

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	CASE NO.: 12-0852
)	
Plaintiff-Appellee,)	On Appeal from the Court of Appeals of
vs.)	Ohio, Eighth Appellate District,
)	Cuyahoga County
)	
ROMELL BROOM,)	
)	Court of Appeals Case No. 96747
Defendant-Appellant.)	
)	

AMENDED MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ROMELL BROOM

(This is a Postconviction Death Penalty Case - No Execution Date)

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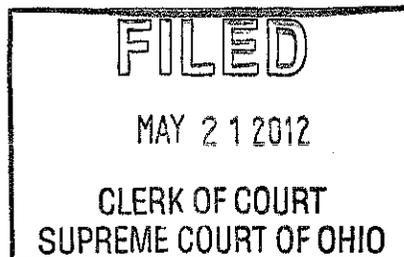


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EXPLANATION OF WHY THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A CASE OF GREAT GENERAL AND PUBLIC INTEREST

The experience through which Romell Broom passed on September 15, 2009 – surviving an execution attempt that started and then failed through no fault of his own and to then be informed that the State will try again – is a singularly rare occurrence. Since the resumption of capital punishment in Ohio with Wilfred Berry's execution in 1999, no inmate besides Broom has survived a failed execution attempt, and Broom is unaware of any other Ohio inmates in the 20th century that survived a failed attempt. Nationwide, Willie Francis in 1946 is the only reported case, and Broom is unaware of any others. The universe of litigants in the U.S. with claims like Broom's over the past century is thus two: Willie Francis and Romell Broom. The fact that the situation in which a second execution attempt might be made is rare does not diminish the importance of the issues at stake.

A society is judged by the way in which it treats its most despised members. The standard set in the meting out of punishment is the baseline by which justice in all aspects of the legal system will be viewed. This case presents a situation that, though factually discrete, casts light upon the entire criminal justice system. If shoddy practices are ignored in the most serious of government activities - carrying out a sentence that ends the life of one of its citizens - what level of inaccuracy is being tolerated in the rest of the system? Once the phrase "close enough for government work" was a reference to high quality and integrity. In current usage it is a tongue-in-cheek acknowledgment of government failure to meet acceptable standards. The way in which a capital sentence is carried out should not lend validity to doubt and distrust of the legal system or its mechanisms.

The evolving standards of decency that inform the Eighth Amendment, the assurance that no person will be placed twice in jeopardy for the same offense, should not be undermined to validate a second attempt to execute Romell Broom. The Ohio General Assembly's promise that those

sentenced to die in Ohio's criminal justice system face only a quick and painless death at the State's hands should not be treated like an inconvenient white lie than can be ignored when it suits the needs of the moment.

If the State of Ohio is to continue to have a death penalty, the people of the state must know that it is carried out humanely and in conformity with the legislature's promise that it will be quick and painless. Whether the state meets its obligations in the use of the death penalty and what remedy applies when it fails to do so are matters of great general and public interest. Review of this case should be granted.

STATEMENT OF THE CASE

On September 15, 2009, the State of Ohio attempted to execute Romell Broom, but failed through no fault of Broom's. The procedural history that led to that day is as follows.

Trial and sentencing

Romell Broom, an African-American man, was charged in 1985 with the kidnapping, rape, and aggravated murder of Tryna Middleton the previous autumn. He was convicted and sentenced to death. He has always maintained, and still maintains, his innocence.

Direct Appeal

Broom's convictions and sentences were affirmed on appeal. State v. Broom (July 23, 1987), Cuyahoga App. No. 51237, 1987 WL 14401. This Court denied relief. State v. Broom, 40 Ohio St. 3d 277 (1988), cert. denied, Broom v. Ohio, 490 U.S. 1075 (1989).

State Postconviction Relief and Public Records Litigation

Broom sought state postconviction relief under §2953.21. At the same time he pursued additional information under Ohio's public records law, §149.53. Broom obtained some of the public records he was seeking and was awaiting the production of the balance when this Court issued its decision in State ex rel. Steckman v. Jackson, 639 N.E.2d 83 (1994), holding that, "A defendant in a criminal case who has exhausted the direct appeals of her or his conviction may **not** avail herself or himself of [the Ohio public records statute] to support a petition for post-conviction relief." Id. syllabus 6. Broom had not at that time filed his Brady claim. Broom's postconviction counsel later testified that he understood the Steckman decision to bar the use of public records to support a postconviction petition. The Ohio courts understood Steckman in the same way as did Broom's counsel. See, e.g., State v. Storer, 1994 Ohio App. LEXIS 5210, *4-5 (Nov. 4, 1994) (rejecting any use of public records to support PCR petition).

Broom was denied postconviction relief by the trial court on April 24, 1997. The appellate court affirmed on May 7, 1998. State v. Broom, Case No. 72581, 1998 WL 230425 (Cuyahoga Cty. App. May 7, 1998). This Court declined review. State v. Broom, 83 Ohio St. 3d 1430 (1998).

Federal Habeas Corpus

Thereafter, Broom sought a writ of habeas corpus in federal court and filed, among others, a Brady claim based on the public records he had received pre-Steckman. Also based on those records he sought and was granted discovery and an evidentiary hearing. In that process Broom obtained an additional 145 pages of discoverable materials that supported his Brady claim. The State argued that none of the materials that supported Broom's Brady claim could be used based on its theory that Broom's claim had been defaulted because Steckman did not clearly bar their use in state postconviction.

The federal district court found Broom's Brady claim to be defaulted, although recognizing its possible merit. The court found Steckman's prohibition "not so clear" as to prevent Broom from making an "attempt" at using the sixteen pages to support a successor or amended postconviction petition. The court found that it could not determine with certainty whether or not Steckman precludes the use of public records. The court said that "Steckman may not bar" the use of public records under the circumstances in Broom's case. Broom v. Mitchell, N.D. Ohio, Case No. 1:99 CV 0030 (Aug. 28, 2002).

On appeal the Sixth Circuit noted that the district court found the law "unsettled" and itself found the Steckman rule suffered from ambiguity. Broom v. Mitchell, 441 F.3d 392 (2006). Based on the perceived ambiguity, the court agreed with the district court that the Brady claim was defaulted because Broom had not tried, after Steckman, to use the public records in his state postconviction proceeding.

Broom's Second Postconviction Petition

Broom filed, on August 16, 2007, a second petition for postconviction relief arguing that as a result of Steckman he had been unavoidably prevented from raising his Brady claim based on public records. On March 17, 2008, the trial court adopted the Sixth Circuit's reasoning and held that the claim was defaulted because Broom had not attempted to use the records post-Steckman.

The appellate court reversed in an opinion issued on July 30, 2009. State v. Broom, 2009 Ohio 3731 (Ohio App. July 30, 2009). The court held that there was no ambiguity about the reach of Steckman at the time Broom was in his first state postconviction proceedings and that any ambiguity that had arisen occurred in response to its 2003 decision in State v. Larkins, 2003 Ohio 5928 (2003). The court noted that its decision, cited by the Sixth Circuit as the source of ambiguity, State v. Apanovitch, 107 Ohio App. 3d 82 (Cuyahoga App. 1995), addressed a situation in which the petitioner had filed his postconviction claim based on public records before the Steckman decision was announced. Id. at 97.

The State sought reconsideration and upon losing that effort sought, on August 31, 2009, discretionary review in this Court. The Court accepted jurisdiction on September 2, 2009, and scheduled expedited briefing, with all briefing to be completed by September 9, 2009. Broom's requests for oral argument and for a normal briefing schedule were denied.

On September 11, 2009, this Court reversed the appellate court's decision that Broom is entitled to raise his Brady claim based on public records "in a successive petition," without deciding whether Steckman would have prohibited or permitted his use of the public records he had acquired in 1993-94 in a post-Steckman amendment to his petition or a post-Steckman successor petition. State v. Broom, 123 Ohio St. 3d 114 (2009). Broom sought reconsideration on September 21, 2009. Reconsideration was denied on November 4, 2009.

The U.S. Supreme Court denied *certiorari* on September 14, 2009. Broom v. Ohio, 130 S. Ct. 46 (2009). Rehearing was denied on September 15, 2009.

Federal Rule 60(b) litigation

Broom filed a motion in the federal district court under FRCP 60(b) seeking relief from the district court's earlier judgment denying habeas relief. The motion was denied on September 14, 2009. Broom v. Mitchell, N.D. Ohio, Case No. 1:99 CV 0030 (Sept. 14, 2009).

Broom appealed to the Sixth Circuit. A panel of that court affirmed on September 14, 2009. Broom v. Mitchell, Case No. 09-4125, Order (6th Cir. Sept. 14, 2009). Broom sought *en banc* review, which was denied by the Sixth Circuit on September 15, 2009, at approximately 12:30 P.M. Broom v. Mitchell, Case No. 09-4125, Order (6th Cir. Sept. 15, 2009).

Litigation following the execution attempt on September 15, 2009

The State of Ohio proceeded with its plan to execute Broom on September 15, 2009. The execution attempt failed through no fault of Broom's. After more than 2 hours of the execution attempt, Governor Ted Strickland issued a one-week reprieve.

Broom filed a petition for habeas corpus in the Ohio Supreme Court on September 18, 2009. This was voluntarily dismissed without prejudice on November 9, 2009.

Broom also 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, and that court granted a preliminary injunction staying Broom's execution scheduled for September 22, 2009. On August 27, 2010, the federal district court dismissed without prejudice Broom's claims raised under the Fifth, Eighth, and Fourteenth Amendments, that the State could not attempt to execute him a second time, holding, as to those "no multiple attempts" claims, that they were more properly raised in the context of a habeas corpus action and not in an action under §1983. 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 other constitutional claims in his §1983 action, including those based upon the denial of equal protection and denial of his rights to counsel (and those claims are still pending).

Broom again filed a petition for a writ of habeas corpus in this Court as to his "no multiple attempts" claims. On December 2, 2010, this Court dismissed with a four word entry: "Sua sponte, cause dismissed." In re Broom, 127 Ohio St. 3d 1450 (2010). The U.S. Supreme Court denied certiorari on May 2, 2011. Broom v. Bobby, 179 L. Ed. 2d 1193 (2011).

Broom on September 15, 2010, filed a petition for postconviction relief under ORC §§2953.21 and 2953.23 and for declaratory relief in the Cuyahoga County Court of Common Pleas. Broom alleged four claims for relief in his petition:

FIRST CLAIM FOR RELIEF

ANY FURTHER ATTEMPTS TO EXECUTE ROMELL BROOM WILL VIOLATE THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENTS AND THE OHIO LAW REQUIRING THAT EXECUTIONS BE QUICK AND PAINLESS: EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ART. I, SEC. 9, 10, AND 16 OF THE OHIO CONSTITUTION; OHIO REVISED CODE §2949.22(A).

SECOND CLAIM FOR RELIEF

IMPOSITION OF THE DEATH PENALTY UNDER THE CIRCUMSTANCES OF THIS CASE WOULD VIOLATE ARTICLE I, SECTIONS 1, 2, 8, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

THIRD CLAIM FOR RELIEF

THE PROHIBITION AGAINST DOUBLE JEOPARDY WOULD BE VIOLATED BY ANOTHER ATTEMPT TO EXECUTE ROMELL BROOM: FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ART. I, SECTION 10, OHIO CONSTITUTION.

FOURTH CLAIM FOR RELIEF

BROOM IS ENTITLED TO A DECLARATORY JUDGMENT IN HIS FAVOR.

All proceedings in Broom's common pleas case were stayed pending disposition of Broom's petition for habeas corpus in this Court. The stay was lifted effective January 5, 2011.¹

The State, on February 14, 2011, filed a response to Broom's postconviction petition. On February 22, 2011, Broom filed his First Submission of Publicly-Available Federal Court Opinions, Witness Testimony, & Exhibits (in Five Volumes and Comprising 25 Numbered Exhibits), all in further support of his Petition (hereinafter "Broom First Submission"). On February 25, 2011, Broom filed his reply to the State's untimely response and submitted additional documents and exhibits in support of his claims ("Broom Reply/Second Submission").

Without holding a hearing, the trial court denied relief on April 7, 2011. (Its short opinion is attached hereto as Exhibit D) Notably, the trial court's opinion (like the State's own trial court filings) did not even mention the words "deliberate indifference," much less hold that such a standard -- applicable to cases wherein a prisoner challenges the conditions of his prison confinement in circumstances where the prison has a duty to keep him safe, healthy and alive -- was applicable to the Eighth Amendment claim in a situation like this one where the state actors are responsible, not for keeping the prisoner safe, healthy, and, alive, but for their antithesis: causing his death against his will on that very day.

The Ohio Court of Appeals affirmed on February 16, 2012, in a two to one decision. State v. Broom, 2012 Ohio 587 (2012). With respect to the Eighth Amendment claim, the majority adopted on its own, and without any request for briefing from the parties, "the 'deliberate indifference' standard developed for conditions-of-confinement claims" as a required allegation for stating a

¹Also on September 14, 2010, Broom filed a habeas petition in the U.S. District Court, and that action has been stayed and held in abeyance in deference to these Ohio state court proceedings. Broom v. Bobby, 2010 U.S. Dist. LEXIS 126263 (N.D. Ohio Nov. 18, 2010).

substantive claim under Ohio's postconviction statute for Broom's Eighth Amendment claim. (Op. p.25.) The majority then mistakenly found that Broom had not made the newly required allegation. The majority also rejected the pleas of the dissenting judge that this matter of first impression and national importance, in which the new "deliberate indifference" standard had been adopted by the appellate court *sua sponte* and with no argument or briefing from the parties, should be remanded to the trial court so that the parties could develop and litigate the court's new standard as applicable to such a unique and unusual Eighth Amendment claim. (Exhibit A)

Broom's timely applications for reconsideration and for reconsideration en banc were denied by the appellate court on March 29, 2012 and April 5, 2012, respectively. (Exhibit B and Exhibit C). Broom filed his initial memorandum in support of jurisdiction and notice of appeal on May 14, 2012. He files this amended memorandum in support of jurisdiction in conformity with S. Ct. Prac. R. 8.7.

STATEMENT OF FACTS

Romell Broom is a 56 year-old African-American man who was sentenced to death in 1985 when he was 29 years old. He has resided on Ohio's death row since then. On September 15, 2009, the State of Ohio attempted to carry out that sentence but due to the State's failure to follow its own execution protocol, its deliberate indifference to Broom's rights, and its reckless disregard of prior similar failures, Broom suffered a unique and constitutionally unacceptable physical and psychological trauma at the State's hands. As a result, the State is barred from ever again attempting to execute Broom for his subject conviction by any means or methods.

At the time of the Broom execution attempt on September 15, 2009, the State had adopted procedures, practices, policies and rules for conducting executions by lethal injection in accordance with ORC §2949.22, Ohio's lethal injection statute. These procedures, practices, policies and rules were written and unwritten, and they included the written protocol, Number 01-COM-11, effective as

of May 14, 2009. (Broom Reply/Second Submission, Exh. 4.) This collection of materials is hereinafter referred to as the “execution protocol” or “protocol.”²

The execution protocol is administered by an “execution team” that includes approximately 15-16 members, all of whom are employees of Ohio’s prisons, with the majority being employed at the Southern Ohio Correctional Facility at Lucasville, Ohio (“SOCF), the prison where Ohio’s executions are conducted. The execution team members are selected and approved by the State. The execution team includes, broadly speaking, two categories of team members: (1) security, and (2) medical. (E. Voorhies Depo (Broom First Submission, Exh. 12) at 115-17.)

The “security” members comprise the majority of the team, and their principal functions are security and transport. (*Id.* at 117.) The “medical” members are responsible for, among other things, establishing and maintaining intravenous (“IV”) access via the successful insertions of catheters into the inmate’s peripheral veins, delivering the lethal drugs through the IV’s, and monitoring the inmate once the drugs are started to determine if the drugs are being properly delivered until death. At the time of Broom’s execution attempt, there were three medical team members (identified in the Cooey litigation by numbers to maintain their anonymity, and likewise here), and none of the medical team members were physicians. Broom’s medical team was comprised of Team Members (“TM”) #’s 9 (a phlebotomist and prison employee), TM #17 (a part-time EMT and prison employee), and TM #21 (a

²The execution protocol was changed by the State in the months after the failed attempt to execute Broom. (See Second Biros Injunction Order (Broom First Submission, Exh. 1).) The protocol now provides for usage of a single execution drug, although that drug is still administered by the same medical team and still inserted via IV catheters into the inmate’s peripheral veins. Moreover, the protocol now finally includes a backup plan (or “Plan B”) in the event the medical team is unable to establish and maintain IV’s in the inmate’s peripheral veins: to wit, an intramuscular shot of a massive dose of the drug hydromorphone. Broom claims in his Petition that the State is barred from attempting to execute him again by any means or methods (Petition), including any means or methods adopted after and/or in response to the State’s first failed attempt to execute him on September 15, 2009.

part-time EMT and prison employee). About two months before Broom's execution, the longest serving medical team member – TM #18 -- who had been responsible during all prior Ohio executions (but one) for mixing and actually injecting the drugs into the IV tubing, where the drugs would then on his command be released down the tubing and into the IV catheters that had been established in the inmate's peripheral veins, retired from his position at Ohio's prisons and was no longer on the medical team. (See generally Cooey (Biros) v. Strickland, 610 F. Supp. 2d 853 (S.D. Ohio 2009) ("First Biros Injunction Order") (Broom First Submission, Exh. 3); Cooey (Biros) v. Strickland, 2009 U.S. Dist. LEXIS 122025 (S.D. Ohio Dec. 7, 2009) ("Second Biros Injunction Order"), aff'd, Cooey v. Strickland, 589 F.3d 210 (6th Cir. 2009) (Broom First Submission, Exhs. 1, 2); Hearing Transcript ("HT") TM#17 (First Biros Hearing) (Broom First Submission, Exh. 5); HT TM#18 (First Biros Hearing) (Broom First Submission, Exh. 4).)

