tested by the scope of the Eighth Amendment" and that the prohibition against cruel and unusual punishments was not one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Id. at 470.[3] Since the time Resweber was decided, this Court has determined that the Eighth Amendment is applicable to the states through the Fourteenth Amendment's Due Process Clause. Robinson v. California, 370 U.S. 660 (1962), Furman v. Georgia, 408 U.S. 238 (1972).

The Resweber decision, viewed under today's law, would prevent a second attempt to execute Broom. The Ohio Supreme Court's reliance on Resweber misconstrued present day Eighth Amendment values.

[3]Justice Frankfurter did not approve of Louisiana's choice to inflict a second attempt upon Francis – indeed, he was revolted by the state's "insistence on its pound of flesh." Resweber, 329 U.S. at 471 (Frankfurter, J., concurring). Following the Court's 5-4 decision, Frankfurter asked a prominent Louisiana attorney, his old Harvard classmate, to appeal to the Governor of Louisiana to spare Francis the second attempt. See A. Miller and J. Bowman, supra, Death by Installments at 123-30.

### C. Even under the Resweber plurality analysis, the attempted execution of Broom was cruel and unusual.

#### 1. What happened to Broom on September 15, 2009 was not an unforeseeable accident.

The Resweber plurality assumed the state officials acted "in a careful and humane manner" in their first attempt to execute Willie Francis. They found that no one was responsible for the "unforeseeable accident" that befell Francis. p. 464. The plurality's conclusion that the State of Louisiana was not to blame and that this absence of fault negated the seriousness of the first attempt to execute Francis was a significant aspect of their analysis. The court emphasized the accidental nature of Francis's ordeal mentioning it at least five times. p. 463, 464, 465. They said that "laws cannot prevent accidents." p. 465.

Broom's case does not involve an unforeseeable accident. The inherent perils of an execution process that was dependent for its completion on obtaining and maintaining IV access to the inmate's peripheral veins were entirely foreseeable to the State because similar problems with IV access had happened in Ohio's very recent past. Virtually the same medical team, in the three years before Broom's attempt, had experienced serious problems establishing and maintaining peripheral IV's during the executions of Joseph Clark and Christopher Newton

When the State executed Christopher Newton in 2007, the medical team needed approximately 90 minutes to establish two IV lines. State v. Broom, 146 Ohio St. 3d at 77 (French, J., dissenting). In Clark's 2006 case, the team was only able to establish and maintain one IV, in one of Clark's arms, and the decision was made to nevertheless attempt to deliver the execution drugs into that one arm (though the policy required IV's in two locations). Some moments after the drugs started flowing into the IV tubing, Clark sat up and said, five times according to media witnesses, "It don't work. It don't work." According to a media report: "Medical technicians returned and the curtain was closed at 10:37 a.m., blocking the view of

authorized witnesses, who later heard what they described as 'moaning, crying out and guttural noises.'" Alan Johnson, "'It don't work,' inmate says during botched execution," COLUMBUS DISPATCH (May 3, 2006).[4] It took more than 40 minutes for a new IV to be established and, during those 40 minutes, Clark was poked and stuck with at least 17-18 needles, including in his neck and head. An IV was eventually established in one of Clark's arms. The execution then proceeded, albeit again with only one IV site, and was completed. State v. Broom, 146 Ohio St. 3d at 77 (French, J., dissenting). See also Cooey (Biros) v. Strickland, 2009 U.S. Dist. LEXIS 122025, ** 17-32, 46-54, 92-96, 139-52, 173 (S.D. Ohio Dec. 7, 2009) ("Second Biros Injunction Order"), aff'd, Cooey v. Strickland, 589 F.3d 210 (6th Cir. 2009).

Following the Clark execution Ohio revised its execution protocol adding training requirements and vein checks. Expert witnesses in Ohio's lethal injection litigation suggested the adoption of a back-up plan for use in the event IV access could not be obtained or maintained, but the State didn't listen. Thus the protocol in place in September 2009 had no back-up plan and remained singularly dependent upon obtaining and keeping IV access to the inmate's peripheral veins to succeed.[5]

Yet, despite the singular importance of venous access, the team paid little attention to that

[4]Available at: https://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/articles/botchedcov/itdidntwork.pdf.

[5]Ohio's execution protocol has been changed several times since Broom's failed attempt. It was first changed effective November 30, 2009. See Second Biros Injunction Order at **207-14, 253-62. That change provided for use of a single execution drug, although that drug was still to be administered by the same medical team and still inserted via IV catheters into the inmate's peripheral veins. That protocol finally included a backup plan (or "Plan B") in the event the medical team was unable to establish and maintain IV's in the inmate's peripheral veins: to wit, an intramuscular shot of a large dose of the drugs hydromorphone and midazolam. Id. at **210. However, in 2015, Ohio abandoned the intramuscular injection. So, now, there is again no back-up plan, and completion is dependent upon obtaining and maintaining IV access to the inmate's peripheral veins. State v. Broom, 146 Ohio St. 3d at 79 (French, J., dissenting).

critical issue for Broom's execution. Team members were permitted to skip required training sessions. When problems with Broom's veins were discovered by the team in the hours before the execution, required vein checks were still skipped. Second Biros Injunction Order at **309.