For many years, the State has known that it would one day be called upon to execute Broom by lethal injection. Broom entered the prison system under sentence of death in 1985. Ohio began using lethal injection as an execution method in 1993 and made lethal injection its exclusive means of execution in 2001. ORC §2949.22. On April 22, 2009, this Court set the September 15, 2009 date for Broom's execution and the State fought vigorously to keep that date. (Broom Reply/Second Submission Exh. 3.)

The State knew that its execution protocol required the State to obtain access to Broom's peripheral veins with IV needles, install the accompanying IV catheters into the accessed veins, attach receptacles to the IV's to keep the veins "open" so that the fatal drugs can be delivered to the body, and monitor and maintain that IV access until death. (Exh. 4 to Broom Reply/Second Submission.) The process of establishing and maintaining proper peripheral "IV access" was a core

and crucial part of any execution the State conducted under its execution protocol. Without proper peripheral vein access the lethal drugs could not be delivered effectively and the inmate would suffer and/or the execution would go on interminably, or it could not be completed. The State also knew, as of September 15, 2009, that it had no backup plan in place to humanely complete an execution if it was unable to establish or maintain IV access to an inmate's peripheral veins after the execution started.

In preparation for his execution, Broom was transported to SOCF on Monday, September 14, 2009. (P. Kerns Depo (Broom First Submission, Exh. 13) at 19.) Upon his arrival at SOCF, medical personnel conducted a physical examination of Broom, which included an assessment of his arms for viable and accessible veins. (R. Clagg Depo (Broom First Submission, Exh. 16) at 73-74.) Notes from this initial venous assessment entered on the official computerized timeline on September 14, 2009 reflect concern about potential problems accessing Broom's veins, especially in his left arm. (Id. at 74-76; 79-80.) At approximately 8:30 p.m. that same evening, another SOCF medical staff member conducted the second of the three venous assessments required by the protocol. (Broom Execution Timeline, Broom First Submission, Exh. 20.) The required third venous assessment was never done, despite the protocol's requirement of a third assessment prior to 9:00 a.m. on the day of an execution. (Id.; Cooey (Smith) v. Kasich, 2011 U.S. Dist. LEXIS 73606, *36-40, 103-04 (S.D. Ohio July 8, 2011) ("Ken Smith Injunction Order"); Second Biros Injunction Order at 185-87 (Broom First Submission, Exh. 1).)

While the State normally starts an execution at approximately 10:00 a.m., matters were delayed on the morning of September 15, 2009 while the Sixth Circuit considered Broom's request for stay as to the Brady/Steckman issue addressed in this Court's opinion of September 11, 2009 (State v. Broom, 123 Ohio St. 3d 114 (2009).) (P. Kerns Depo (Exh. 13 to Broom First Submission)

at 23.) Thus, Broom's execution did not begin until approximately 2:00 p.m., some 90 minutes after the Sixth Circuit denied his appeal. At approximately 2:00 p.m., Warden Kerns approached the holding cell. Flanked on both sides by members of the security team, Kerns read the death warrant aloud from the door of the holding cell, thereby beginning the execution. (*Id.* at 27.) When he finished, Kerns directed seven team members -- the team leader (TM #10), four security members, and two medical members (TM #'s 9 and 21) -- into the small cell where Broom waited on a gurney, while, above Broom's gurney, a closed circuit camera began broadcasting the execution events to the victim and inmate witnesses.

The two medical members immediately began their task of establishing and maintaining two working IV catheters in Broom's peripheral veins. *Id.* Stationed closely nearby as the medical members made their attempts were Warden Kerns, the SOCF nurse Roseanna Clagg, and the two highest-ranking management personnel from Ohio's DRC, to wit Director Terry Collins (an appointee of the governor) and Regional Director Edwin Voorhies. These four officials witnessed what happened that day and were active participants in all key events. Their depositions were filed with the trial court below, as were the depositions of DRC's in-house counsel (Austin Stout) and communications director (Julie Walburn), both of whom were also present in the death house that day.³ Another prison official, Charles Miller, was stationed a few steps away from Broom's cell, and his job was to maintain and record a detailed, minute-by-minute, contemporaneous timeline of the events that day. His deposition and the timeline were also filed with the court below.⁴ The facts recited here are, or should be, undisputed.

³E. Voorhies Depo (Broom First Submission, Exh. 12); R. Clagg Depo (Exh. 16); T. Collins Depo (Exh. 11); P. Kerns Depo (Exh. 13); J. Walburn Depo (Exh. 15); T.A. Stout Depo (Exh. 14).

The medical team members made numerous attempts to establish viable IV catheters in Broom's peripheral veins. Some of those attempts were initially successful, only to fail for one reason or another, accidental or otherwise. Others were unsuccessful from the outset. At one point, the other medical member, TM #17, entered the cell and tried to establish a working IV in Broom's peripheral veins, also to no avail. (See Broom Affidavit, attached to the Petition; Broom Execution Timeline (Broom First Submission, Exh. 20); T. Collins Depo (Exh. 11); E. Voorhies Depo (Exh. 12); P. Kerns Depo. (Exh. 13); C. Bautista Depo (Exh. 18); R. Clagg Depo (Exh. 16); C. Miller Depo (Exh. 17); Second Biros Injunction Order (Exh. 1); Ken Smith Injunction Order (attached to this Brief).)

After approximately 45 minutes of unsuccessful needle jabs, Director Collins ordered that the medical team exit the cell and take a break. (T. Collins Depo at 56; P. Kerns Depo at 36.) Collins conferred with the three medical members, along with the team leader, Regional Director Voorhies, and Warden Kerns. He inquired whether the team believed the task at hand was feasible, and he was assured that it was. After approximately ten minutes, team members reentered the holding cell, and further attempts were made to establish a working IV catheter in Broom's veins. Team members punctured Broom that day at the antecubital area, the biceps, the forearm and the hand, on both arms. (See references cited id.)

At one point, more than an hour into the execution, it was suggested and then decided that one of the institution's medical doctors should be summoned to assist the team's efforts. The doctor, Carmelita Bautista, was a part-time contract physician at the prison. She had no prior experience with executions, had no knowledge of the execution protocol, she was not a member of the execution team, and her participation was in violation of the protocol. (C. Bautista Depo (Broom First

⁴C. Miller Depo (Exh. 17); Broom Execution Timeline (Exh. 20).

Submission, Exh. 18).) Nevertheless, she was summoned to assist and, by the time she exited the holding cell area, Broom had two additional puncture wounds; one on the top of the left foot and one directly into the right medial malleolus (the ankle bone on the inside of the foot). Dr. Bautista's deposition too was filed with the court below. (Id.)

The team again took a break after another forty-five minutes or so of attempting to establish IV's, approximately an hour and forty-five minutes after they began the execution process. During this second break, the team members met again with Director Collins and other high-ranking officials. This time, the team members expressed their increasing frustration and their view that establishing viable IV access that day was not feasible. Director Collins had called the Governor's office shortly after the first break and informed the Governor's counsel about the developing situation. Collins again called the Governor's office after the second break. During the call after the second break, Collins recommended that the Governor grant a reprieve to stop Broom's execution. Collins testified that he did not recommend stopping the execution out of concern for the physical and mental anguish that Broom was suffering from the repeated attempts. Instead, Collins made his decision based on three factors: (1) concern for the team's well-being; (2) his belief, informed by discussions with the medical 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 somehow managed to establish two viable IV sites and they 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); see also Depo E. Voorhies (Exh. 12); Depo R. Clagg (Exh. 16); Depo P. Kerns (Exh. 13).)

Approximately two hours after Warden Kerns read the death warrant, Collins was informed that the Governor had signed a seven-day reprieve. (Id.) The team thus stopped for the day, and was

informed that it would try again to execute Broom in one week, on September 22, 2009. (Id.)

By the time the team quit that day around 4:00 p.m., Broom had sustained approximately 18 to 20 puncture wounds at myriad places over his four extremities. At various times during those two hours, Broom was in such pain that he sobbed, hiding his face in his hands. He was sweating such that at one point a team member gave him a roll of toilet paper to wipe his face. Broom audibly reacted in pain when Dr. Bautista stabbed him in the ankle. The purple and black bruises at some of the wound sites clearly demonstrate what Broom endured physically from the repeated needle punctures. (Broom Affidavit, attached to the Petition; Photographs of Broom's Injuries (Broom First Submission, Exh 19); HT Mark Heath, M.D. (Second Biros Hearing) at 41-43, 50-54, 96-101, 110-11 (Broom Reply/Second Submission, Exh. 1); Second Biros Injunction Order at 132-36, 140 (Broom First Submission, Exh. 1); HT (Second Biros Hearing) at 129-33 (court admitting pictures) (Broom Reply/Second Submission Exh. 1).) The psychological trauma of being subjected to such an experience, and then told you will have to go through it all over again in one week, is self evident and beyond dispute.

And, despite his anguish, there is no dispute that Broom was cooperative and compliant throughout the entire process. (See E. Voorhies Depo at 162-63, 204-07 (Exh. 12); T. Collins Depo at 88-89 (Exh. 11); Broom Execution Timeline (Exh. 20).)

LEGAL ARGUMENT

Proposition of Law No. 1:

IN AN ACTION FOR POSTCONVICTION RELIEF, A PETITION THAT PRESENTS SUFFICIENT OPERATIVE FACTS SUPPORTED BY EVIDENCE *DEHORS* THE RECORD MEETS THE REQUIRED PLEADING STANDARD AND, TO COMPORT WITH DUE PROCESS AND PROVIDE ADEQUATE CORRECTIVE PROCESS TO THE PETITIONER, MUST NOT BE SUMMARILY DISMISSED WITHOUT AN EVIDENTIARY HEARING. U.S. CONST. AMEND. XIV.

The duty “to search for constitutional error with painstaking care is never more exacting than it is in a capital case.” Kyles v. Whitley, 514 U.S. 419, 422 (1995) (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)). The lower courts erred in dismissing Broom’s postconviction petition because: (1) Broom properly and adequately alleged in his petition violations of his constitutional rights that warrant relief; and (2) the petition and supporting papers (see, e.g., Broom First Submission; Broom Reply/Second Submission) contained sufficient operative facts supporting the grounds for relief, requiring discovery and meriting an evidentiary hearing.

Indeed, Broom submitted his own affidavit as to the events of September 15, 2009, as well as the sworn deposition and/or hearing testimony of six of the State actors who supervised and/or directly participated in Broom’s execution attempt on that date (to wit, DRC Director Terry Collins, Edwin Voorhies, SOCF Warden Phillip Kerns, Roseanna Clagg, Carmelita Bautista, M.D., and Charles Miller). Broom was only able to obtain the testimony of these State actors because they had testified in proceedings in the Cooley case in federal court; there would have been no means for Broom to compel such testimony under Ohio’s post-conviction statute unless the trial court, after Broom had filed his postconviction petition, had granted discovery and/or a hearing on his petition.

Broom also submitted the sworn testimony of Mark Heath, M.D., who, shortly after the failed execution, examined Broom’s peripheral veins and the wounds inflicted by the State and concluded,

among other things, that Broom's veins should have been "easily accessible by a competent team," that the grossly excessive number of failed attempts made on Broom far exceeded that which is reasonable or appropriate in any setting, and that the multiple and repeated failures to establish IV access with Broom demonstrated that the execution team lacked basic competence as to an aspect of their job on which all else depended in conducting a successful execution without any back-up plan in place: achieving and maintaining IV access on Broom's peripheral veins. HT Mark Heath, M.D. (Second Biros Hearing) at 41-43, 50-54, 96-101, 110-11 (Broom Reply/Second Submission, Exh. 1).

Broom also submitted the comprehensive written decisions of Judge Greg Frost from the Cooley case which include detailed summaries of the sworn testimony provided in that case by these witnesses and also by the anonymous "medical team" members who participated in Broom's execution attempt under the direction of Collins, Voorheis, and Kerns, to wit Team Member Nos. 9, 17 and 21. See Cooley (Biros) v. Strickland, 2009 U.S. Dist. LEXIS 122025 (S.D. Ohio Dec. 7, 2009) ("Second Biros Injunction Order"), aff'd, Cooley v. Strickland, 589 F.3d 210 (6th Cir. 2009) (Broom First Submission, Exhs. 1, 2); Cooley (Smith) v. Kasich, 2011 U.S. Dist. LEXIS 73606, *36-40, 103-04 (S.D. Ohio July 8, 2011) ("Ken Smith Injunction Order").

Ohio's postconviction statute directs that a hearing shall be held "[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief." O.R.C. § 2953.21(E). The plain language of the statute creates a presumption in favor of a hearing in this case and against dismissal or summary judgment for the State.

A. The Appellate Court Committed Obvious Error, and Denied Broom Due Process and an Adequate Corrective Process, in Requiring Broom to Meet a Different Pleading Standard Than That Applicable to All Other Postconviction Petitioners.

An Ohio postconviction petitioner is not required to prove his case in his pleadings nor is he

required to parrot certain magic words in his pleadings in order to survive dismissal. Decisions from this Court establish (1) that in order to determine whether the petitioner has presented a substantive ground for relief in post-conviction, the court must look not only to the petition but also to the documents in support of it; and (2) that the question of whether the petitioner has set forth sufficient operative facts is determined by not only the content of the petition but also by the content of his supporting documents *de hors* the trial record. See, e.g., State v. Calhoun, 86 Ohio St.3d 279 (1999) (paragraph two of the syllabus); State v. Jackson, 64 Ohio St. 2d 107 (1980); State v. Milanovich, 42 Ohio St. 2d 46, syllabus 1 (1975). The appellate court majority ignored these basic principles and thereby denied Broom due process and an adequate corrective process as to his constitutional claims.

The panel decided that it was required in this case of first impression to determine what standard to apply in determining whether the state through its agents/actors “had the requisite intent to cause unnecessary pain.” Op. p. 25. The panel then decided to “adopt the ‘deliberate indifference’ standard developed for conditions-of-confinement claims.” Id. After establishing this standard the panel said, “Broom has not alleged that the specific state officials were subjectively aware of the risks to him when deviating from the Protocols or attempting to establish the IV catheters. Such omission is dispositive.” Id. at 28.

While Broom disagrees with the standard adopted (as discussed more fully *infra*), that disagreement is not the basis for the error he is presenting in this Proposition of Law. The panel made an obvious error in stating that Broom did not allege its newly adopted intent requirement. Broom specifically alleged in his Petition that the State was “deliberately indifferent” to the risks of pain and suffering its execution procedures, and the failure to follow them, would and did cause Broom. Petition, p. 20, ¶77. Broom alleged that “pain, suffering, and distress were deliberately and intentionally inflicted upon him.” Petition, p. 3, ¶3; p. 22, ¶82. He alleged that, “The State exhibited

cruel indifference to [his] rights and his humanity.” Petition, p. 22, ¶83. He alleged that the State demonstrated “reckless indifference” to his suffering. Petition, p. 20, ¶76.

Moreover, Broom alleged facts and provided uncontested documentation that the State had acted with deliberate indifference. Broom showed with the uncontested documentation that the State was aware from the executions of Joe Clark (May 2006) and Chris Newton (May 2007) of the very defects in its procedure that caused the pain and suffering Broom endured and that the State totally ignored the recommendations of its own expert and others that the State needed to have a back-up plan in place in the event that, like during Clark and Newton’s executions, the State was unable to obtain or maintain peripheral IV access to the inmate’s veins. Broom showed that the State knew, when it knowingly chose not to adopt any backup to peripheral IV access as its method of execution-drug-delivery, that there was a highly foreseeable risk of another prolonged and painful execution like Clark’s. The uncontested documentation also showed that the State knew on the night before Broom’s execution that there could be problems with Broom’s veins. They showed that, in spite of that specific knowledge, the State failed to follow its own protocols and skipped the morning vein check that should have taken place before the scheduled execution. Broom alleged and showed, again with uncontested documentation, that when the execution procedure had already gone terribly and painfully wrong, the State did not follow its execution procedures but instead called in a non-team member who inflicted more terrible pain upon Broom by trying to establish an IV in his ankle through the bone. Broom showed that the State continued to subject Broom to painful needle sticks for a period of time far beyond what was reasonable in any setting and even though its efforts to obtain peripheral IV access had obviously become futile long before.

Ohio long ago abandoned ritualistic forms of pleading that elevated form over substance. Such formalistic pleading requirements have not been applied in state postconviction proceedings.

Broom's allegations, and the facts and documentation he provided in support of his petition (i.e., largely the sworn testimony of participants in Broom's, as well as Clark's and Newton's, executions) demonstrated deliberate indifference by the State and its actors or, at the very least, set forth substantive grounds for relief under that or even any higher standard.