The Ohio Supreme Court, though it said the cause of the execution team's failure was "unclear," found that "the state failed to follow the protocol in 2009" and recognized that "[s]trict compliance with the protocol will ensure that executions are carried out in a constitutional manner." Broom, 146 Ohio St. 3d at 73. Failing to follow the protocol designed to insure that a lethal injection execution renders the "quick and painless death," required by Ohio law, Ohio Rev. Code §2949.22(a), and approved in In re Kemmler, 136 U.S. 436, 443-44 (1890), is not an unforeseeable accident any more than is the fact that after the execution team fails to comply with training and vein check requirements of the protocol the execution goes awry. Ohio's execution team did not carry out its duties "in a careful and humane manner" and Broom's suffering was not an unforeseeable accident.

The Resweber plurality so strongly stressed the importance of the absence of foreseeability, the accidental nature of what happened to Francis, and the certainty that state officials carried out their duties in a careful and humane manner, that it is clear that their holding would be different in Broom's case. There was no careful adherence to the law for Broom. The foreseeability of the problems that occurred was established by a history of similar problems in past executions and by the State's multiple decisions not to comply with the protocol provisions adopted to avoid such problems.

**2. Broom was subjected to a more painful, physically invasive process than the one in Resweber.**

The physical and emotional pain endured by Broom was far greater than that suffered by Willie Francis. While pain is not the only factor in cruelty, the degree, duration, and frequency of

infliction must be. Broom suffered more and greater injuries and over a much longer period of time than did Francis.

Francis was prepared for execution and the witnesses were assembled. He was strapped into the electric chair, a hood was placed over his head, the switch was thrown and, after some number of seconds, when it became clear that the chair was not working, the execution was promptly stopped. Resweber, 329 U.S. at 460 (Reed, J. for the plurality). Before it was stopped Francis asked for the hood to be removed: "Take it off. Let me breath." Id. at 480 n.2 (Burton, J., dissenting). The hood was then removed, Francis was unstrapped from the chair, and he walked back to the nearby holding cell. Francis himself reportedly said to a jailer that the electric current had "tickled him." Id. The Governor of Louisiana issued a six-day reprieve. Id. at 460 (Reed, J. for the plurality).

Broom too was prepared for execution, spending the day before locked up in the single segregated cell of the death house undergoing periodic (though not all that were required) vein assessments, filling out paperwork for the disposal of his body, and saying good-bye to family and friends. When the time for the execution arrived, the death warrant was read, the witnesses assembled, the video feed for their viewing was started, and the execution began. But, by contrast to Francis's short ordeal, Broom was subjected to two hours of physical and mental torment with no expected end other than his eventual death. It was only at the end of those two hours that the Ohio governor issued a seven-day reprieve. Unlike with Francis, there is no question that the executioners inflicted substantial pain upon Broom. He suffered 18-19 painful wounds at multiples places on his body, his ankle bone was jabbed with a needle, he bled from his wounds, he cried in pain at times, he sobbed at other times. His bruises were still apparent three days later. And Broom was repeatedly hurt with more and more needle stabs into his swelling and bruised body.

### 3. Broom suffered prolonged and increasingly painful physical and emotional trauma in an out-of-control and lawless execution process

What happened to Broom was not a normal process that just took too long and was stopped before any harm was done. It was a process that was so out of control—literally lawless in the State's failure to follow the rules as set out in Ohio's execution protocol—that even the participant execution team members were distressed.

This highly unusual process was fraught with unusual behavior by the State actors. One team member left the chamber mid-process after an IV failed, responding "no" when asked if she was okay. The other medical members all needed and took more than one break. They were sweating and agitated. Team Member 9's reaction when the non-team member physician entered the room is telling: "I look up and she's present [in the holding cell]. And I'm like, dear God, what is she doing here?" "That is a question that requires an answer," wrote U.S. District Judge Gregory L. Frost, overseeing Ohio's lethal injection litigation. Cooey (Smith) v. Kasich, 801 F. Supp. 2d 623, 650 (S.D. Ohio 2011). Moreover, while the non-member physician was participating, no one supervised her. As Judge Frost found: "failing to exercise any oversight over that non-execution team member's activities in the execution house is inexcusable." Id.

As the process continued the pain inflicted on Broom increased with each attempt to establish IV lines, first from the multiple needle stabs, then from additional stabs into his already bruised and swollen arms, and next from stabbing a needle into his ankle bone. In the end the execution was stopped primarily out of concern for the execution team members' stress, frustration, and inability to establish and maintain IV lines. (T. Collins Depo. at 18, 20, 30-38, 60-72 (Exh. 11); E. Voorhies Depo. at 138 (Exh.12).) What the execution team members suffered in attempting to carry out the execution, Broom suffered a thousand fold, not only because he was the target of the execution attempt but also because he was the one suffering

repeated and increasingly painful wounds in the effort to bring about his death in an uncertain and out of control situation.

Under Ohio law and the common law, each needle stab constituted a separate battery. A "person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results." Love v. City of Port Clinton, 37 Ohio St.3d 98, 99 (1988); Stafford v. Columbus Bonding Ctr., 177 Ohio App. 3d 799, 810 (2008); Harris v. United States, 422 F.3d 322, 330 (6th Cir. 2005); Wayne R. LaFave, Criminal Law (3rd Ed.) West Group, St. Paul Minn. (2000) p. 736. Each needle stab in an execution is a battery with legal excuse. See Love, 37 Ohio St. 3d at 99. The Eighth Amendment cannot tolerate an execution process carried out by the infliction of 18 or 19 batteries. Even though it is done in the name of the law, it must still be done with humanity and comport with human dignity

And while the execution team members took breaks, Broom got no relief from the terror he was enduring. He was left to wonder when they would come back, how long would it go on, and, as the pain inflicted increased with each attempt to establish IV lines, what would they do to him next. Leaving Broom in this state of pain, uncertainty and fear in tandem with the increasingly painful efforts to kill him, was cruel. A punishment that "subjects the individual to a fate of ever-increasing fear and distress" violates the Eighth Amendment. Trop v. Dulles, 356 U.S. 86, 102 (1958).

### D. This case presents the rare opportunity to evaluate Eighth Amendment standards for the conduct of lethal injection executions in light of a real event with a surviving litigant.

The execution protocol used on Broom was supposed to avoid the recurrence of problems like those that arose in other Ohio executions, but the State failed to comply with the new execution protocol and the same thing happened again. But this time Broom lived to tell about his suffering and raise his constitutional claims.

Typically, the Court has only the opportunity to review the use of lethal injection in a prospective manner, at the instance of a condemned prisoner *who has not yet faced the challenged method*. Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (firing squad); In re Kemmler, 136 U.S. 436, 447 (1890) (electrocution); Baze v. Rees, 553 U.S. 35, 49 (2008) (lethal injection); Glossip v. Gross, 135 S. Ct. 2726 (2015) (lethal injection using midazolam). The question encountered in these cases is the forward-looking one of whether the inmate can show that, when applied to him, the method presents "a demonstrated risk of severe pain that is substantial when compared to the known and available alternatives." Baze, 553 U.S. at 49. These challenges, by inmates not yet exposed to the challenged method, turn on whether there is an "'objectively intolerable risk,' not simply the possibility of pain." Baze, 553 U.S. at 61-62 (citations omitted).

Diligent and detailed though the analysis may be in such cases, it still bears the weakness of distance and the uncertainty of when or whether the anticipated painful execution will take place. In Broom's case, however, that distance is not present and there is no uncertainty. Broom has already suffered severe pain, as the Ohio Supreme Court's factual findings confirm. And he suffered the mental trauma of undergoing the execution attempt. He thus presents the Court with the rare opportunity to evaluate Eighth Amendment standards for the conduct of lethal injection executions in light of a real event with a surviving litigant, and where actual facts, and not merely predictions about future "risks," are before the Court. The opportunity to assess the Eighth Amendment claim in the context of the actual human experience of the execution process is the difference between the account of a survivor versus an observer. The observer can describe appearances and what they imagine it might feel like. The survivor knows what it was. This unique perspective allows an insight into the true impact of the execution process on the human

being going through it and allows a fact-based, as opposed to speculative, assessment of its impact on human dignity.

### E. The appropriate remedy is to bar resumption of the execution attempt.

Broom has already undergone most of the execution process with the "superadded" penalty of multiple painful and unnecessary needle jabs including one into his ankle bone. What Broom endured at the hands of his would-be-executioners cannot be undone.

Turning Broom's execution into a two-stage process by engaging in a second attempt, as the State of Ohio proposes to do, will not change the fact that Broom's execution has already been cruel and unusual and cannot be continued. Broom cannot receive the equivalent of jail time credit for the part of the execution process that he has already experienced. Allowing the State to continue, even in a more humane way, with Broom's execution will not cure what went before. Broom can die only once. Execution in stages would make that single death into a lingering death that is constitutionally prohibited. Weems v. United States, 217 U.S. 349, 401 (1910). The cruel and unusual nature of the first stage of Broom's execution requires that the process be permanently stopped.