The panel also said that "Broom does not allege any deliberate indifference on the part of the specific state actors." Op. p. 28. However, the documents and testimony in support of Broom's petition demonstrate numerous acts of deliberate indifference on the parts of the specific State actors involved in the botched execution attempt including but not limited to the following: (1) the team member who failed to conduct the final vein assessment on the morning of the execution attempt; (2) the team members who failed to attend trainings and the supervisors who excused them; (3) the team members who continued to make needle sticks long after it should have been obvious that doing so was futile; (4) the supervisors who ignored the lessons of the Clark and Newton executions and thus failed to implement a back-up plan in the event peripheral IV access as the drug delivery method could not be obtained or maintained; (5) the supervisors who allowed the failed needle jabs to go on for a grossly excessive number of attempts and without any regard for Broom's obvious pain, suffering, and psychological turmoil of continuing delayed imminent death; (6) the Director Terry Collins who testified that Broom's well being was not his concern (Collins Depo at 68-69) and who called in the non-team member Carmelita Bautista; and (7) Carmelita Bautista herself in attempting to establish an IV in an ankle with such lack of care that she struck bone.

The trial court did not discuss or address any of the above evidence. The appellate court failed to discuss or address most of the above evidence. Neither the trial court nor the appellate court explained why the above evidence is supposedly insufficient to meet a "deliberate indifference" or any other standard. It is a mystery to Broom as to what more he could have alleged or submitted to

satisfy the appellate court's arbitrary standard. The appellate court was presented with the case at the **pleading** stage and with the trial court having denied Broom's request for discovery and an evidentiary hearing. Surely the appellate court is not saying that Broom had a duty at the pleading stage of an Ohio postconviction proceeding, in order to avoid summary dismissal, to obtain affidavits or testimony from the state actors who had tried to kill him and whose intent would be at issue under the appellate court's standards. Broom would have no ability to obtain such evidence under Ohio's postconviction statute absent discovery and a hearing. Yet, here, because of the Cooey case, Broom did present sworn testimony of some of the state actors and did provide other substantial evidence of their deliberate indifference. He has thus done much more than ever could be expected or required at the pleading stage under any fair standard.

B. The Lower Courts Committed Obvious Error, and Disregarded this Court's Precedents, in Denying Broom's Claims Without a Hearing.

Broom sought an evidentiary hearing on the claims he raised in the court below. (Petition at 28). The court denied Broom's petition without holding a hearing.

As the dissenting judge on Broom's appellate panel concluded, Broom was entitled to a hearing. In order to obtain an evidentiary hearing, the postconviction petitioner must demonstrate that there are substantive grounds for relief. ORC §2953.21(C); State v. Jackson, 64 Ohio St. 2d 107 (1980). In determining whether substantive grounds for relief exist, the court must consider, in addition to the petition, the "supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript." ORC §2953.21(C). Testimony by deposition must also be considered. ORC §2953.22.

“Where a claim in a petition for postconviction relief. . . is sufficient on its face to raise an issue that petitioner’s conviction is void or voidable on constitutional grounds, and the claim is one which depends upon factual allegations that cannot be determined by examination of the files and records of the case, the petition states a substantive ground for relief.” State v. Milanovich, 42 Ohio St. 2d 46, syllabus 1 (1975). When the evidence upon which the petitioner’s claim rests is in dispute or conflicting evidence is before the court, an evidentiary hearing is warranted. State v. Kinley, 136 Ohio App. 3d 1 (1999). When the petitioner meets this burden, the court must promptly set an evidentiary hearing on the issues presented in the petition. ORC §2953.21(E).

General conclusory allegations to the effect that a petitioner has been denied a constitutional right are inadequate as a matter of law to impose an evidentiary hearing requirement. State v. Kanner, 5 Ohio St. 3d 36 (1983); State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). But it is equally true that the petitioner is not required **to prove** his claims based solely on his petition. Indeed, adopting such a position would simply read the evidentiary hearing provision out of the statute. While the petitioner is thus required to raise grounds and present sufficient operative facts to demonstrate an entitlement to relief, an evidentiary hearing, with proper discovery, is the proper forum for a petitioner -- such as Broom -- to prove his claims. State v. Jackson, 64 Ohio St. 2d 107, 112 (1980); State v. Cooperrider, 4 Ohio St. 3d 226, 228 (1983) (citing State v. Hester, 45 Ohio St. 2d 71 (1976)).

Broom presented substantive grounds for relief including that any further attempts by the State to execute him, by any means or methods, would violate: (1) the Ohio and U.S. constitutional prohibitions against cruel and unusual punishment and the Ohio law requiring that executions be quick and painless (First Claim); (2) the Fifth Amendment’s guarantee against Double Jeopardy as applied to the States through the Fourteenth Amendment and the comparable double jeopardy clause

of the Ohio Constitution (Third Claim); and (3) a number of specific provisions of the Ohio Constitution, including to the extent those provisions provide greater protection than their federal counterparts (Second Claim). (See Petition.)

As is set out above, Broom's allegations, and the documents (and testimony) he offered in support, more than meet the requirements recognized by this Court for requiring a postconviction hearing. The dissenting judge in the appellate court agreed. State v. Broom, 2012 Ohio 587, ¶¶ 61-62 (2012) (Keough, J., dissent) ("Given the importance of the issue and the impact this case has had on other death row inmate cases, I would find that the failure to conduct a hearing under these circumstances was unreasonable and arbitrary. I recognize that the trial court could reach the same conclusion after hearing on remand. However, and because the record is created and established at the trial court level for all subsequent reviewing courts, **the trial court should develop the most thorough record possible to afford meaningful appellate review, especially considering that the issues presented in this case are those of first impression in Ohio.**") (emphasis supplied).

Broom does not have to prove his case with his postconviction petition and supporting documents. All that is required, according to this Court, are that he present sufficient allegations and evidence to demonstrate a substantive ground for relief. Broom easily met that standard.

Proposition of Law No. 2:

THE LOWER COURTS ERRED WHEN THEY FOUND THAT THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSES OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION DO NOT BAR ANOTHER ATTEMPT TO EXECUTE BROOM.

The lower courts erred when they found that the cruel and unusual punishments clauses of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the

Ohio Constitution do not bar another attempt to execute Broom by any means or methods.

As a death-sentenced inmate seeking to bar any further execution attempts upon him after the first attempt had started and failed through no fault of his own, Broom should be presumptively entitled to relief under the cruel and unusual punishments clauses of the Ohio and U.S. Constitutions, that will bar any further attempts to execute him by any means or methods, unless the State can demonstrate, by clear and convincing evidence and based upon the totality of the circumstances, that the State's failure to complete the first execution attempt was the result of an unforeseeable accident or "innocent misadventure," that the failure did not result from circumstances that were foreseeable and preventable, and that the State did not inflict unnecessary pain and suffering upon the inmate. Because the State cannot, and does not, meet its burden in the circumstances of this case, Broom is entitled to the relief he seeks.

A. The "cruel and unusual punishments" clause bars any further execution attempts upon a condemned inmate already once subjected to an execution attempt that failed through no fault of the inmate unless the State can prove, by clear and convincing evidence and based upon the totality of the circumstances, that the State's failure to complete the first execution attempt was the result of an unforeseeable accident or "innocent misadventure," that the failure did not result from circumstances that were foreseeable and preventable, and that the State did not inflict unnecessary pain and suffering upon the inmate.

The Eighth Amendment, applicable to the states under the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Ohio Constitution also provides that "[e]xcessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Ohio Const. Art. I, § 9. See also, ORC §2949.22.

No state or federal court, prior to Broom's case, has ever addressed, at a time in our history

when the Eighth Amendment was applicable to the states, a claim that the “cruel and unusual punishments” clause bars a second attempt to carry out a sentence of death upon a condemned inmate after a first attempt had started and failed through no fault of that inmate. And, even assuming application of the Eighth Amendment to such a claim, no state or federal court prior to *Broom* has ever addressed this important issue in a modern setting, where the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

In this issue of first impression and of national importance, and recognizing the evolving standards of decency that must guide a determination of this issue, this Court should hold that a death-sentenced inmate, seeking to bar any further execution attempts upon him after a first attempt had started and failed through no fault of his own, is presumptively entitled to relief under the cruel and unusual punishments clauses of the Ohio and U.S. Constitutions, that will bar any further attempts to execute that inmate by any means or methods, unless the State can demonstrate, by clear and convincing evidence and based upon the totality of the circumstances, that the State’s failure to complete the first execution attempt was the result of an unforeseeable accident or “innocent misadventure,” that the failure did not result from circumstances that were foreseeable and preventable, and that the State did not inflict unnecessary pain and suffering upon the inmate.

Broom submits that a proper application of the state and federal constitutional provisions, and full consideration for the importance of these constitutional protections in this unique context, compel this result. Moreover, although not directly on point, the Supreme Court’s decisions in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) and *Baze v. Rees*, 128 S. Ct. 1520 (2008), provide a useful framework that focuses on whether the failed attempt was truly an accident or “innocent misadventure,” on the one hand, or the foreseeable result of preventable errors and

omissions by the state and its executioners in carrying out this most solemn of duties, on the other.

In Resweber, a plurality of the Court said that a failed execution caused by “an accident for which no man is to blame” would not preclude a second execution attempt. There the case was resolved by one vote. That vote was cast by Justice Felix Frankfurter. Justice Frankfurter did not decide the constitutional questions presented but cast his vote against granting relief because neither the Eighth Amendment nor the Double Jeopardy Clause applied to the states. Id. at 469, 470. Since Resweber, the Supreme Court has held that the Eighth Amendment’s prohibition against cruel and unusual punishment and the Fifth Amendment’s Double Jeopardy Clause are applicable to the states. (Eighth Amendment) Robinson v. California, 370 U.S. 660 (1962), Furman v. Georgia, 408 U.S. 238 (1972); (Fifth Amendment) Bullington v. Missouri, 451 U.S. 430 (1981), Benton v. Maryland, 395 U.S. 784 (1969), North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Thus, the single point of agreement between the winning plurality and Frankfurter’s concurrence has been reversed.

“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority], the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Marks v. United States, 430 U.S. 188, 193 (1977).

The winning plurality in Resweber recognized that at that time neither the Fifth nor the Eighth Amendment was applicable to the states. 392 U.S. at 462, n.2. The plurality then assumed applicability of the Amendments for purposes of discussion. Id. The Court said that a failed execution resulting from “an accident for which no man is to blame” would not preclude a second execution attempt, id., thereby leaving open the possibility that a second execution attempt required due to the purposeful, willful, reckless, or negligent conduct of the State in the first attempt would be unconstitutional. The case left open is the one Broom now presents.

The four dissenting justices in Resweber found that a second execution attempt would violate the Eighth Amendment. They said:

The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the Eighth Amendment or its state counterparts. **Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man.** It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. **It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally death shall result.** The Legislature of Louisiana did not do so. The Supreme Court of Louisiana did not say that it did.

Resweber, 329 U.S. at 473-74 (Burton, J. dissenting, joined by Douglas, J., Murphy, J., and Rutledge, J.) (emphasis supplied.)

The dissenters also **squarely rejected** the approach of the appellate majority in Broom in two critical respects. First, unlike the Broom majority which carefully avoided the issue by incorrectly characterizing the critical IV insertion activities as being only a “preparatory stage” to an Ohio lethal injection execution (see, infra, at Proposition of Law 2(C)), the four Resweber dissenters flatly condemned the constitutional legitimacy of “death by installments” that would be perpetrated upon Willie Francis (and, likewise, upon Romell Broom) with a second execution attempt after the first one had failed through no fault of Francis:

In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. **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.** Electrocution, when instantaneous, can be inflicted by a state in conformity with due process of law. *In re Kemmler*, 136 U.S. 436. The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging. *State ex rel. Pierre v. Jones*, 200 La. 807, 9 So. 2d 42, cert. denied, 317 U.S. 633. See also, *Malloy v. South Carolina*, 237 U.S. 180.

The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocutation has been approved only in a form that eliminates suffering.

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. **Prescribing capital punishment, it should be construed strictly. There can be no implied provision for a second, third or multiple application of the current. There is no statutory or judicial precedent upholding a delayed process of electrocution.**

These considerations were emphasized in *In re Kemmler*, supra, when an early New York statute authorizing electrocution was attacked as violative of the due process clause of the Fourteenth Amendment because prescribing a cruel and unusual punishment. In upholding that statute, this Court stressed the fact that the electric current was to cause instantaneous death. Like the Louisiana statute before us, that statute called expressly for the continued application of a sufficient electric current to cause death. It was the resulting “instantaneous” and “painless” death that was referred to as “humane.”

Resweber, 329 U.S. at 474-75.

Second, the four Resweber dissenters squarely rejected any suggestion that the “intent” of the executioners is relevant to the constitutional analysis:

If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. **Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional.** How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment? While five applications would be more cruel and unusual than one, the uniqueness of the present case demonstrates that, today, two separated applications are sufficiently “cruel and unusual” to be prohibited. If five attempts would be “cruel and unusual,” it would be difficult to draw the line between two, three, four and five. It is not difficult, however, as we here contend, to draw the line between the one continuous application prescribed by statute and any other application of the current.

Lack of intent that the first application be less than fatal is not material. The

intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure. The procedure in this case contrasts with common knowledge of precautions generally taken elsewhere to insure against failure of electrocutions.

Resweber, 329 U.S. at 475-76.

More recently, but in the different context of whether a lethal injection protocol presents a risk of severe pain that would bar its use on an inmate being subjected to his first attempt, the Supreme Court noted in Baze v. Rees, 128 S. Ct. 1520 (2008), that “a hypothetical situation” where a protocol has resulted in “a series of abortive attempts” at execution “*would present a different case.*” Id. at 1531 (citing Resweber, 329 U.S. at 471 (Frankfurter, J., concurring) (emphasis added)). The Court continued saying that “such a situation . . . would demonstrate an ‘objectively intolerable risk of harm’ that officials may not ignore.” Id. (citing Farmer v. Brennan, 511 U.S. 825, 846 and n.9 (1994)).

These cases provide a useful framework from which this Court should draw the applicable standards for the rare claim presented here by Broom, for the first time in a modern setting.

First, there can be no question that Broom’s factual situation, of having once been subjected to an execution attempt that failed through no fault of his own, presents a viable claim under the cruel and unusual punishments clauses of the Ohio and U.S. Constitutions, and that claim, if successful, would bar any subsequent execution attempt upon him by any means or methods. See also Broom v. Strickland, 2010 U.S. Dist. LEXIS 88811, *5-7 (S.D. Ohio Aug. 27, 2010) (“There is no doubt that the Eighth Amendment applies to [Broom’s] situation. *See Robinson v. California*, 370 U.S. 660 (1962). To hold that [Broom’s] claim is not plausible based on *Resweber* would thus be an erroneous application of a case that has shown its age in at least one relevant, core aspect.”).

Second, the standard for determining whether Broom can succeed on his claim is dependent

on whether the failed attempt was an accident or innocent misadventure, on the one hand, or was due to an act or omission by the State that could have been prevented, on the other.

Third, the subjective intent of the executioners, including whether or not they were “deliberately indifferent,” is not a required showing in order for an inmate in Broom’s position to be entitled to relief on his claim.

Fourth, the inmate already once subjected to a failed execution attempt should be presumptively entitled to relief. If the State never-the-less wants to make a second execution attempt upon that inmate, the ultimate burden should be on the State to make the required showing, not on the inmate. The State is in complete control of the execution process and has sole access to all of the relevant documents and execution personnel. Moreover, proceeding a second time should be “construed strictly” against the State. Resweber, 329 U.S. at 474-75 (dissenting opinion). The State’s burden should be an elevated one, by clear and convincing evidence.

These principles, informed by the evolving standards of decency applicable in this context, suggest that the Court adopt the following legal standard for a claim like the one Broom here presents: A death-sentenced inmate seeking to bar any further execution attempts upon him after the first attempt had started and failed through no fault of his own is presumptively entitled to relief under the cruel and unusual punishments clauses of the Ohio and U.S. Constitutions, barring any further attempts to execute him by any means or methods, unless the State can demonstrate, by clear and convincing evidence and based upon the totality of the circumstances, that the State’s failure to complete the first execution attempt was the result of an unforeseeable accident or “innocent misadventure,” that the failure did not result from circumstances that were foreseeable and preventable, and that the State did not inflict unnecessary pain and suffering upon the inmate.

The materially different standard adopted by Broom’s appellate court majority is contrary to

what is required by the cruel and unusual punishments clauses in the Ohio and U.S. Constitutions, fails to provide sufficient protection to a condemned inmate's constitutional rights in this unique setting, is contrary to Resweber and Baze, and fails to take into account the evolving standards of decency that mark the progress of a maturing society. Accordingly, the standard adopted by Broom's appellate court majority must be rejected by this Court in favor of the standard here advocated by Broom.

B. Broom's allegations and evidence state a viable claim that a second execution attempt upon him by any means or methods would violate his right to be free from cruel and unusual punishments under the Ohio and U.S. Constitutions

Broom has more than sufficiently alleged and presented supporting evidence to demonstrate a substantive ground for relief on his claim. His allegations and supporting evidence demonstrate that the first attempt on September 15, 2009 had started and failed through no fault of his own, and that the State's failure to complete the execution attempt that day was not the result of an unforeseeable accident or "innocent misadventure," but instead resulted from circumstances that were foreseeable and preventable. Moreover, Broom was subjected to unnecessary pain and suffering. He is at the very least entitled to a hearing.