## II. WHETHER OR NOT THE FIRST ATTEMPT TO EXECUTE BROOM VIOLATED THE EIGHTH AMENDMENT, A SECOND ATTEMPT WOULD DO SO.

Broom's claim that any further attempt to complete his execution is constitutionally prohibited does not hinge on whether the first attempt violated the cruel and unusual punishments clause of the Eighth Amendment. Broom believes that the first attempt to execute him was cruel and unusual and that that cruelty carries over into any further attempt, but whether or not the first attempt violated the Eighth Amendment, a second attempt would.

### A. The first attempt will always be part and parcel of any further effort to carry out Broom's execution.

Because he endured the process on September 15, 2009, Broom cannot face a second execution attempt as if it were the first. He 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.

The Resweber plurality said the failed attempt to execute Francis was no different than an unrelated "other occurrence," such as a cell fire that involved "anguish and physical pain." Resweber, 329 U.S. at 464. Evolving standards of decency, advances in psychology, and common human experience show that this is not true.

What Broom suffered—"[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, ($5^{th}$ Ed.) American Psychiatric Association (2013), Sec. 309.81. And though his death was the intended outcome, what Broom suffered was no different than a mock execution – a recognized form of torture. D. Miller, Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action, 17 Geo. Immigr. L.J. 299, 320 (2003). Where the Resweber plurality thought that every trauma is alike and one traumatic experience has no impact on future experiences, we now know this is not true. Since the Resweber decision, we as a society, and psychiatry as a discipline, "have learned an enormous amount . . . about the impact and manifestations of trauma." Bessel van der Kolk, M.D., THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA at p. 21, Penguin Random House, New York, New York (2014). Contrary to the Resweber Court's view, trauma is not an event that dissipates

when the traumatic event ends. "We have learned that trauma is not just an event that took place sometime in the past: it is also an imprint left by that experience on mind, brain, and body." Id.

A second execution attempt after the events of September 15, 2009 is not the same as a first execution attempt after some unrelated accident. The character of a traumatic event deeply influences its psychological impact. And the passage of time does not eliminate the impact of the trauma. "While specific, trauma-related symptoms seem to fade over time, they can be revived, even years after the event, by reminders of the original trauma." Judith Herman, M.D., TRAUMA AND RECOVERY at p. 48, Basic Books, New York, New York (1992) (reprinted 2015). Putting Broom in the same situation—another execution attempt—in which he suffered unnecessary pain and psychological trauma, is cruel and unusual.

What Broom endured—nearly two hours of pain, uncertainty, and fear— compared to the short time suffered by Willie Francis, deepened the traumatic effect on Broom. "The most powerful determinant of psychological harm is the character of the traumatic event itself. . . . There is a simple, direct relationship between the severity of the trauma and its psychological impact, whether the impact is measured in terms of the number of people affected or the intensity and duration of harm." TRAUMA AND RECOVERY at p. 57. (emphasis added). As the Resweber dissent observed, it might be difficult to draw the line where cruelty begins between a second and a fifth attempt, but it is not difficult to draw the line between the first and any other attempt. Id. at 476.

### B. Glossip and Baze do not set the standard for determining the constitutionality of a second execution attempt.

Though it recognized that Broom's case did not "concern Ohio's chosen method of execution," the Ohio Supreme Court determined that the way to decide whether a second attempt was cruel and unusual was to decide, under Glossip and Baze, whether "the state is likely to

violate its execution protocol in the future." Broom, 146 Ohio St. 3d at 70, 72. By adopting this inapplicable standard, the Ohio court avoided giving any consideration to what happened on September 15, 2009 in deciding whether another execution attempt would be cruel and unusual.

Broom is not challenging Ohio's execution method. He is instead claiming that, in light of what went before, any further attempt to execute him would be cruel and unusual. Adopting a standard for reviewing his claim that eliminates the basis of his claim – the conditions that give rise to it – ignores the core of the constitutional violation from which Broom seeks relief. That is, that under the unique circumstances of this case – specifically the prior efforts to kill him – any continued effort to carry out his execution would be cruel and unusual. Even the Ohio Supreme Court recognized that such a situation could arise (second attempt does not result in "per se" violation of the Eighth Amendment), but then it failed to consider whether Broom's was such a situation.

### C. Even under Glossip and Baze, a second execution attempt would be cruel and unusual.

Applying Glossip and Baze, the Ohio Supreme Court said, "it is Broom's burden to establish that he is likely to suffer severe pain if required to undergo a second execution." Broom, 146 Ohio St. 3d at 72. The court then noted that Ohio had adopted a new protocol and that several executions had been carried out under it.[6] But, as the dissent noted, the procedures for establishing IV lines were not changed in the new protocol. Id. at 79. Broom still has the same veins and Ohio still uses the same non-doctor medical team members to access them. Ohio's past failure to meet its duty to carry out Broom's execution in a humane way creates an "objectively intolerable risk" that the same thing—and the same or greater pain—will happen

[6]At least one of those executions did not go smoothly. On January 16, 2014 Dennis McGuire took 26 minutes to die using the then new drug combination of hydromorphone and midazalom. See State v. Broom, 146 Ohio St. 3d at 81 n.6 (O'Neill, J., dissenting).

again because the procedures that went wrong the first time have not been changed. Baze, 553 U.S. at 50.

Moreover, forcing Broom to face the intolerable risk that he will suffer again what he went through before, or worse, does not comport with human dignity or societal values. Trop v. Dulles, 356 U.S. 86 (1958); Furman v. Georgia, 408 U.S. 238 (1972). The people of Ohio have entrusted the State to impose in their names the death penalty. When the State fails in that job, societal values of fairness, responsibility, and humanity preclude another attempt.

## III. A SECOND ATTEMPT BY THE STATE OF OHIO TO EXECUTE ROMELL BROOM, AFTER THE FAILURE OF THE FIRST ATTEMPT, WOULD VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

This Court need not conclude that a second attempt would be unconstitutionally cruel under the Eighth Amendment in order to grant Broom relief. That is because, under the circumstances here, the prohibition against double jeopardy, as applied to a sentence of death, also bars the State from making a second attempt to execute Broom. The double jeopardy bar is particularly appropriate to prohibit a second attempt when the first attempt subjected the inmate to intense pain and suffering—regardless of whether that pain and suffering rises to the level of an Eighth Amendment violation.

In rejecting Broom's double jeopardy claim, the Ohio Supreme Court accepted as a given that double jeopardy protection is applicable to the exceedingly rare situation of a second execution attempt. However, relying on its interpretation of Ohio's lethal injection statute, the Ohio court determined that Broom's execution on September 15 had not progressed far enough that day for "jeopardy" to have "attached," because the drugs had not yet started to flow. Broom, 146 Ohio St. 3d at 66 ("[B]ecause the attempt did not proceed to the point of injection of lethal drugs into the IV line, jeopardy never attached.").

The Ohio court is correct that double jeopardy applies to Broom's case, but

fundamentally wrong in its reliance on an interpretation of a state statute in determining the purely federal issue of jeopardy's attachment. Under governing federal principles, and for all purposes relevant in the multiple punishments context involving a failed execution attempt, jeopardy "attached" no later than the point when, under all the facts and circumstances of the first attempt, Broom had the legitimate expectation of finality in the completion of his death sentence that day. Broom had no hope of leaving the death house alive, just as none of his fellow inmates had done in Ohio's 32 lethal injection executions before his. And for two hours Ohio tried to execute him. Because Broom was well beyond the point of legitimate expectation of imminent death, and was made to endure intense pain and suffering, a second attempt to execute Broom is barred by double jeopardy.

### A. General principles of double jeopardy in the context of multiple punishments.

The double jeopardy clause of the federal constitution "protects against three distinct abuses: [1] a second prosecution for the same offense after acquittal; [2] a second prosecution for the same offense after conviction; and [3] **multiple punishments for the same offense**." United States v. Halper, 490 U.S. 435, 440 (1989) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (emphasis supplied)). See also United States v. DiFrancesco, 449 U.S. 117, 129 (1980). Broom's case involves the protection against "multiple punishments."

The aspect of double jeopardy proscribing multiple punishments has "deep roots in our history and jurisprudence." Halper, 490 U.S. at 440. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." Ex parte Lange, 85 U.S. (18 Wall.) 163, 168 (1873). See also In re Bradley, 318 U.S. 50, 51 (1943). No case has overturned this fundamental precedent.

The theory of double jeopardy, applicable most directly in the multiple punishments context, is that a person must not be required to run the gauntlet more than once. North Carolina v. Pearce, 395 U.S. at 727 (Douglas, J., concurring). Applicable too is the principle that all or part of a maximum permissible punishment, having been once endured, need not be endured again for the same offense. Where part of a punishment has been already served, it must be fully credited upon another punishment for the same offense. North Carolina v. Pearce, 395 U.S. at 717. And, once a sentence has commenced and there is a legitimate expectation in its finality, the sentence may not later be increased or augmented. See, e.g., United States v. DiFrancesco, 449 U.S. at 127-28, 134-38; United States v. Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987) (Bork, C.J.). See also United States v. Benz, 282 U.S. 304, 307 (1931); Reid v. Covert, 354 U.S. 1, 37-38, n. 68 (1957).

### B. Double jeopardy is implicated when a state seeks a second chance to carry out an inmate's death sentence after the state's first attempt on that same inmate had failed.

Application of double jeopardy's prohibition against multiple punishments rarely arises in the context of death sentences, and for obvious reasons. When executions in this country are attempted they are overwhelmingly successfully completed, such that it is beyond rare for courts to be presented with an inmate seeking to bar a second attempt. Accordingly, Broom is aware of two such cases in this country's history: his own, by lethal injection, and Willie Francis's, by electrocution.