There can be no dispute that Broom's execution started and failed on September 15, 2009 through no fault of Broom. The warden read the death warrant at approximately 2:00 PM, and the executioners then entered Broom's holding cell to begin the execution by starting and completing the insertion into Broom's peripheral veins of the two IV catheters required for drug delivery. Absent successful IV insertion into Broom's peripheral veins, the execution could not be completed because the State had no backup plan for delivering the fatal drugs through other delivery means. The injection and successful completion of inserting the IV catheters into Broom's peripheral veins was

thus an essential and core component of the execution, and the execution started once that effort began. Indeed, the closed circuit camera above the gurney started to broadcast the execution to the assembled witnesses as soon as the executioners entered the holding cell to begin IV insertion.⁵

Broom was compliant and cooperative throughout the entire process, until the governor intervened some two hours later. At times, Broom was even noted to have tried to assist the executioners.

The State's failure to complete the execution on September 15, 2009, was solely and exclusively the State's fault and was not an "accident" or "innocent misadventure," its failure was foreseeable and preventable, and the State knowingly subjected Broom to excessive pain and suffering in the process of making the failed attempt.

This is demonstrated by, among other facts developed in Broom's petition and supporting documents, the facts that: (1) the State allowed the execution attempt to continue for a grossly excessive length of time in defiance of the constitutional and statutory requirement that Broom's execution be "quick and painless"; (2) the State knowingly and stubbornly utilized in Broom's execution an execution protocol that was dependent upon successfully establishing and maintaining peripheral IV access to Broom's veins, without any back-up or contingency plan for completing the execution in a quick and painless way (or in any way) in the greatly foreseeable event that peripheral IV access could not be established or maintained; (3) the State permitted the execution team and others to deliberately inflict an intolerable number of painful needle sticks on numerous parts of Broom's body when it should have been apparent that continuing to do was futile; (4) the State

⁵The conclusion of the appellate court majority that IV insertion is merely a "preparatory stage" and not part of the execution is legally and factually incorrect. See *infra* at Proposition of Law 2(C).

blatantly and shamefully failed to follow its own execution protocol by, including, but not limited to, recruiting in the attempt to execute Broom, while the execution was in progress, a non-team member, Carmelita Bautista, who had no prior experience with executions and was powerless to say no to her bosses, and then failing to supervise her in any way; (5) the State inhumanely engaged in an on-again, off-again course, with several lengthy breaks for the medical team, and as a result knowingly prolonged the periods of anguish, terror, and torment to which Broom was subjected as he waited still longer for his executioners to do their job; and (6) the State cruelly announced to Broom at the end of the day's torture that he would be going through it all over again in one week's time, and then required him to remain at SOCF among his executioners to await that next date. See, e.g., Reynolds v. Strickland, 583 F.3d 956, 957 (6th Cir. 2009) (recognizing the "possibility that Broom has already suffered an Eighth Amendment violation by being subjected to this failed execution attempt" and that the "failed Broom execution raises concerns about the risks of maladministration under the Ohio protocol, and its intravenous siting provisions in particular") (Cole, J., concurring); Cooey (Smith) v. Kasich, 2011 U.S. Dist. LEXIS 73606, *36-40, 103-04 (S.D. Ohio July 8, 2011).

Broom's facts demonstrate that he has suffered unique physical and psychological trauma as a result of the State's conduct. He spent approximately two to two-and-a-half hours imprisoned in a small room in which every other human being present was trying to kill him. He was denied access to counsel and was falsely told that his counsel would be notified that he was requesting legal assistance in the process. He suffered repeated needle sticks that were not just pin pricks but were instead wounds where once the needle was under his skin it was moved around in an effort to find a vein. A needle was jabbed into his ankle bone. The process was so inept that Broom's blood sprayed out of his wounds and splattered his clothing.

The pain, suffering, and distress caused by the failed execution were deliberately and

intentionally inflicted upon Broom, and the possibility that he would suffer such pain, suffering and distress was completely foreseeable to the State, as opposed to being the result of an “accident,” or an “innocent misadventure,” or an “isolated mishap.”

Indeed, problems with establishing and maintaining peripheral IV’s were not at all uncommon for the State’s medical team. As recently as the Joseph Clark and Christopher Newton executions, in May 2006 and May 2007, respectively, the medical team’s struggles to establish and maintain peripheral IV access received national attention and, at least in Mr. Clark’s case, resulted in a horror-show of an execution. (The timelines of the Clark and Newton executions are included in the Broom First Submission, Exhs. 21, 22.)

In Clark’s 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 (whereas the policy required IV’s in two locations). Some moments after the drugs started flowing into the IV tubing, Clark sat up and said “you’re drugs aren’t working.” The curtain to the execution chamber was immediately closed and the team members and others swarmed into the chamber to attempt to establish other viable peripheral IV sites. It took more than 40 minutes for a new IV to be established this second time, and during those 40 minutes Clark was poked and stuck with at least some **17-18 needles**, including in his neck and head, and he was heard to be moaning in pain. At one point, the team ran out of tourniquets from all the poking they were doing. As a result, one of the security team members, a former football player, was enlisted to squeeze Clark’s arm as tightly as he could to simulate a tourniquet, and thereby cause the veins to “pop up” so they could be stuck with an IV needle. As a result of this improvised process, an IV was eventually established in

one of Clark's arms, and the execution resumed and was completed.⁶

When Broom's turn came around on September 15, 2009, the State unconscionably was still relying upon an execution method that was **totally dependent on its medical team being able to establish and maintain IV access to the inmate's peripheral veins and with no back-up plan whatsoever for completing the execution in the event peripheral IV access could not be established or maintained with the particular inmate.** And, it was doing so even though it certainly knew by then the hazards of such an execution protocol (see Joseph Clark), and even though the State's own expert and others had advised the State that it needed to have a back-up plan in place to humanely complete the execution in the event peripheral access could not be established or maintained.

Nevertheless, and with venous access being so singularly important, the State's execution team failed in Broom's case to conduct all of the pre-execution vein assessments! This is shockingly indefensible neglect and demonstrates the reckless disregard with which the state proceeded. Moreover, the State's team failed to abide by the execution protocol in many other critical respects, most alarmingly by allowing non-team members to participate and without any guidance or supervision. The State's neglect in these and other respects caused Broom to experience substantial physical and psychological pain. He was visibly in pain at various times during the execution

⁶The facts concerning the Clark and Newton executions are in the record below, with all exhibit references being to the Broom First Submission. See, e.g., Joseph Clark: Second Biros Injunction Order at 8-9, 10-11, 15-17 (Clark stuck 19 times), 26-30, 55-60 (painful noises), 62-63, 83-91 (17-18 needles were used), 105-06 (Broom First Submission, Exh. 1); HT E. Voorhies (First Biros Hearing) at 35-59, 67-68 (Exh. 7); HT T. Collins (First Biros Hearing) at 19-24 (Exh. 10); HT TM#18 (First Biros Hearing) at 136-190 (Exh. 4); HT TM#17 (First Biros Hearing) at 74-85 (Exh. 5); HT TM#12 (First Biros Hearing) at 6-33 (Exh. 6); HT Mark Heath, M.D. (First Biros Hearing) at 91-93, 121-31, 140 (Exh. 8); Chris Newton Second Biros Injunction Order at 30-31, 58-59, 99-102 (Exh 1); HT TM#18 (First Biros Hearing) at 196-99 (Exh. 4); HT E. Voorhies (First Biros Hearing) at 60-63 (Exh. 7); Lowe Declaration (Exh. 23).

attempt, and was observed to be wincing, and, eventually, was crying because of the pain and trauma that was inflicted upon him. Execution team members and non-members made repeated and persistent attempts to get access to Broom's veins by poking him with IV needles again and again, at least 18 times, and they continued to do so when it was or should have been obvious that their repeated efforts to obtain access were futile and were causing Broom severe and excruciating pain and severe emotional distress.

Broom is entitled to relief in his claim. At the very least he is entitled to a hearing.

C. The appellate court erred in holding that the process of obtaining and maintaining successful insertion of the IV catheters into Broom's peripheral veins is a "preparatory stage" and did not commence Broom's lethal injection execution.

Broom has already been subjected to one execution attempt. The death warrant was read to him and the process began with the witnesses watching. There is no question that he felt at the end of the day on September 15, 2009, that there had been a concerted, hands-on, effort to kill him. There is no disagreement about the fact that Broom was in a small room, alone except for those who were trying to kill him, surrounded, while multiple efforts to insert the needles that are a critical step in the process of execution were made on his body. The court of appeals however, said, "we cannot hold that establishing the IV access is part of the punishment of execution. 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 argued below that until poison is actually flowing no attempt to execute has been made. The trial court accepted this analysis and referred to what happened to Broom on September 15, 2009 as

"execution preparation." Trial Opinion, p. 2. The State and the courts below ignored well established Ohio law. The concept of attempt is well defined, though in another context.

Once the State took a substantial step towards carrying out the execution, the execution process had begun. Where, as in this case, bodily intrusions for the purpose of causing death have been made, the execution process was underway. When the state prosecutes an attempted murder charge, the attempt can begin before the victim is even touched. (See for example, State v. Green, 122 Ohio App. 3d 566, 570 (1997) where attempted aggravated murder was shown when the defendant decided to kill, hid in the back of potential victim's van in a K-Mart parking lot with his knife open, with the intention to stab her and drink her blood.) There is no reason why the State's attempt to kill Broom should be subjected to any lesser standard.

In State v. Woods, 48 Ohio St. 2d 127, syl. 1 (1976), the Ohio Supreme Court said there is an attempt when "...[one] purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. A substantial step is taken when "...[the conduct embodies] overt acts that convincingly demonstrate a firm purpose to commit the crime." Id. at p. 132. In State v. Brooks, 44 Ohio St. 3d 185 (1989), the Ohio Supreme Court stated that a substantial step does not necessarily mean that a person has to be close to the completion of the crime: "...[the substantial step] need not be the last proximate act prior to the consummation of the offense" Id. at p. 191. Substitute the word execution for the words crime and offense in the preceding quotes and it is apparent that the execution of Romell Broom was attempted.

The view that the lethal drugs must be flowing into the condemned inmate before the execution has begun rejects common sense. Once again, reasoning from another area of law is helpful. The law of battery makes it clear that the process begins with contact. 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, 524 N.E.2d 166, 167 (Ohio 1988); Stafford v. Columbus Bonding Ctr., 896 N.E.2d 191, 200 (Ohio Ct. App. 2008); Harris v. United States, 422 F.3d 322, 330 (6th Cir. 2005). An execution, at least initially, is a battery with legal excuse. Nothing distinguishes when an execution begins from when an unlawful battery begins. Though the purpose is different, the process is the same. There is no rational justification for saying that an execution does not start at least when the first needle pierces the condemned inmate's skin. The court of appeals erred when it held that establishing IV lines in Broom's peripheral veins is not a part of the process of execution.

D. The appellate court erred in rejecting an assessment of the “totality of the circumstances” in determining whether a second execution attempt upon Broom would result in cruel and unusual punishment proscribed by the U.S. and Ohio Constitutions.

The appellate court majority rejected Broom’s contention that the court must review the totality of the circumstances in determining whether a second execution attempt upon Broom would result in cruel and unusual punishment proscribed by the U.S. and Ohio Constitutions. Instead, the majority adopted a piecemeal approach that distinguishes between challenges premised on alleged violations of the protocol, on the one hand, and challenges to state officials’ actions on September 15, 2009, on the other. The majority’s piecemeal approach is arbitrary, contrary to Supreme Court precedent, and denies meaningful consideration to Broom’s Eighth Amendment claim.

Whether Broom’s constitutional rights have been violated – even under the “deliberate indifference” approach of the appellate court majority – cannot be evaluated properly or in accordance with due process unless all relevant facts and circumstances are considered. This includes all of the facts and circumstances concerning: (1) the many ways in which the State and its execution

team defied the applicable protocols both on the date of Broom's execution attempt and before that date (such as in the Clark and Newton executions); (2) the State and its execution team's failure to adopt reasonable measures for Broom's execution, based upon its known prior problems with IV administration in recent lethal injection executions, to avoid the known foreseeable risks of being unable to start or maintain IV access in Broom's peripheral veins, including disregarding the advice of the State's own expert to have a backup plan in place; and (3) the specific actions and inactions of the State and its execution team on September 15, 2009 and in preparation for that date.

To hold that only some of the facts in category 3, above, are relevant to Broom's present constitutional claims, and that those in categories 1 and 2 are not, as the appellate court majority does, is to misunderstand Broom's claims and fails to give them the full and fair consideration required by due process. Indeed, the subjective intent of the state actors – to the extent such intent is relevant, as the appellate court majority holds that it is – can only be determined upon consideration of all of the facts and circumstances both before and on the date of Broom's failed execution attempt.

The appellate court majority's conclusion that Broom's "facial challenges" to the protocols supposedly should have been raised by Broom prior to September 15, 2009, does not mean that the facts and circumstances underlying those protocol issues are irrelevant to a determination of whether Broom's constitutional rights were violated on September 15, 2009 and/or would be violated by a subsequent attempt. Such facts and circumstances are directly relevant, as suggested in Resweber and Baze. Moreover, since 2007, Broom was part of the Cooey litigation challenging various aspects of the State's protocols. Therefore, Broom did raise challenges to the State's execution protocols prior to September 15, 2009, with the result being that the State actors stubbornly maintained that the challenges raised by Broom and other inmates were groundless and that nothing needed to be changed. Indeed, this attitude of arrogance and defiance by the State officials prior to September 15,

2009, is one of the many reasons why Broom can meet whatever “intent” requirement the courts may choose to impose as to the constitutional claims he has raised seeking to bar any further execution attempt upon him.

E. The appellate court’s adoption of the “deliberate indifference” standard is obvious error that prejudiced Broom.

As already addressed above, the “deliberate indifference” standard adopted by the appellate court majority is not properly applicable in this unique context, and the appellate court majority erred in holding otherwise. An assessment as to whether a state actor is “deliberately indifferent” to the rights of an inmate might make sense in conditions of confinement cases whether the state actor has a duty to keep the inmate safe, healthy, and alive while he is confined in the jail or prison. But, Broom’s case is not a condition 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. And, this attitude of indifference was confirmed by Director Collins when he testified that his decision to seek a reprieve from the governor after two hours of failed attempts was not based on his concern for the physical and mental anguish that Broom was suffering that day.

Not surprisingly, there is no case law to support the appellate court majority’s adoption of the deliberate indifference standard in this unique and rare context. Indeed, the only relevant decision, Resweber, includes a dissent from four justices of the Supreme Court which rejects any suggestion that the intent of the state actors is relevant or dispositive. Resweber, 329 U.S. at 475-76 (“Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that

there was no failure.”).

F. Even if Broom is required to allege and prove “deliberate indifference” by the State actors, Broom had more than sufficiently done so on the record before the trial court.

Finally, even if Broom is required to demonstrate that the state actors had the mental state of “deliberate indifference,” or any other more culpable mental state, Broom more than sufficiently alleged, and presented substantial evidence to establish a substantive ground for relief under, that standard in the record that was before the trial court. It was thus clear error to deny him a hearing and to summarily reject his claims. See supra Proposition of Law 1.

Proposition of Law No. 3:

THE LOWER COURTS DENIED BROOM DUE PROCESS OF LAW, AN ADEQUATE CORRECTIVE PROCESS, AND HIS DAY IN COURT ON HIS “NO MULTIPLE ATTEMPTS” CLAIMS WHEN (1) THE TRIAL COURT DENIED HIM DISCOVERY AND A HEARING, AND (2) THE APPELLATE COURT, IN A CASE OF FIRST IMPRESSION AND WITHOUT PRIOR NOTICE TO BROOM, ADOPTED A NEW CASE-SPECIFIC AND FACT-BASED STANDARD FOR ADJUDICATING BROOM’S UNIQUE AND RARE CONSTITUTIONAL CLAIMS, AND THEN REFUSED TO REMAND THE CASE TO THE TRIAL COURT SO THAT BROOM COULD DEVELOP EVIDENCE AND PRESENT ARGUMENT THAT HE MEETS THAT NEW STANDARD.

An adequate corrective process should be “swift and simple and easily invoked,” should “eschew rigid and technical doctrines of forfeiture, waiver, or default,” and should “provide for full fact hearings to resolve disputed factual issues.” Case v. Nebraska, 381 U.S. 336, 346-47 (1965) (Brennan, J., concurring). See also Goldberg v. Kelly, 397 U.S. 254 (1970); Evitts v. Lucey, 469 U.S. 387 (1985).

Postconviction was Broom’s opportunity to test the constitutional validity of any further

attempts by the State to carry out his sentence of death after the first attempt had started and failed through no fault of Broom's. But as applied to Broom, Ohio's process was neither adequate nor corrective. For Broom, it was an exercise in futility, in blatant disregard of his right to due process.

Broom was denied discovery and an evidentiary hearing in the trial court, although he asked for both. Then, when he got to the appellate court, a divided court adopted a new standard never before applied to the rare claims Broom had presented, and then refused to give Broom any meaningful chance to meet that newly announced standard (which, he had, in any event, met for purposes of securing an evidentiary hearing under a proper application of this Court's postconviction cases).

The treatment of Broom's constitutional claims by the appellate court majority is especially egregious, and is illuminated by the historical backdrop against which Broom's claims arose. The experience through which Broom passed on September 15, 2009 – surviving an execution attempt that started and then failed through no fault of his own and to then be informed that the State will try again in one week – is a singularly rare occurrence. Since the resumption of capital punishment in Ohio with Wilfred Berry's execution in 1999, no inmate besides Broom has survived a failed execution attempt, and Broom is unaware of any other Ohio inmates in the 20th century that survived a failed attempt. Nationwide, Willie Francis in 1946 is the only reported case, and Broom is unaware of any others. The universe of litigants in the U.S. with claims like Broom's over the past century is thus two: Willie Francis and Romell Broom.

The appellate court in Broom's case was thus presented with exceedingly rare claims that were being decided for the first time in U.S. history with the Eighth Amendment applicable to the states. Broom's claims thus presented issues of first impression and national importance. The two-judge appellate court majority concluded that an inmate presenting a once-in-a-century claim like

Broom's must be able to offer proof as to his executioner's "subjective state of mind" and whether the executioners had the "mental state" to cause unnecessary pain during the attempted execution of the inmate. As previously discussed, the majority's standard was not dictated by any controlling precedent in a case presenting the same claims as Broom's, because there are no such cases, as the appellate court itself acknowledged. Instead, the majority imported this "mental state" requirement from "conditions of confinement" cases. That means the majority adopted a legal standard applicable to state prison officials in performing day-to-day duties of keeping an inmate safe, healthy and alive, and imported it into the antithetical, and totally dissimilar, context in which state officials are responsible, not for keeping the inmate safe, healthy, or alive, but for imminently causing the inmate's death against his will on the very day the state actors' mental state is being assessed. While it may be appropriate to require a "mental state" of deliberate indifference when a prison official is alleged to have failed to provide medical care to a sick inmate, the majority failed to recognize or appreciate the absurdity of imposing that same "mental state" requirement in the context of prison officials whose job it is to kill the inmate, not keep him healthy and safe.

Not only did the appellate court majority import into the "no multiple attempts" context a "mental state" arising in an antithetical setting, but the majority did so for the first time in history, not just in Ohio, but in the United States. And the majority did so with no notice to Broom. The State itself never asked that such a standard be adopted here, and the trial court never addressed or even hinted at the application of such a standard. The Supreme Court's most recent lethal injection decision – Baze v. Rees – did not apply such a standard, nor did Judge Frost or the Sixth Circuit in the Cooey cases.

Adopting and applying a new standard in an antithetical setting, and without prior notice to Broom, clearly denied Broom due process of law, but the majority's disregard for Broom's due

process rights went beyond that. The majority refused to remand the case to the trial court to enable Broom to develop evidence and present argument to show that Broom could meet the new standard the majority had adopted for his once-in-a-century claim. The failure to remand means that the majority has in effect offered an interesting advisory opinion for the next inmate who, in another hundred years but probably not in Ohio, might present a rare claim like Broom's. But, as for Broom, he has been denied his day in court on his claims because he (just like the trial court) did not predict that the majority would import a "mental state" requirement into an antithetical context and the reviewing court assumed that he cannot meet the newly adopted standard.

The majority's failure to remand prompted the dissenting judge to correctly conclude that the majority had denied Broom "meaningful consideration of his petition" and his "day in court":

I disagree with the majority's decision to apply [the deliberate indifference] standard to the facts of this case and to Broom's petition as submitted. I would remand the matter to the trial court to allow the parties to brief the issue and provide any relevant evidentiary materials addressing the 'deliberate indifference' standard. I find that applying this standard to this case retroactively without allowing Broom an opportunity to set forth an argument **deprives him of meaningful consideration of his petition.**

... I find that it is difficult to set forth allegations and facts to satisfy a standard that has yet to be adopted by a court on a case and issue of first impression. By applying this standard retroactively, finding that "Broom failed to allege" the requisite facts to prove this standard, **the majority deprives Broom of his day in court and a fair opportunity to comply with this court's newly-adopted standard of reviewing such Eighth Amendment challenges.**

State v. Broom, 2012 Ohio 587, ¶¶ 64-65 (emphasis supplied).

The barriers erected by the state courts have materially hampered Broom's ability to fully present his constitutional claims and denied him a full and fair adjudication of them. Ohio established a postconviction procedure to effectuate constitutional rights for those defendants

sentenced to death. “[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.” Evitts v. Lucey, 469 U.S. 387, 401 (1985). This is all the more so when a petitioner’s life interest is at stake. See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998). Death is different. For that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

The trial court abused its discretion when it denied discovery and an evidentiary hearing. The court of appeals erred by not finding the trial court’s decision to be unreasonable, arbitrary, or unconscionable. See State v. Adams, 62 Ohio St. 2d 151, 157 (1980). And, the court of appeals exacerbated the futility of the process, and denied Broom due process of law, by *sua sponte* adopting its new “deliberate indifference” standard for application in the rare situation presented by Broom’s case of first impression, and then refusing to remand the case back to the trial court to allow Broom to develop facts and present additional argument and evidence to meet that new standard (a standard he had easily met, in any event, on the pleadings, but which was disregarded or ignored by the appellate court majority).

Proposition of Law No. 4:

THE LOWER COURTS ERRED WHEN THEY FOUND THAT A SECOND ATTEMPT TO EXECUTE BROOM WOULD NOT VIOLATE THE PROHIBITIONS AGAINST BEING PLACED TWICE IN JEOPARDY FOR THE SAME OFFENSE IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

Any further attempts to execute Broom would violate his right under the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution not to be placed twice in jeopardy for the same offense. The United States Supreme Court

has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. See, e. g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The third of these protections - the one at issue here - has deep roots in our history and jurisprudence. As early as 1641, the Colony of Massachusetts in its “Body of Liberties” stated: “No man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.” American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: “No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.” 1 Annals of Cong. 434 (1789-1791) (J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: “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, 18 Wall. 163, 168 (1874).

United States v. Halper, 490 U.S. 435, 441 (1989). “The Double Jeopardy Clause, . . . ‘prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.’” Id. at 442.

The State has previously relied on a statement in Resweber that compares a second effort to carry out a previously failed execution as similar to a retrial after reversal on appeal. 329 U.S. at 461 (Reed, J. for the plurality). First, the validity of the comparison is questionable, for Broom took no step comparable to seeking review on appeal. He, unlike an appellant, played no role in the failure of the first execution attempt or the circumstances that led to the State’s request for a second try. Second, the Court’s analogy to a retrial in Resweber hinges on “[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence.” Here the allegations and evidence before the Court are that the problem with the execution procedure and venous access were foreseeable because these problems had happened before during the execution of other Ohio inmates including Joseph Clark on May 2, 2006, and Christopher Newton on May 24, 2007. Reynolds v. Strickland, 583 F.3d 956, 957 (6th Cir. 2009) (noting that Ohio has “experienced serious and

troubling difficulties in executing at least three inmates, most recently Romell Broom”); Id. at 957 (recognizing that the “failed Broom execution raises concerns about the risks of maladministration under the Ohio protocol, and its intravenous siting provisions in particular”) (Cole, J., concurring); Reynolds v. Strickland, 598 F.3d 300, 300 (6th Cir. 2010) (noting the “alarming difficulties on Ohio’s part in executing several other death row inmates” including Broom); Ken Smith Injunction Order.

What happened to Broom was not an innocent mistake or unforeseeable accident but rather was the fault of the State. Under Resweber, Double Jeopardy will be implicated only if the first botched execution is not the fault of the executioners, but here it was. 329 U.S. at 462-63. Broom has alleged and presented substantial evidence to establish a cognizable double jeopardy claim on which he is entitled to relief.

Indeed, in the federal court Cooey litigation that has been pending since 2004, Broom and numerous other death row inmates have for years been warning the State of the serious problems with its lethal injection protocol and the venous access issues. (See generally Broom’s First Submission at Exhs. 1-3.) A mere five months before Broom’s execution attempt, Judge Frost on April 21, 2009, on the basis of a five-day evidentiary hearing (the transcript of much of which was filed by Broom in the trial court) issued a 159-page opinion – the First Biros Injunction Order -- which warned the State that its lethal injection system was broken and needed to be fixed:

Ohio’s method of execution by lethal injection is a flawed system. . . .

. . . .

Based on the arguments and evidence before this Court [at a preliminary injunction stage], the Court cannot say that Biros has demonstrated a strong likelihood of success under the standard advanced by the Baze plurality. This is not to say that Biros can never prevail under the plurality standard. He might produce additional evidence at the subsequent trial on the merits, or Ohio may depart from the unwritten custom and practice that props up its teetering written procedures that alone might

likely fall. A new warden who elects to abandon the custom and practice that has grown around the written protocol would risk enabling an inmate to assert a new challenge directed to what would be the new (old) protocol and would arguably undercut today's conclusions as to an inmate's likelihood of success on the merits of a § 1983 claim of the sort advanced here.

.....

Ohio's method of execution by lethal injection is a system replete with inherent flaws that raise profound concerns and present unnecessary risks, even if it appears unlikely that Biros will demonstrate that those risks rise to the level of violating the United States Constitution. **Thus, although the fact that the evidence at this stage of the litigation does not present a likelihood of Biros prevailing on his claim of a constitutional violation proves dispositive of his request for a continued stay of execution, it does not foreclose the possibility that additional evidence will indeed prove that the problems with Ohio's policies and practices rise to the level of constitutional error.** Today's decision therefore neither holds that Ohio's method of execution by lethal injection is constitutional nor unconstitutional. Rather, today's decision reflects **only that at this juncture**, Biros has not met his burden of persuading this Court that he is substantially likely to prove unconstitutionality. It would wholly confound this Court and no doubt many if not most of the people of the State of Ohio, however, if Defendants regarded today's interlocutory decision as a wholesale endorsement of Ohio's protocol, practices, and policies, both written and unwritten, and then did nothing to improve them. Such a misconstrued legal victory for Defendants would be Pyrrhic given that Defendants are charged with carrying out humane and constitutional executions and not with simply prevailing in litigation. Director Collins appears to recognize as much, given that he testified that the ultimate goal is for Ohio to be as humane as possible and as professional as possible in carrying out its lawful executions. These are indisputably correct goals. **But Collins also testified that he believes Ohio's procedures are as humane and the best they can be right now, and he is incorrect.**

In fact, the protocol, even propped up by unwritten custom and practice of vital importance, **comes notably close in some respects to failing under at least one or more of the standards discussed above.**

First Biros Injunction Order at 123, 147-56 (Broom First Submission, Exh. 3) (published as Cooley (Biros) v. Strickland, 610 F. Supp. 2d 853, 918, 932, 937-38 (S.D. Ohio 2009).)

And, on June 10, 2008, the common pleas court judge in State v. Rivera held that the State's use of the three drugs in its execution protocol, and in particular the pancuronium bromide and the potassium chloride, is "inconsistent with the intent of the General Assembly in enacting §2949.22

and violates the duty of [DRC], mandated by §2949.22, to ensure the statutory right of the condemned person to an execution without pain, and to an expectancy that his execution will be painless.” State v. Rivera, Judgment Entry (Lorain C.P. June 10, 2008) (Broom First Submission, Exh. 24).⁷

Despite the clear recognition by both federal and state courts that its execution protocol was flawed and broken, the State made no material changes to its protocol prior to Broom’s failed execution attempt on September 15, 2009. Indeed, all of the following is true of the State’s actions on that fateful day: **(1)** the State chose to go forward with a protocol that was still exclusively dependent on its medical team being able to establish and maintain IV access to Broom’s peripheral veins, and did so despite numerous prior problems with venous access and most glaringly the debacle involving Joe Clark; **(2)** the State had no backup plan for humanely completing an execution in the foreseeable event peripheral IV access could not be established and maintained; **(3)** the State failed to follow its own execution protocol and training requirements despite repeated prior representations to the federal court in the Cooey litigation that the protocol was viewed as the “law” and would be followed; **(4)** the State failed to perform required vein inspections to determine whether venous access was available for Broom; **(5)** the State allowed Broom’s execution to continue for a length of time that is simply shocking and with a grossly excessive number of painful IV attempts after it was or should have been obvious that the attempts were futile and were causing Broom severe pain and traumatic psychological distress; and **(6)** when the situation was getting desperate after more than an hour of futile IV attempts and with no backup plan whatsoever in the event they failed, the State

⁷The State appealed the trial court’s decision in Rivera. The appellate court dismissed the appeal because the trial court’s order was not a final appealable order and ORC §2949.22, “which creates a right to a quick and painless death,” does not constitute a “special proceeding” such as would permit an immediate appeal. State v. Rivera, 2009 Ohio 1428, ¶¶ 28-29 (Ohio

required a non-team member with zero execution experience to come into the chamber and actively assist the medical team in the execution process, and that non-member was left to do whatever she wanted with no supervision!

What happened to Broom was thus hardly an innocent mistake or unforeseeable accident but rather was obviously the State's fault. Broom has already suffered more pain and trauma at the State's hands in the course of the execution attempt than is inherent in a normal execution. Any effort to execute Broom a second time will necessarily repeat at least some part of the pain he has already endured, and that he can only be required to endure one time, thus punishing him twice for the same offense.

Proposition of Law No. 5:

**THE LOWER COURTS ERRED WHEN THEY DENIED BROOM
DECLARATORY RELIEF UNDER OHIO REV. CODE §2721.01 *ET SEQ.*
AND CIV. R. 57.**

The trial court denied Broom declaratory relief saying only that §2949.22(A) “does not create a cause of action to enforce any right to a quick and painless death” and citing two federal decisions that rely upon the holding in State v. Rivera, 2009 Ohio 1428. Opinion, p. 4. Ohio's declaratory judgment statute, §2721.03, provides:

Subject to division (B) of section 2721.02 of the Revised Code, any person . . . whose rights, status, or other legal relations are affected by a constitutional provision, statute, [or] rule . . . may have determined any question of construction or validity arising under the . . . constitutional provision, statute, [or] rule . . . and obtain a declaration of rights, status, or other legal relations under it.

State v. Rivera specifically contemplates the possibility of using a declaratory judgment action to determine rights under §2949.22(A) but found the trial court's ruling in Rivera's case not to be a declaratory judgment because there was no real controversy at the time due to the fact that Rivera

App. Lorain County Mar. 30, 2009).

had not been sentenced to death. Id. Nothing in State v. Rivera precludes the use of the declaratory judgment statute when the elements necessary for declaratory judgment are present.

All of the prerequisites for declaratory relief are present in Broom's case: (1) a real controversy exists between the parties; (2) the controversy is justiciable in character; and (3) the situation requires prompt relief to preserve the rights of the parties. See, e.g., Burger Brewing Co. v. Liquor Control Comm., 34 Ohio St. 2d 93, 97 (1973); Buckeye Quality Care Centers, Inc. v. Fletcher, 48 Ohio App. 3d 150, 154 (1988). See also, Scott v. Houk, 127 Ohio St. 3d 317, 328-29 (2010) (Brown, C.J. dissenting).

It is generally recognized that "a declaratory judgment action . . . cannot be used as a substitute for an appeal or as a collateral attack upon a [criminal] conviction," that declaratory relief "does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies," and that a declaratory judgment is "not part of the criminal appellate process." Moore v. Mason, 2005 Ohio 1188, ¶14 (Cuyahoga App. Mar. 17, 2005) (citing cases). See also Jackson v. Bartec, Inc., 2010 Ohio 5558, ¶37 (Ohio App. Nov. 16, 2010). However, these restrictions upon declaratory judgments simply do not apply to Broom's action. He is not seeking to appeal his criminal judgment or sentence, nor is he here claiming that the trial court made an error of law during his trial. Rather, Broom claims that, because of the failed execution attempt on September 15, 2009 (i.e., events which occurred long after his conviction and sentence were final and during the course of carrying out the court's sentence), his sentence of death has already been "imposed" and in excess of the fullest extent the constitution permits and beyond what §2949.22(A) allows, and may not therefore be "imposed" again. This is not an attack on the conviction and sentence in any respect relevant to the above cases, nor is it an appeal of or challenge to the underlying judgment. It is instead an effort to have the courts declare that Ohio

law, specifically the relevant constitutional provisions and ORC §2949.22(A), mean what they say.

Broom's claims are analogous to those made by an offender claiming that his sentence has been served or is subject to reduction, or that his parole has expired. These types of claims, like Broom's, are squarely within the province of the declaratory judgment statute. See, e.g., State ex rel. Mora v. Wilkinson, 105 Ohio St. 3d 272, 274 (2005); State ex rel. Yonkings v. Ohio DRC, 1993 Ohio App. LEXIS 5212 (1993), aff'd, 69 Ohio St. 3d 70 (1994); Hattie v. Anderson, 68 Ohio St. 3d 232, 235 (1994); State v. Laney, 2011 Ohio 135 (Ohio App. Jan. 14, 2011); McGrath v. Ohio Adult Parole Auth., 2004 Ohio 6114 (Cuyahoga App. Nov. 18, 2004).

Proposition of Law No. 6:

THE LOWERCOURTS ERRED WHEN THEY FOUND NO DENIAL OF BROOM'S RIGHTS UNDER OHIO REVISED CODE §2949.22(A), ARTICLE I, SECTIONS 1, 2, 8, 9, 10, AND 16 OF THE OHIO CONSTITUTION, AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION WHEN THE STATE FAILED TO CONDUCT BROOM'S EXECUTION ATTEMPT ON SEPTEMBER 15, 2009 IN CONFORMITY WITH OHIO LAW.