Yet, despite the rarity of the issue, Broom's unique situation fits squarely within the scope of double jeopardy's multiple punishments jurisprudence—especially given the pain and suffering he unquestionably endured on September 15, 2009. As a result of the first attempt, Broom has already been punished up to the last moment under a death warrant that said, in effect, "You shall suffer death by lethal injection on September 15, 2009." All that a death-

sentenced prisoner must endure up to the brink, and more, has already been endured by Broom; he has suffered the worst of a "botched" execution, and the State wants a second chance despite no assurance of future success in establishing the vein access necessary for execution. Permitting the State to expose Broom to another execution attempt under a new warrant would be doubling his punishment, and with no "credit" for what he's already endured.

The plea that double jeopardy prohibits the government, for the same offense, to force the condemned prisoner to twice endure all that the infliction of a death sentence entails, because the government failed in its first attempt to complete the sentence, is perhaps the paradigm of double jeopardy's prohibition against multiple punishments. It is the rarest, but most perfect, example. The one that most directly implicates the principal concerns about punishing twice for the same offense: being forced into a continuing state of anxiety, insecurity, and fear; the increase or augmentation of the punishment's severity after it was imposed and after much of it had already been served; the inability to "give back" or "credit" punishment already served once, especially where that punishment included traumatic pain and suffering; and not being compelled to run the gauntlet twice. See, e.g., Pearce, 395 U.S. at 727 (Douglas, J., concurring); Green v. United States, 355 U.S. 184, 187-89 (1957). To force a man to prepare for his death—not once but twice—and the second time with the full knowledge of the error of the first, is an elevation of punishment repugnant to our constitution.

Given these interests at stake, it is no surprise that, in both Willie Francis's case and in Broom's, the highest reviewing courts recognized that double jeopardy principles are implicated. They were correct to do so because the prohibition against double jeopardy in the U.S. Constitution is plainly implicated whenever the government seeks to compel a condemned inmate to endure a second execution attempt after the first attempt failed.

In Resweber the four Justices in the plurality opinion noted the obvious double jeopardy

implications of a second attempt on Willie Francis *as their first point*: "First. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense." Resweber, 329 U.S. at 462 (citing Ex parte Lange, 85 U.S. (18 Wall.) at 168, 175 and In re Bradley, 318 U.S. 50). These Justices did *not* conclude that double jeopardy was not implicated by the second attempt, and they assumed, without deciding, that a violation of double jeopardy would also violate the due process clause of the Fourteenth Amendment.

Instead, the Justices concluded that double jeopardy rights were not *violated* because they were bound by the Court's then recent landmark decision in Palko v. Connecticut, 302 U.S. 319 (1937) (Cardozo, J.). Palko was directly analogous to Francis's case: it involved multiple attempts by a state government to *obtain* a death sentence, whereas Resweber involved multiple attempts to *carry out* a death sentence. In the first attempt at issue in Palko, the capitally accused was acquitted of first-degree murder and received a life sentence for second-degree murder. The state appealed, arguing errors at trial, and won reversal and a new trial, i.e., a second attempt. On its second attempt, the state succeeded in obtaining a first-degree murder conviction and sentence of death. The Palko Court rejected the defendant's argument that the prohibition on double jeopardy applies to the states through the Fourteenth Amendment, and concluded that the "kind of double jeopardy" to which Mr. Palko was subjected is not a "hardship so acute and shocking that our polity will not endure it." Palko, 302 U.S. at 328.

As a result, the Resweber plurality held that, "so far as double jeopardy is concerned, the Palko case is decisive" of Francis's double jeopardy claim too. Reasoning, "[f]or 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." Resweber, 329 U.S. at 463. Just as Palko found double jeopardy principles not to be violated when a state subjects the capitally accused to multiple trials until

such time as "there shall be a trial free from the corrosion of substantial legal error," so too could a state make the condemned prisoner endure multiple execution attempts until the proceeding occurs without error.

Palko, of course, was ultimately overruled in 1969 in Benton v. Maryland, 395 U.S. 784 (1969). Benton held that the double jeopardy clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, thus upending the principal justification underlying the plurality's rejection of Willie Francis's double jeopardy claim. After Benton, double jeopardy precludes states from making multiple attempts to secure death sentences where the first attempt produced an acquittal on the death-eligible offence. Had Benton been the law in 1947, Willie Francis's analogous double jeopardy claim may well have been decided differently.

The Ohio Supreme Court below, like the plurality in Resweber, also recognized that double jeopardy is implicated in a no-multiple-attempts claim like Broom's. The Ohio court did *not* hold that double jeopardy was inapplicable in this setting. Broom, 146 Ohio St. 3d at 65-66. Instead, the court considered whether or not jeopardy had "attached," concluding that it had not quite yet done so, based on its review of Ohio's lethal injection statute for when "lethal force" actually begins, as distinguished from the "necessary preliminary steps" to such lethal force. Id. Although the Ohio court is wrong in its analysis of jeopardy's attachment, the court is correct that double jeopardy is implicated in this unique setting.

### C. Double jeopardy bars a second execution attempt where, under all the facts and circumstances of the first attempt, the inmate had a reasonable expectation that his death would be imminently inflicted during that attempt.

Broom's constitutional right not to be subjected to double jeopardy is squarely implicated by the State's attempt to proceed with a second execution attempt after the first one failed. The issue thus becomes the proper application of double jeopardy's principles in this extraordinary

setting, the first case presenting the multiple-attempt issue of Willie Francis's case since Palko was overruled.

**1. The scope of double jeopardy, including its attachment, are issues of federal, not state, law.**

Federal law, not state law, determines the scope of the constitutional protection against double jeopardy, including the issue of jeopardy's "attachment." In Crist v. Bretz, 437 U.S. 28 (1978), the Court held that the federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy, and that it controls in the face of a contrary state "attachment" rule. Id. at 38.

More recently, the Second Circuit addressed these issues in determining whether a defendant had been placed in jeopardy in state court for purposes of that defendant's federal habeas challenge to being tried twice for the murder of a witness. The court held that the "attachment" issue is one of federal law:

> On de novo review of whether jeopardy attached at an initial state criminal proceeding, neither the state court's decision, nor the state law on which it relies, binds this court. As we stated in Boyd v. Meachum, 77 F.3d 60 (2d Cir. 1996), "[t]he contours of the Fifth Amendment's guarantee against double jeopardy are indisputably federal," and "a federal constitutional right, to have any constant and discernible substance, cannot turn on the vagaries of state procedural definitions," id. at 65 (internal quotation marks omitted).

Hoffler v. Bezio, 726 F.3d 144, 156 (2d Cir. 2013). See also Missouri v. Hunter, 459 U.S. 359, 368 (1983). Accordingly, federal law governs double jeopardy issues.

**2. When does jeopardy attach in this unique context?**

Federal law determines when jeopardy attaches, not Ohio law. As it relates to barring multiple punishments for the same offense in *noncapital* sentencing,

> the application of the double jeopardy clause . . . turns on the extent and legitimacy of a defendant's expectation of finality in

> that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause. If, however, there is some circumstance which undermines the legitimacy of that expectation, then a court may permissibly increase the sentence.

United States v. Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987). See also DiFrancesco, 449 U.S. at 139; Commonwealth v. Kunish, 529 Pa. 206, 213, 602 A.2d 849, 852 (1992). Whether a defendant has a legitimate expectation of finality in a sentence is the analytical touchstone for double jeopardy analysis in the multiple punishments context, and it depends on whether he believed his service of the sentence was final and the legitimacy of that expectation. Once jeopardy attaches, double jeopardy bars the sentence from being increased or augmented. See, e.g., Fogel, 829 F.2d at 87; People v. Williams, 14 N.Y.3d 198, 216, 899 N.Y.S.2d 76, 86 (2010); Cardwell v. Commonwealth, 12 S.W.3d 672, 675 (Ky. 2000) ("jeopardy only attaches to a sentence if the defendant has a legitimate expectation of the finality of that sentence").

These principles of "expectation of finality" and "attachment of jeopardy" provide a pragmatic rule of attachment in the unique context of a second execution attempt, one that is sufficiently robust to protect against the evils of multiple punishment forbidden by the double jeopardy clause. Under federal law, in the multiple punishments context of a once-attempted death sentence, jeopardy attaches when the failed execution has progressed at least to the point where, under all the facts and circumstances of the attempt, the inmate had a legitimate expectation that his death would be imminently inflicted during that attempt. That legitimate expectation should always be found to exist when the executioners have inflicted substantial physical pain and suffering upon the inmate in the process of accomplishing their task, and regardless of whether that pain and suffering rises to the level of an Eighth Amendment violation. If the first attempt had progressed up to or beyond that point, and the inmate is not ultimately executed during that attempt, then a subsequent attempt is barred by double jeopardy.

See generally Serfass v. United States, 420 U.S. 377, 388 (1975) (observing that the concept of "attachment of jeopardy" defines a point in criminal proceedings at which the purposes and policies of the Double Jeopardy clause are implicated).

An attachment rule that focuses on whether the inmate had, during the first attempt, the reasonable expectation that his death would be imminently inflicted is proper for at least four reasons: (1) it provides the essential fact-based assessment of what the inmate *actually experienced*, (2) it is necessary to sufficiently protect the interests the double jeopardy clause addresses in the multiple punishments context, (3) it avoids exalting form over substance, and (4) it ensures that only legitimate multiple-attempts claims are entitled to relief.