Relying on its view that establishing venous access for the administration of the lethal drugs is not part of the execution, the Court of Appeals held that "Ohio law, R.C. 2949.22(A), does not create a right to a quick and painless execution process, only a right to have a sufficient dosage of drugs to cause a quick and painless death. Broom did not receive any drugs, prior to the governor's issuing his reprieve, to even implicate R.C. 2949.22(A)." (App. Opinion ¶56)

This Court in Scott v. Houk, 127 Ohio St.3d 317 (2010), found that Ohio law provides no mechanism for testing "whether a specific lethal-injection protocol is constitutional under *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420, or under Ohio law." The question of what remedy is available for violation of the statutory obligation to ensure that an execution is quick and

painless has not been addressed by this Court, though the fact that the State is required to meet this obligation has been noted: "[A] writ of mandamus to ensure that the warden fulfills his duty to carry out the death penalty quickly and painlessly under *R.C. 2949.22* would simply order the warden to do that which he or she is already required to do by law." *Id.* at 321 (Lanzinger, J., concurring). Moreover, this Court did not address the question of whether a violation of ORC §2949.22 is a denial of due process and the prohibition against cruel and unusual punishments as guaranteed by both the Ohio Constitution (Art. I, §1 life and liberty, §2 equal protection and benefit, §9 cruel and unusual punishment, §16 due process) and federal constitutions (Eighth Amendment cruel and unusual punishments, Fourteenth Amendment, life, equal protection and due process).

A. Ohio Revised Code §2949.22(A) creates a right guaranteeing that condemned prisoners will only be executed by a quick and painless means.

The State of Ohio established by statute the requirement and the promise that death sentences will be "quick and painless." ORC §2949.22(A). In *State v. Rivera*, 2009 Ohio 1428 (Lorain App., Mar. 30, 2009), this right was recognized when the court said in discussion of the State's argument:

[T]he State focused more narrowly on Section 2949.22, which *creates a right to a quick and painless death*, and argued that this section constituted a special proceeding because *the right to a quick and painless death* was purely statutory and was unavailable at common law. The State focused on the *statutory right* and the trial court's order, not the action.").

Rivera, 2009 Ohio 1428, at P25 (emphasis added). The trial court below held that Ohio provides no means of enforcing this right saying that §2949.22(A) "does not create a cause of action to enforce any right to a quick and painless death." Tr. Opinion. p.4.

There can be no dispute that state laws and procedures create protected interests and Ohio did just that with the enactment of §2949.22(A). *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972) (stating that property interests are created and defined not by the Constitution but by

independent sources such as state law); Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31 (1982); Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Gunaskera v. Irwin, 551 F.3d 461 (6th Cir. 2009).

Broom has a real, present and cognizable interest and expectation that Ohio's execution protocol will be designed and implemented to provide the promised quick and painless death. The trial court, without analysis, held that §2949.22(A) "does not create a cause of action to enforce any right to a quick and painless death" and declined to review Broom's claim. Opinion, p. 4. The fact that a statute does not itself create a cause of action to enforce its provisions does not mean that the statute is a nullity or that it can be violated at will without consequence or recourse. It simply means that the statutory right will be enforced within the context of the matters in which it arises or by declaratory judgment. Broom's claim should have been reviewed under §§2953.21 and/or 2721.03.

B. By failing to abide by Ohio law, the State violated Broom's right to Due Process under the Fourteenth Amendment.

The Supreme Court has held repeatedly that when a state establishes procedures those procedures must comport with the requirements of Due Process. Evitts v. Lucey, 469 U.S. 387, 396 (1985); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (citations omitted). Neither can the state change the character of an inmate's confinement from a penal institution to a mental health facility without providing Due Process protection. Vitek v. Jones, 445 U.S. 480 (1980). Likewise, even if a State has no duty to authorize parole, probation, or good time credit, if it does exercise its discretion to grant these conditional liberties to convicted felons, any decision to deprive a prisoner, parolee or a probationer of such conditional liberty must accord that person Due Process. Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); Morrissey v. Brewer, 408 U.S. 471, 480-90 (1972).

The State has suggested that Broom's substantive and procedural due process claims are precluded by Whitley v. Albers, 475 U.S. 312 (1986). In Whitley, the Court said,

We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment were not also punishment "inconsistent with contemporary standards of decency" and "*repugnant to the conscience of mankind.*"

Id. at 327 (citations omitted). There the Court found that the infliction of pain that violates the Fourteenth Amendment's Due Process Clause would also violate the Eighth Amendment. That question - whether the Due Process Clause provides protection against cruel and unusual punishments that the Eighth Amendment does not - has no application to Broom's claim that the Due Process Clause requires Ohio to keep its promise of a quick and painless death. ORC §2949.22(A).

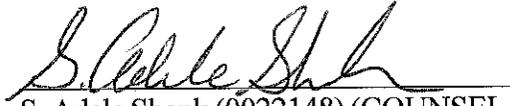
The trial court did not decide whether Ohio's failure to comply with its own law violated the Due Process Clause but instead held only that §2949.22(A) "does not create a cause of action to enforce any right to a quick and painless death." Opinion, p.4. Due Process requires that where there is a right there is a remedy for its violation and a procedure to ensure its enforcement.

CONCLUSION

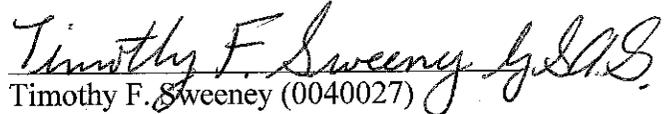
The lower courts' decisions dismissing Broom's postconviction petition and denying him declaratory relief were error. This case involves substantial constitutional questions. This Court should accept jurisdiction and reverse the Eighth District Court of Appeals' decision. Broom is entitled to an order that the State may not again try to execute or carry out an execution on Broom by any means or methods. Alternatively, this Court should remand this case to the trial court for full

discovery and an evidentiary hearing on the claims presented in Broom's postconviction petition and request for declaratory relief.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AMENDED MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ROMELL BROOM was served by regular U.S. Mail, first-class postage pre-paid on William Mason, Prosecuting Atty., and Matthew E. Meyer, Assistant Prosecuting Attorney, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, this 21st day of May, 2012.



One of Broom's Attorneys

[Cite as *State v. Broom*, 2012-Ohio-587.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96747

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROMELL BROOM

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-196643

BEFORE: S. Gallagher, J., Jones, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 16, 2012

Exhibit A

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SEAN C. GALLAGHER, J.:

{¶1} Defendant-appellant Romell Broom appeals the trial court's decision denying Broom's petition for postconviction relief. For the following reasons, we affirm.

{¶2} Broom was convicted for the rape and murder of Tryna Middleton in 1985 and sentenced to death. Broom exhausted his appellate rights and faced execution on September 15, 2009. As of September 15, 2009, the state of Ohio had adopted procedures, practices, policies, and rules to guide the execution team in carrying out its statutory mandate in accordance with R.C. 2949.22. These procedures will be referred to as the “Protocols.” The Protocols included the written protocol No. 01-COM-11, effective May 14, 2009, which has since been superseded. All executions are conducted at the Southern Ohio Correctional Facility in Lucasville, Ohio (“SOCF”).

{¶3} Broom was transported to SOCF on September 14, 2009, in preparation for the next-day execution. Upon his arrival, the medical personnel conducted a physical examination of Broom, including the first of three, Protocol-required, venous assessments. These assessments were intended to monitor whether an intravenous line (“IV”) could be placed and maintained during the execution. The staff noted potential concerns over the accessibility of Broom’s veins in his left arm, but noted that his right arm would be amenable to IV access. Later that same day, the medical staff performed the second venous assessment, but only noted the fact that the assessment was completed. The third required assessment was either never performed or never recorded. It is undisputed that none of the completed assessments indicated that Broom’s left-arm veins would be anything other than problematic, and none of the assessments indicated that the execution should be delayed.

{¶4} Broom's delayed execution began around 2:00 p.m. on September 15, 2009, because of some last minute legal attempts to stay the execution. In preparation for the lethal injection, the execution team attempted to establish two working IV catheters in Broom's peripheral veins. The Protocols suggested, but did not require, two IV catheters in case the primary catheter malfunctioned during the execution. The team made numerous, unsuccessful attempts to establish and maintain viable catheters. After 45 minutes, the team was ordered to take a break in order to confer. Ten to twenty minutes later, the team resumed their attempts to establish the IV catheter in Broom's biceps, forearms, and hands.

{¶5} At this point, a SOCF staff doctor who was not a member of the execution team appeared to assist the team in placing the IV catheters. The doctor tried placing the IV catheters on the top of Broom's foot and over his ankle bone. Neither attempt was successful, and Broom contends that the needle was pushed into his ankle bone. Almost two hours into the preparation, the execution team took another break and indicated that establishing IV access that day was not feasible. The director contacted Governor Strickland's office, and the governor signed a seven-day reprieve ending the execution attempt. During the course of the two hours, Broom received approximately 20 puncture wounds, some causing Broom to audibly react.

{¶6} Broom filed various motions and petitions in both state and federal court in response to the failed execution attempt. In Cuyahoga County C.P. No. CR-196643, Broom filed a motion for postconviction relief pursuant to R.C. 2953.21 and a declaratory

action seeking to “declare” any future attempts to execute Broom would violate his state and federal constitutional rights. Relying on the evidentiary submissions, the trial court denied Broom’s petition prior to holding an evidentiary hearing. It is from this decision that Broom appeals, raising five assignments of error.

{¶7} Before addressing the merits of Broom’s appeal, we are compelled to make the following observation. As noted by the Ohio Supreme Court, “[r]easonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable.” *Scott v. Houk*, 127 Ohio St.3d 317, 319, 2010-Ohio-5805, 939 N.E.2d 835 (Stratton, J., concurring), quoting *Baze v. Rees*, 553 U.S. 35, 61, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). As judges, we have our own personal concerns about capital punishment. Capital punishment, however, is constitutional, and the “Constitution does not demand the avoidance of all risk of pain in carrying out executions.” *Id.* As Justice Frankfurter aptly noted, courts “must abstain from interference with State action no matter how strong one’s personal feeling of revulsion against a State’s insistence on its pound of flesh.” *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (Frankfurter, J., concurring). We are not debating the efficacy of Ohio’s execution system or the possibility of eliminating all pain from the execution process. Our duty is to uphold the law and the Constitution. While we are conscious of the gravity of the matter before us, we can only address the issues properly before us.

{¶8} At the center of this appeal, we are presented with a simple question: Does the state have the right to subject Broom to a second execution attempt? The answer, despite the simplicity of the question, is far more complex. For this reason, Broom's assignments of error can be divided into three categories: procedural issues, constitutional issues, and state statutory issues. We will address Broom's assignments of error out of order where appropriate and combine any overlapping arguments.

Standard of Review

{¶9} “[A] trial court’s decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion * * *.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. The term “abuse of discretion” means “an unreasonable, arbitrary, or unconscionable action.” *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 15. It is “a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” (Citations and quotations omitted.) *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 130. “[A] reviewing court should not overrule the trial court’s finding on a petition for postconviction relief that is supported by competent and credible evidence.” *Gondor* at 390.

Procedural Issues

{¶10} Broom's fifth assignment of error provides as follows: "The trial court erred when it denied Broom declaratory relief under Ohio Revised Code 2721.01 *et seq.* and Civ.R. 57." The trial court summarily denied Broom's request for declaratory relief. Broom's fifth assignment of error is without merit for the following reasons.

{¶11} Broom sought to overturn his death sentence as being unconstitutional through his petition for postconviction relief. His request for declaratory relief seeks nothing more than a declaration of the same and, in fact, was raised in the alternative. "A declaratory judgment action, however, cannot be used as a substitute for an appeal or as a collateral attack upon a conviction. Declaratory relief * * * is [not] a substitute for appeal or post conviction remedies." *Moore v. Mason*, 8th Dist. No. 84821, 2004-Ohio-1188, 2005 WL 628512, ¶ 14, quoting *Shannon v. Sequechi*, 365 F.2d 827, 829 (10th Cir.1966). Because his request for declaratory relief seeks the same remedy advanced through his petition for postconviction relief, we find that any declaratory relief sought was duplicative and, therefore, improper. The trial court did not err in denying Broom declaratory relief, and his fifth assignment of error is overruled.

{¶12} Broom's first assignment of error provides as follows: "The trial court erred when it denied Broom an evidentiary hearing on his post conviction and declaratory judgment claims." Broom argues that because of the five volumes of supporting documentary and other evidence filed with his petition, he is entitled to a hearing. The five volumes largely consist of the publically available evidence used in the course of

Cooley v. Strickland, S.D. Ohio No. 2:04-CV-1156, 2009 WL 4842393 (Dec. 7, 2009).

We disagree with Broom's argument.

{¶13} A trial court's decision to deny a postconviction petition without a hearing is also reviewed under the abuse of discretion standard. *State v. Abdussatar*, 8th Dist. No. 92439, 2009-Ohio-5232, 2009 WL 3155131, ¶ 15. R.C. 2953.21 (A)(1)(a), governing postconviction petitions, provides the following:

Any person who has been convicted of a criminal offense * * * who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

The trial court must determine whether there are substantive grounds for relief, when considering the supporting affidavit and other documentary evidence filed in support of the claim, prior to setting the matter for hearing. R.C. 2953.21(C) and (E).

{¶14} Broom cites *State v. Milanovich*, 42 Ohio St.2d 46, 325 N.E.2d 540 (1975), in support of his argument,

which held that where the petitioner's claim is one which cannot be determined by an examination of the petition, files, or records of the case *and* which states a substantive ground for relief, the Court should proceed to a prompt evidentiary hearing * * *. (Emphasis added.) *State v. Rembert*, 8th Dist. No. 49422, 1985 WL 8124 (Oct. 10, 1985), citing *Milanovich*.

Because that proposition of law is stated in the conjunctive, there are two conditions that must be satisfied prior to the court holding a hearing: the petitioner must state substantive

grounds for relief, and the issue cannot be determined through a review of the record. This court, therefore, additionally recognized that trial courts are required to hold an evidentiary hearing only if the petitioner is relying on facts outside the record. *Id.*

{¶15} In this case, the state is not disputing the facts as advanced by Broom, leaving no issue of fact to be resolved at an evidentiary hearing. Broom also argues that he would have presented additional evidence at the hearing, but does not specify what additional evidence would have been introduced beyond the five volumes of documentary evidence filed. In fact, Broom concedes that “much of” the outside evidence was before the trial court, including the deposition testimony of the public members responsible for carrying out Broom’s execution attempt and Broom’s affidavit supplanting his sealed deposition testimony. Further, the parties attached copies of Judge Gregory Frost’s lengthy federal court opinions, which largely recounted any additional evidence Broom would have included at a hearing. In fact, Broom conceded at oral argument that the trial court had enough evidence before it to find in his favor.

{¶16} We recognize this is a case of first impression and potentially of national importance. On the face of the petition and given the magnitude of the issues presented, we understand Broom’s insistence on getting his day in court. It remains, however, that there are no factual disputes to resolve at an evidentiary hearing. The facts are known and accepted by the state. In this instance an evidentiary hearing was not required, further highlighted by the fact that the trial court’s opinion focused on legal issues. The trial court based its decision on the undisputed and voluminous documentary evidence

properly before it and did not abuse its discretion in denying Broom's petition without conducting an evidentiary hearing. Broom's first assignment of error is overruled.

Constitutional Issues

{¶17} Broom's fourth assignment of error provides: "The trial court erred when it found that a second attempt to execute Broom would not violate the prohibitions against being placed twice in jeopardy for the same offense in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution." Broom's fourth assignment of error is without merit.¹

{¶18} Broom sought the overarching declaration that a second execution attempt would violate either the Fifth Amendment Double Jeopardy Clause or Eighth Amendment prohibition against cruel and unusual punishment per se. The Supreme Court "has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989); *Hudson v. United States*, 522 U.S. 93, 98-99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

{¶19} Broom contends the third abuse, multiple punishments, is implicated in his case because it was through the state's failures that his execution could not proceed. We

¹Although Broom argues that multiple execution attempts and the execution team's conduct on September 15, 2009, violated both the United States and Ohio Constitutions, his substantive arguments are limited to alleged violations of the Fifth and Eighth Amendments to the U.S. Constitution. Our analysis is accordingly limited.

disagree. Broom largely attacks the state's actions on the failed execution attempt and relies on the state's knowledge of problems in the execution procedures. The Fifth Amendment prohibition against double jeopardy does not focus on the state's action in effectuating punishments, rather the focus is on the punishment itself. The Fifth Amendment prohibits states from punishing a defendant twice for the same offense. On this point, a slight digression is in order.

{¶20} Broom was sentenced to death. The process he complains of, and what he endured was through the preparation to carry out a lawful sentence. The parties disagree on this point. The state argues the execution begins with the injection of lethal drugs. *See Resweber*, 329 U.S. at 477, 67 S.Ct. 374, 91 L.Ed. 422 (Rutledge, J., dissenting) (acknowledging that the Louisiana Legislature requires a single, continuous application of electricity to effectuate the death sentence as the basis for remanding the case to the trial court for a hearing on the evidentiary dispute regarding whether electricity was applied to the inmate). Broom essentially contends the preparation of the IV catheter constitutes the beginning of the execution attempt.

{¶21} In *Resweber*, an inmate sentenced to death was placed in the electric chair. When the executioner "threw the switch," the device malfunctioned and failed to deliver the necessary voltage to execute the inmate. The state of Louisiana terminated the execution attempt and granted a six-day reprieve. With a divided Supreme Court, four justices agreed that Louisiana's conduct of subjecting the inmate to multiple execution attempts did not violate the Fifth or Eighth Amendments. Four justices dissented, but

not before implicitly agreeing on one issue. The four dissenting justices would have remanded the case to the trial court for a determination of whether the state's conduct violated the constitutional prohibition against cruel and unusual punishment. *Id.* at 477.