**1. A fact-based assessment is essential**. Resolution of the double jeopardy issue in this context requires a fact-based assessment of what the inmate actually experienced during the first attempt. When did the attempt begin? How long did it last? How far did it progress? Was the inmate subjected to pain and suffering during the attempt? Why was it stopped and by whom? These questions, and more, are essential to know the experience through which the inmate passed, and the legitimacy of the resulting expectations he formed as to the imminence of his death.

**2. A focus on the inmate's legitimate expectations is necessary to protect the interests at stake.** A fact-based assessment of legitimate expectations resulting from the inmate's unique experience is necessary to properly address the double jeopardy interests at stake in this setting. The experience of being brought to the brink of death during an execution is an ordeal the constitution should not compel a condemned prisoner to endure twice. The double jeopardy clause protects against the continuing state of anxiety, insecurity, and fear to which an inmate will be subjected if forced to repeat that experience. On the other hand, an inmate whose first attempt did not place him in legitimate expectation of imminent death, or such claimed

expectation was unreasonable, may stand on a different footing.

**3. It does not exalt form over substance**. The principal deficiency in the Ohio Supreme Court's approach—whether the drugs started to flow or not—is that it exalts form over substance, ignores the inmate's actual experience, and does not protect the interests at stake. Depending upon the facts, a legitimate expectation of imminent death can be formed with or without drugs actually starting to flow. It is the *substance* of the inmate's unique experience, not the formulaic point of whether drugs started or not—or, in other contexts, whether a bullet actually left the gun, or electricity actually touched the subject—that is determinative.

Indeed, an inmate whose execution progressed as Broom's did—with dozens of painful needle insertions, intense physical and psychic pain, the team taking breaks, and no end in sight for two hours—implicates double jeopardy interests equally as much as does an inmate whose execution proceeded promptly and smoothly to include administration of some part of the barbiturate, only to be stopped with the inmate "peacefully" asleep but not dead. Under the Ohio state court's approach, jeopardy attaches for that latter inmate because drugs started to flow, but it does not attach for Broom even though he stands in exactly the same position in all material respects, and his expectation of imminent death was equally legitimate under the circumstances.

4. **The rule isolates invalid claims**. Because it focuses on the inmate's *legitimate* expectations, the rule isolates invalid claims. An 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. Nor could a person for whom the execution process never actually commenced, i.e., never went beyond the reading of the death warrant and beginning of the video transmission to witnesses.

The line of legitimate expectation will almost always be crossed, however, once the death warrant has been read, the video feed has begun, the executioners have taken physical control of

the condemned prisoner's body, and they have actually started to invade his body with the instruments of execution. And it is *always* crossed, Broom submits, when the executioners in the course of their task inflict substantial pain and suffering upon the inmate, regardless of whether that pain and suffering violates the Eighth Amendment.

### D. Under all the facts and circumstances of the first attempt, Broom had a reasonable expectation that his death would be imminently inflicted during that attempt, thereby barring the State from making a second attempt.

Under all the facts and circumstances of the first attempt on September 15, 2009, Broom had the legitimate expectation that his death would be imminently inflicted during that attempt, and thus jeopardy "attached" as to his death sentence.

The facts establishing Broom's legitimate expectation are undisputed, and have been addressed throughout this brief. They include: (1) the warden read the death warrant to Broom, which was the solemn announcement that the execution was underway; (2) the video feed to the assembled witnesses began; (3) the execution team members took control of Broom's body, and Broom surrendered to their authority and allowed them to do their jobs; (4) the medical team members invaded Broom's body with needles—sticking him multiple times for almost two hours—in attempts to establish the required IV lines; (5) the medical team members took breaks and even brought in others to assist, all in further efforts to complete the task; (6) the attempt went on for so long, and was so painful and traumatic, that Broom bled from many of his wounds, he was sweating, and he sobbed; (7) as the attempt went into its second hour, Broom was denied the opportunity to see his attorney; (8) throughout the attempt, there was no outcome expected for Broom other than his death that day; (9) no execution in Ohio had ever begun and not been completed; (10) only after some 2 hours did the governor intervene to stop the failing attempt, yet even then Broom was informed he would have to endure it again in one week.

Any person in Broom's position, on these facts, would have the legitimate expectation that his death was imminent. The requirement of a legitimate expectation of imminent death is satisfied here solely by the fact that the executioners inflicted so much physical pain and suffering upon Broom in doing their task, and regardless of whether that pain and suffering rises to the level of an Eighth Amendment violation (although it did rise to that level here).

Jeopardy thus attached as to Broom's service of his death sentence, and was terminated when the State discontinued the execution. His sentence may not now be increased or enhanced by requiring him to live through it all over again. Any subsequent attempt is thus barred by the double jeopardy clause made applicable to the states by the Fourteenth Amendment.

## CONCLUSION

For all of these reasons, and in the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully Submitted,


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