The dissent was silent on the double jeopardy issue. *See Broom v. Strickland*, S.D. Ohio No. 2:09-CV-823, 2010 WL 3447741 (Aug. 27, 2010) (noting that the justices disagreed over the application of the Eighth Amendment). This omission is instructive, and the dissent's language is equally availing.

{¶22} The *Resweber* dissent distinguished the application of electricity to the inmate from merely placing the inmate in the electric chair with no application of electricity. *Resweber* at 477. At the time, the Louisiana statute required a continuous application of electricity to cause the inmate's death. *Id.* The import was that the Louisiana state officials had a statutory duty to ensure that once the electricity was applied, that application must be continuous until the inmate's death. *Id.* at 476. In *Broom's* case, Ohio law, R.C. 2949.22(A), requires the state to apply a drug or combination of drugs of sufficient dosage to cause death. Applying this rationale, Ohio state officials have a statutory duty to ensure that once the drugs are applied, a sufficient dosage is injected to cause the inmate's death. For this reason, we cannot hold that establishing the IV access is part of the punishment of execution. 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.

{¶23} The state, therefore, has not yet punished Broom so as to implicate the Fifth Amendment prohibition against punishing an individual twice for the same crime. An inmate can only be put to death once, and that process legislatively begins with the application of the lethal drugs. R.C. 2949.22(A). We cannot adopt a bright-line rule based on the Fifth Amendment that prohibits the state from effectuating a death sentence after being unable to carry out the execution because of failings in the preparatory stages.

{¶24} For this same reason, we also hold that a second execution attempt cannot constitute cruel and unusual punishment per se solely on the fact that the inmate must endure a second execution attempt. We must decline to reach such a definitive conclusion. 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 likely would 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. Therefore, in a case such as this, we must make the overarching declaration that multiple execution attempts do not implicate the Fifth Amendment's prohibition against double jeopardy or the Eighth Amendment per se.

{¶25} Courts cannot eliminate all pain from the execution process, and along the same lines, we must allow the state discretion to grant a temporary reprieve in situations that proceeding to execution could cause needless pain. We do agree that the state's use of multiple execution attempts needs to be tempered; however, this cannot be through the Fifth Amendment's Double Jeopardy Clause or through creating a per se Eighth Amendment violation. In the rare instance where the state attempts to execute an inmate on multiple occasions, the appropriate remedy is through the Eighth Amendment's prohibition against cruel and unusual punishment based on the case-specific inquiry. Broom's fourth assignment of error is overruled.

{¶26} Broom's second assignment of error provides: "The trial court erred when it found that the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Ohio Constitution do not bar another attempt to execute Broom." Broom's second assignment of error is without merit.

{¶27} Broom primarily argues that the state willingly strayed from the Protocols, causing his execution attempt to be aborted, and that the repeated attempts to establish the IV access resulted in unconstitutional suffering.² According to Broom, these aberrations

²This Eighth Amendment claim must be distinguished from the equal protection claims most recently addressed in *In re: Ohio Execution Protocol Litigation*, S.D. Ohio No. 2:11-CV-1016, 2012 WL 84548 (Jan. 11, 2012), which granted a preliminary injunction against carrying out an inmate's execution based on the likelihood the state will deviate from the written protocols. Those deviations created an unequal treatment of the inmate from other similarly situated inmates. *Id.* The federal court specifically distinguished cruel and unusual punishment claims, which focus on severe pain, from equal protection claims and noted that the two claims do not overlap. *Id.*

transformed the constitutionally valid method into an unconstitutional execution attempt. Succinctly stated, he contends the state (1) failed to conduct the third venous assessment; (2) failed to implement backup plans to humanely execute inmates with poor venous assessments; (3) failed to ensure proper training of the execution team in accordance with the Protocols; (4) allowed the execution preparation to proceed for an excessive length of time and for an excessive amount of attempts at establishing the IV catheter; (5) allowed a non-execution team member to assist in the execution preparation; and (6) engaged in sporadic attempts to establish the IV catheter while allowing the execution team to take breaks. Further, Broom claims the circumstances were not unknown to the state. The state knew that problems with establishing the IV catheter arose in earlier executions, and the Protocols still failed to include an alternative.

{¶28} This is an issue of first impression in Ohio and nearly first impression in the United States. *Broom v. Bobby*, N.D. Ohio No. 1:10-CV-2058, 2010 WL 4806820 (Nov. 18, 2010). Never before has the state failed to execute an inmate after beginning the execution process. *Id.* There also is little federal jurisprudence on this issue. In *Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422, the only other case dealing with a second execution attempt,

[t]he Supreme Court held * * * that the Fifth and Eighth Amendments do not preclude a state from a second attempt at an execution[,] * * * however, “*Resweber* is a plurality decision in which there were not five justices who found that a second execution attempt did not offend the Eighth Amendment.” *Id.*, quoting *Broom v. Strickland*, S.D. Ohio No. 2:09-CV-823, 2010 WL 3447741 (Aug. 27, 2010).

{¶29} We acknowledge the limited precedential value offered by *Resweber*, despite both parties' reliance on different aspects of the opinion. Broom seeks to distinguish his circumstances from those identified in *Resweber* because he claims that his ordeal was not from the technical failure, or "misadventure," found to be the cause in *Resweber*. Despite the limits of the *Resweber* opinion, *Resweber* and its progeny offer a persuasive framework.

{¶30} Before addressing this framework, it bears repeating that the Supreme Court has "never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Baze*, 553 U.S. at 48, 128 S.Ct. 1520, 170 L.Ed.2d 420. In reviewing the history of the prohibition against cruel and unusual punishment, the Supreme Court noted that "[w]hat each of the forbidden punishments had in common was the *deliberate* infliction of pain for the sake of pain-'superadd[ing]' pain to the death sentence through torture and the like." (Emphasis added.) *Id.* at 48. An isolated occurrence during the execution process does not imply cruelty. *Id.* at 50. The Supreme Court

observed [that] "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there [is] something inhuman and barbarous, something more than the mere extinguishment of life." *Id.* at 49, citing *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890).

{¶31} With that proposition in mind, we must separate Broom's second assignment of error into two categories: facial challenges to the Protocols and challenges based on state officials' actions on September 15, 2009.³

{¶32} We begin our analysis with Broom's post hoc facial challenges to Ohio's Protocols, specifically, Broom's complaint that the state failed to implement backup plans to humanely execute inmates with poor venous assessments, allowed the execution preparation to proceed for an excessive length of time, and engaged in sporadic attempts to establish the IV catheter while allowing the execution team to take breaks. The arguments essentially addressed the Protocols as they existed at the time of his execution date. The Protocols did not allow for a backup plan of execution or for a set time-limit within which to establish the IV catheters.

{¶33} Broom argues that the executions of Joseph Clark and Christopher Newton highlighted the state's awareness that establishing and maintaining IV catheters on certain inmates could be problematic and therefore the state should have had a backup execution method in place. In Clark's case in particular, the state attempted to establish an IV catheter 17 to 18 times and only successfully established one. During Clark's execution, it became clear that the one IV catheter established was not operating properly when the

³We separated Broom's constitutional arguments into their component pieces because the analysis differed between the facial, per se, and case-specific analyses. Broom, however, seems to be implicitly advocating for an accumulation-of-errors type approach that bases the constitutional analysis on the totality of circumstances surrounding the execution attempt; i.e., while no single error rises to the level of a constitutional violation, the errors in total violate the tenets of the Constitution. We decline to address Broom's argument in such a fashion as being unsupported by case or statutory authority.

first of three drugs was pushed. The execution team ceased pushing the drug mixtures and reestablished IV access. This process took over 45 minutes, but the team was able to complete the execution. Broom's argument is a double-edged sword. Just as the state was aware of problems with venous access, so was Broom prior to the September 15 execution attempt.

{¶34} Broom's challenge to the Protocols, in regard to the lack of a backup plan, should have been addressed prior to the execution attempt. We cannot look back at the constitutionality of a particular method after a problem arises. The appropriate time to challenge the method of execution is prior to the execution.

{¶35} More important, courts at every level continuously upheld Ohio's lethal injection procedure prior to the September 15 execution attempt. See *Cooley v. Strickland*, 610 F.Supp.2d 853 (6th Cir.2009); *Cooley v. Strickland* (6th Cir.2009), 589 F.3d 210, 227-228 (additionally concluding that the lack of a prescribed limit for the execution team to search for accessible veins is not unconstitutional); *Baze*, 553 U.S. at 35, 128 S.Ct 1520, 170 L.Ed.2d 420 (upholding Kentucky's lethal injection procedure, which was similar to Ohio's three-drug injection method). No reviewing court required any state, much less Ohio, to include a backup plan in order to pass constitutional scrutiny.

{¶36} Finally, Broom claimed that the state's allowing the execution preparation to proceed for an excessive length of time and engaging in sporadic attempts to establish the

IV catheter was unconstitutional. Neither of those actions is prohibited under the Protocols. To the contrary, the Protocols provided in pertinent part:

The appropriate team member(s) shall make every effort to establish IV sites in two locations, and shall take the amount of time necessary when pursuing this objective. * * * 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 establishing two or even one site, the team will consult with the warden.

Therefore, in essence, these claims are also facial challenges to the Protocols, which should have been addressed prior to the attempt to execute Broom.

{¶37} Nonetheless, in *Baze*, the Supreme Court held that the one-hour time limit established by the Kentucky protocols was not excessive and noted that the execution team was not required to use the one-hour limit to establish the IV catheters continuously.

Baze at 55. *Baze* is instructive. It first encourages the practice of attempting to locate veins in short blocks of time rather than continuously. Implicit in allowing sporadic attempts to establish the IV catheters is the concept that multiple “needle sticks” would be necessary.

{¶38} Broom also offered no basis to declare a two-hour time limit excessive. We see no reason to distinguish Broom’s circumstances to the one-hour time limit upheld in *Baze*. *Id.* In that case, the one-hour time limit held to be constitutionally valid could be one hour of continuous or sporadic attempts to establish the IV catheter. While certainly there must be a limit imposed on the amount of time spent establishing the IV catheters, in light of *Baze*, we find that two hours of sporadic attempts to place and

maintain the IV catheters is not so excessive as to distinguish Broom's case from *Baze* and implicate the Eighth Amendment. The state did not spend an excessive amount of time attempting to establish the IV access, and the sporadic attempts to accomplish that task did not render the process unconstitutional. We accordingly find no merit to Broom's facial challenges to the Protocols.

{¶39} We next turn to Broom's challenges to the state's actions during the September 15, 2009 execution attempt. Broom asks us to review the facts of his case and divine that the violations of Protocol and the process of establishing the IV catheters was cruel and unusual punishment. Broom argued that what he suffered at the hands of the "awesome power of the state" constitutes cruel and unusual punishment because of his subjective suffering, an ordeal that could have been remedied by following the Protocols. The state disagreed and argued that in determining the validity of Ohio's and other states' execution methods, courts routinely discount the possibility of errors as being part of the process when resolving facial challenges. *See State v. Webb*, 252 Conn. 128, 143, 750 A.2d 448 (2000) (noting that the fact several needle insertions may be needed to effectuate a lethal injection does not render the procedure to be violative of the Eighth Amendment).

{¶40} Neither position offers a workable standard in the unlikely event that the state finds itself in a similar situation. Courts must be able to review violations and errors in the execution process and cannot circumvent tough issues on the theory that problems could occur during the execution process. The fact is that Broom's execution

went awry, and we must have a workable framework with which to review such unpleasant circumstances. “[I]t seems * * * important to be explicit regarding the criteria by which the State’s duty of obedience to the Constitution must be judged. Particularly * * * when life is at stake.” *Resweber*, 329 U.S. at 466, 67 S.Ct. 374, 91 L.Ed. 422 (Frankfurter, J., concurring).

{¶41} Relying on the parties’ arguments and authority presented, the trial court put much emphasis on *Resweber* and its progeny dealing with the method of execution.⁴ *Resweber* offers a workable framework, however based on a different line of cases. *Resweber* led to multiple branches of legal theory, two of which are pertinent to our discussion: (1) *Resweber* and its progeny dealing with the method of execution, for example, *Cooley v. Strickland*, 589 F.3d 210 (6th Cir.2009), and *Baze*, 553 U.S. at 35, 128 S.Ct 1520, 170 L.Ed.2d 420; and (2) *Resweber* and its progeny dealing with a condition-of-confinement claim, for example, *Wilson v. Seiter*, 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

⁴Typically, inmates challenging their execution as being cruel and unusual punishment, challenge the prospective method of the execution, i.e., the state’s methodology in implementing the death penalty. *See id.*; *Cooley v. Kasich*, 801 F.Supp.2d 623 (S.D. Ohio 2011); *Cooley v. Strickland*, S.D. Ohio No. 2:04-CV-1156, 2009 WL 4842393 (Dec. 7, 2009); *Cooley v. Strickland*, 589 F.3d 210 (6th Cir.2009). Under that analysis, in order to constitute cruel and unusual punishment, an execution method must present a “substantial or objectively intolerable risk of serious harm.” *Id.* at 50. Courts rely on the state’s written protocols to ensure that the execution methods are not objectively intolerable. *See id.* at 55. In other words, the state implements written protocols to decrease the likelihood of human error that would cause unconstitutional pain and suffering during the execution. Courts, in turn, rely on the written protocols in determining whether the state’s chosen methodology facially passes constitutional muster.

{¶42} Contrary to the parties' posturing, our inquiry is not limited to whether a substantial harm *can* occur based on the chosen methodology to execute Ohio's inmates, rather we must determine whether a substantial harm *did* occur in carrying out Broom's execution. As one federal court indicated,

This is an important inquiry. If a court could never look beyond the facial constitutionality of an execution protocol when presented with evidence of improper administration, states could simply adopt constitutionally sufficient protocols * * * then flout them without fear of repercussion. *Dickens v. Brewer*, 631 F.3d 1139, 1146 (9th Cir.2011).

{¶43} In *Resweber*, the Supreme Court, in reviewing the case, assumed that the Fifth and Eighth Amendments of the Constitution applied to the state and that the state officials carried out their duties in a careful and humane manner as there was "no suggestion of malevolence." *Resweber*, 329 U.S. at 462, 67 S.Ct. 374, 91 L.Ed. 422. The Supreme Court specifically held:

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 [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. (Emphasis added.)* *Id.* at 464.

{¶44} Justice Frankfurter, the critical fifth vote, agreed with the result, although concluding the Eighth Amendment did not apply to the states at that time. Justice Frankfurter found, based on the general notion of due process, that a proclamation of judicial clemency for a lawful sentence of death cannot be the remedy simply because the first attempt to carry out the punishment failed because of "an innocent misadventure."

A bright-line test is not necessary to uphold a principle of justice “[r]ooted in the traditions and conscience of our people.” *Id.* at 471 (Frankfurter, J., concurring). This did not “mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions.” *Id.*

{¶45} The repeated references to accidents and innocent misadventures in *Resweber* set the foundation of a subjective state-of-mind requirement on state acts or omissions. Even the *Resweber* dissent recognized such. The dissent focused on the Louisiana statute that required a single, continuous application of electricity to cause the inmate’s death. *Id.* at 477 (Rutledge, J., dissenting). The dissent would have found that the second attempt would require the executioner to intentionally apply a second application of electricity, which would have violated Louisiana law.

{¶46} The Supreme Court later officially recognized that “[b]ecause the first [execution] attempt [in *Resweber*] had been thwarted by an ‘unforeseeable accident,’ the officials lacked the culpable state of mind necessary for the punishment to be regarded as ‘cruel,’ regardless of the actual suffering inflicted.” *Wilson*, 501 U.S. at 297, 111 S.Ct. 2321, 115 L.Ed.2d 271; *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Therefore, in order to determine whether deviations from the Protocols or the subjective pain endured by Broom from the countless “needle sticks” constitutes cruel and unusual punishment, we must inquire into the state actor’s state-of-mind. “The source of the intent requirement is * * * the Eighth Amendment itself, which bans only

cruel and unusual *punishment*. 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.” (Emphasis sic.) *Wilson* at 300.

{¶47} Broom’s case is more analogous to *Resweber* and its progeny dealing with a condition-of-confinement claim, which challenges deprivations that were not specifically part of the punishment but were nonetheless suffered during execution of the punishment.

Wilson at 297. The Protocols are specifically drafted to ensure that Ohio’s execution procedures satisfy the Eighth Amendment. See *Cooley v. Kasich*, 801 F.Supp.2d 623 (S.D.Ohio 2011). Therefore, deviations from the Protocols are not specifically part of the punishment of execution.

{¶48} Because we must review the intent of the state official, we must determine what standard to apply in resolving whether the state official had the requisite intent to cause unnecessary pain. In order to review this issue, we adopt the “deliberate indifference” standard developed for conditions-of-confinement claims and first articulated in *Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251. *Wilson* at 303.⁵ “[D]eliberate indifference to [the] needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.” *Gamble* at 104, citing *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). An

⁵We acknowledge that in certain situations, such as excessive force claims, the Supreme Court has instituted the higher standard of care of establishing the state official applied force “maliciously and sadistically for the very purpose of causing harm.” *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). In light of the fact that the Protocols protect the sanctity of the Constitution, any deviations from those Protocols should not be subjected to such a high standard.

accident, inadvertent failure, or even negligent behavior, although it produced added anguish, cannot be characterized as wanton infliction of unnecessary pain on that basis alone. *Id.* “In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference * * *.” *Id.* at 106; *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

{¶49} The deliberate indifference standard, while entailing something more than negligence, is less than acts or omissions for the very purpose or intent of causing harm or with the knowledge that harm will result. *Brennan* at 835. On this point, the trial court was correct to note that there is a “continuum of possible events” and at some point along that continuum, certain circumstances will lead to constitutional violations. “With deliberate indifference lying somewhere between the poles of negligence at one end and purpose, intent, or knowledge at the other, [courts] have routinely equated deliberate indifference with recklessness.” *Id.* at 836. Thus, the term “deliberate indifference” was defined as “requiring a showing that the official was subjectively aware of the risk.” *Id.*

{¶50} In *Brennan*, the Supreme Court specifically addressed the argument that the term deliberate indifference could involve an objective inquiry. In that case, the petitioner challenged whether the prison official’s deliberate indifference to his safety constituted cruel and unusual punishment. *Id.* at 828. *Brennan* teaches that the criminal recklessness standard is the appropriate standard and differentiated the civil recklessness standard that uses a more objective inquiry. *Id.* at 836. Therefore, in order to determine

whether the state actor's conduct constituted cruel and unusual punishment, the proper determination is whether the state actor disregards a risk of harm of which he is aware. *Id.* “[A]n official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned” as a violation of the Eighth Amendment. *Id.* at 837. In simplistic terms, we must look at what the state actors knew and when did they know it.

{¶51} Broom’s argument claims the state failed to follow its Protocols and those violations led to added anguish during the September 15, 2009 execution attempt. Broom identified several deviations that caused his suffering: specifically, the state failed to conduct the third venous assessment; failed to ensure proper training of the execution team in accordance with the Protocols; allowed a non-execution team member to assist in the execution preparation; and attempted to establish the IV catheters an excessive amount of times. All these deviations were alleged to add to the subjective pain Broom endured in the repeated attempts to establish the IV access.

{¶52} Even when we presume that the deviations occurred and that Broom subjectively suffered physical and emotional distress, Broom’s entire focus is on the undesirable outcome of the failed execution attempt based on the objective standard that any deviation from the Protocols or approximately 20 attempts to establish the IV catheters led to a constitutional violation. We must instead focus on the subjective mind-set of the state officials.⁶ Indeed, Broom does not allege any deliberate

⁶We are conscious of the dissent’s position that we are retroactively applying a new standard

indifference on the part of the specific state actors who made the decision to deviate from the Protocols other than the unsupported assertions that the state deliberately acted. Broom has not alleged that the specific state officials were subjectively aware of the risks to him when deviating from the Protocols or attempting to establish the IV catheters. Such omission is dispositive.

{¶53} The burden of stating a substantive ground for relief in his petition for postconviction relief rested with Broom. That an unfortunate outcome manifested after several violations of the Protocols or that Broom had to endure multiple attempts to establish the IV catheter is insufficient, standing alone, to substantiate the claim that the state officials in charge of effectuating Broom's death sentence demonstrated a deliberate indifference to Broom's rights. We by no means condone the state's failure to abide by the very protocols that ensure the execution process comports with the Eighth Amendment. However, under these specific facts, Broom has failed to allege that the state officials acted with the requisite mental state and therefore the trial court did not err in denying his petition for postconviction relief. Broom's second assignment of error is accordingly overruled.

of review; however, we must confine our analysis to the issues before us. Broom had every opportunity to advance any legal arguments in support of his claim. The fact that we applied the well-established deliberate indifference standard, while Broom advanced other arguments, does not necessitate further review by the trial court.

State Statutory Issues

{¶54} Broom's third assignment of error provides: "Broom's rights under Ohio Revised Code 2949.22(A), Article I, Sections 1, 2, 8, 9, 10, and 16 of the Ohio Constitution, and the Due Process Clause of the United States Constitution were violated when the state failed to conduct Broom's execution attempt on September 15, 2009[,] in conformity with Ohio law." Broom argues that R.C. 2949.22(A) establishes his right to a quick and painless death, a right that must be afforded due process protections.

{¶55} R.C. 2949.22(A) provides in pertinent part: "* * * 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 *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." (Emphasis added.) The statute facially requires the state to use an amount of drugs sufficient to cause a quick and painless death but does not require the same for the entire process. In fact, Broom has not identified any authority for the proposition that this guaranty extends to all aspects of the execution process.

{¶56} To the contrary, one court has already determined that the statute did not create a liberty and property interest in a quick and painless execution protected by the Due Process Clause. *Cooley*, 589 F.3d at 234. Because of our above observation and the persuasiveness of the *Cooley* holding, we find that the trial court did not abuse its discretion in denying Broom's petition for postconviction relief pursuant to R.C. 2949.22(A). Ohio law, R.C. 2949.22(A), does not create a right to a quick and painless

execution process, only a right to have a sufficient dosage of drugs to cause a quick and painless death. Broom did not receive any drugs, prior to the governor's issuing his reprieve, to even implicate R.C. 2949.22(A). Broom's third assignment of error is overruled.

Conclusion

{¶57} The trial court did not abuse its discretion in denying Broom's petition for postconviction relief based on the voluminous, undisputed evidentiary submissions. In order to establish that the first execution attempt violated the Eighth Amendment, an inmate in Broom's position must establish that the state officials were deliberately indifferent to his constitutional rights. Absent such a showing, a trial court does not abuse its discretion in denying postconviction relief. Finally, a second execution attempt does not violate the Fifth Amendment prohibition against double jeopardy.

{¶58} The decision of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, P.J., CONCURS;
KATHLEEN ANN KEOUGH, J., DISSENTS WITH SEPARATE OPINION

KATHLEEN ANN KEOUGH, J., DISSENTING:

{¶59} I respectfully dissent. I would sustain Broom's first assignment of error and remand the matter to the trial court to conduct a hearing on Broom's petition. The decision to hold a hearing on a postconviction petition lies with the trial court, the gatekeeper of the evidence, and the trial court's decision to not hold a hearing will not be disturbed absent an abuse of discretion. *Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶ 60.

{¶60} I agree with the majority that the state did not dispute the facts presented by Broom and that Broom's petition includes voluminous records, depositions, affidavits, and federal court opinions. However, I disagree with the majority's conclusion that an evidentiary hearing was not required because "the trial court's opinion focused on legal issues."

{¶61} First, the trial court did not address all the legal issues raised in Broom's petition. His petition challenged that a subsequent execution attempt will be a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Specifically, Broom contended that the State's deviations from its Protocols caused the first execution attempt to be aborted and that the State's repeated attempts to establish the IV access resulted in unconstitutional suffering. The trial court did not specifically identify or address Broom's challenge, other than to make a blanket declaration that

“Broom’s constitutional claims must fail.” Because Broom’s challenge was fact specific, it required more than a mere legal conclusion. Given the importance of the issue and the impact this case has had on other death row inmate cases, I would find that the failure to conduct a hearing under these circumstances was unreasonable and arbitrary.

{¶62} I recognize that the trial court could reach the same conclusion after hearing on remand. However, and because the record is created and established at the trial court level for all subsequent reviewing courts, the trial court should develop the most thorough record possible to afford meaningful appellate review, especially considering that the issues presented in this case are those of first impression in Ohio. Accordingly, I respectfully dissent.

{¶63} Although I would reverse the trial court and remand the matter for a hearing, I am compelled to comment on the majority’s decision to adopt the “deliberate indifference” standard in determining whether the State’s violations of its Protocols during its execution attempt violate the Eighth Amendment’s protections against cruel and unusual punishment.

{¶64} The majority’s opinion thoroughly discusses the issues, legal history, and rationale for the standard. However, I disagree with the majority’s decision to apply this standard to the facts of this case and to Broom’s petition as submitted. I would remand the matter to the trial court to allow the parties to brief the issue and provide any relevant evidentiary materials addressing the “deliberate indifference” standard. I find that

applying this standard to this case retroactively without allowing Broom an opportunity to set forth an argument deprives him of meaningful consideration of his petition.

{¶65} The majority repeatedly stresses that Broom did not satisfy his burden of stating substantive grounds for relief on his claim that the state acted with “deliberate indifference” in its execution attempt. Specifically, the majority concludes that “* * * Broom has failed to allege that the state officials acted with the requisite mental state and therefore the trial court did not err in denying his petition for postconviction relief.” I find that it is difficult to set forth allegations and facts to satisfy a standard that has yet to be adopted by a court on a case and issue of first impression. By applying this standard retroactively, finding that “Broom failed to allege” the requisite facts to prove this standard, the majority deprives Broom of his day in court and a fair opportunity to comply with this court’s newly-adopted standard of reviewing such Eighth Amendment challenges. Furthermore, this de novo application goes beyond this court’s abuse of discretion standard of review.

{¶66} Lastly, the magnitude of the ultimate outcome of this case cannot be overstated. It has been suggested that it was the State’s failure to follow its own Protocols in this case that resulted in the botched execution attempt of Broom and the subsequent re-writing of its Protocols. It is my hope that the issue before this court is one that no other death row inmate will have to raise before any other court. However, history has a habit of repeating itself. In 1946, Willie Francis first raised the issue in Louisiana, and in 2009, history repeated itself with Romell Broom in Ohio. Given the

state of Ohio's record of not following its own rules and Protocols, history could very well repeat itself again.

{¶67} I agree with the majority that personal feelings need to be put aside when courts consider issues pertaining to the death penalty; however, I am mindful that the State's repeated failure to follow its own Protocols is personal to the families of the victims and the inmate for closure. The people of the state of Ohio, and specifically the families of victims, deserve to feel confident that if the State is going to continue to impose the death penalty, it will perform its obligations error free.

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FILED AND JOURNALIZED
PER APP.R. 22(C)

FEB 16 2012

GERARD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *G. Furst* DEP.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
96747

LOWER COURT NO.
CP CR-196643

COMMON PLEAS COURT

-vs-

ROMELL BROOM

Appellant

MOTION NO. 452709

Date 03/29/12

Journal Entry

Motion by Appellant for reconsideration is denied.

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ALL PARTIES. COURTS TAXED

RECEIVED FOR FILING

MAR 29 2012

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Presiding Judge LARRY A. JONES, SR.,
Concurs

Judge KATHLEEN ANN KEOUGH, DISSENTS

[Signature]
Judge SEAN C. GALLAGHER

VOL 0750 P 00440

Exhibit B



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald-E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
96747

LOWER COURT NO.
CP CR-196643

COMMON PLEAS COURT

-vs-

ROMELL BROOM

Appellant

MOTION NO. 452714

Date 04/05/12

Journal Entry

Motion by Appellant for en banc consideration is denied. See separate Journal Entry of same date.

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APR 05 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

Judge MELODY J. STEWART, Concur

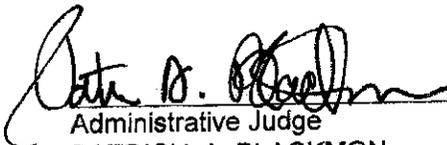

Administrative Judge
PATRICIA A. BLACKMON

Exhibit C

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

State of Ohio

Appellee

COA NO.
96747

LOWER COURT NO.
CP CR-196643

COMMON PLEAS COURT

-vs-

Romell Broom

Appellant

MOTION NO. 452714

Date 04/05/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant's application for en banc consideration is denied. We find no conflict between the panel's decision in this case and the decisions in *State v. Tucker*, 8th Dist. No. 90799, 2008-Ohio-5746, and *State v. Orr*, 8th Dist. No. , 2011-Ohio-1371. To the extent that appellant challenges the standard the court applied in deciding

whether to conduct an evidentiary hearing, this standard was established by the Ohio Supreme Court, not by this district. Therefore, appellant alleges an error in the panel's decision, not a conflict.



PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

Concurring:

FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J., and
MELODY J. STEWART, J.

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GERALD W. UENST
CLERK OF THE COURT OF APPEALS
BY  DEP.

Dissenting:

MARY J. BOYLE, J., and
KATHLEEN ANN KEOUGH, J.

Recused:

JAMES J. SWEENEY, J.

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

STATE OF OHIO,

2011 APR 7 ACASE NO. CR 196643

Plaintiff-Respondent,

GERALD E. FUERST
CLERK OF COURTS
BRENDAN J. SHEEHAN
CUYAHOGA COUNTY

v.

ROMELL BROOM,

Defendant-Petitioner.

OPINION AND JUDGMENT
ENTRY

This matter is before the Court on Defendant-Petitioner's Petition to Vacate or Set Aside Judgment and/or Sentence in Part, or Grant Other Appropriate Relief, Pursuant to ORC §2953.21 and 2953.23, and/or for Declaratory Relief Under ORC §2721.01 *et seq.* and Civ.R. 57. The issues have been fully briefed to the Court.

Defendant Romell Broom was found guilty of aggravated murder with two capital punishment specifications, rape, kidnapping, and two counts of attempted kidnapping related to the rape, murder and kidnapping of fourteen year-old Tryna Middleton. Broom was subsequently sentenced to death on the aggravated murder, rape and kidnapping charges.

Upon exhausting his legal challenges to his convictions and sentence, Broom was scheduled to be executed on September 15, 2009. On September 14, 2009, Broom arrived at the Southern Ohio Correctional Facility and was placed in the holding cell used to house condemned inmates prior to execution. While execution proceedings usually commence at 9:00 AM, the Sixth Circuit Court of Appeals' consideration of Broom's request for a stay of execution delayed all action until Broom's request was denied at approximately 1:00 PM.

At approximately 2:00 PM, Warden Phillip Kerns read the death warrant to Broom and the medical team members began attempting to establish two viable IV sites as required by

Exhibit D

protocol. Their attempts were unsuccessful and one of the institution's medical doctors was summoned to assist further efforts.

Approximately two hours later, after several conferences with officials and medical staff, Director Collins called the Governor's office recommending that he grant a one-week reprieve. According to Petitioner, Collins' decision was based on "(1) concern for his team members' well-being; (2) his belief, informed by discussions with the medical 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 somehow managed to establish two viable IV sites in the holding cell and they started injecting the lethal drugs in the Death Chamber only to suffer yet another venous failure." Defendant/Petitioner's Reply Brief, p. 12.

In addition to pursuing other claims in both state and federal courts, Broom has filed this Petition contending that the attempts to establish an IV were "a form of torture" that subjected him to "inhuman and barbarous" conditions such that any further attempts to effectuate his sentence would violate state and federal constitutional protections. He asks that his sentence be vacated pursuant to R.C. §2953.21(A)(1)(a) as violating State and Federal Constitutions and seeks a declaratory judgment pursuant to R.C. §2721.01 *et seq.* and Civ.R. 57.

Case law in this area does not support Broom's current position. The Court was unable to locate a single case in which a sentence was vacated based upon failures in execution preparation as occurred in the case at bar. While the case relied upon by the State, *Louisiana ex rel. Francis v. Resweber* (1949), 329 U.S. 459, has been called into question, its general proposition has not been overturned. In *Resweber*, the State of Louisiana attempted to execute the defendant by electrocution. A current of electricity was run through defendant's body but he survived the execution attempt. In a plurality opinion, the Court held that additional attempts to

execute the defendant did not *per se* violate Fifth, Eighth or Fourteenth Amendment guarantees. The Court specifically noted that a second execution attempt, even when the execution went beyond the preparatory steps, did not constitute double jeopardy. *Id.* at 461.

Many factors have changed since the holding in *Resweber* including the modes of execution employed by most states toward more humane methods, such as lethal injection. Still, as noted by the Supreme Court, “a hypothetical situation” involving “a series of abortive attempts” that demonstrates an “objectively intolerable risk of harm” giving rise to a “substantial risk of serious harm” could violate the Eighth Amendment. *Baze v. Rees* (2008), 553 U.S. 35, 50. However, the Court reiterated the underlying and long-standing parameters of the Eighth Amendment as set forth in *In re Kemmler* (1890), 136 U.S. 436, 449, that: “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”

The decision in *Baze* has been interpreted and applied by the Sixth Circuit Court of Appeals to facts relevant to the current petition. In fact, in *Cooley (Biros) v. Strickland* (2009), 589 F.3d 210, the Court reviewed Ohio’s execution protocol—much of which Broom now reiterates throughout his petition—and upheld its application as constitutionally permissible. Specifically, the court in *Biros* examined whether: 1) there was an undue risk of improper implementation of Ohio's protocol, leading to severe pain; 2) sufficiently trained and competent medical personnel were required; 3) a licensed physician was required to be present; 4) the execution team should be specifically limited to a defined time to search for accessible veins for IV administration; and 5) the lack of an explicit ban on the use of cut-down procedures for accessing veins as an alternative method of IV placement rendered a protocol unconstitutional.

In rejecting each of these challenges, the court noted that it had previously approved protocols involving cut-down procedures, in which an incision is made to establish IV access, as measures intended to enable more humane execution procedures. *Id.* at 229.

Upon consideration of the arguments and evidence presented, the Court finds that the State's first attempt at effectuating Broom's sentence does not constitute cruel and unusual punishment or otherwise deprive Broom of his rights so as to give rise to constitutional violations. 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).

Protocols involving cut-down procedures have been approved as alternate methods of gaining IV access. Broom was not subjected to a potential cut-down procedure, which clearly involves far more medical invasion and discomfort than even multiple needle sticks. Thus, Broom's constitutional claims must fail.

Broom's claims pursuant to R.C. §2949.22 must also fail because it is established that R.C. §2949.22 does not create a cause of action to enforce any right to a quick and painless death. *Cooley (Biros)*, supra at 234; *Cooley v. Strickland* (2010), 604 F.3d 939, 945.

Accordingly, **DEFENDANT-PETITIONER'S PETITION TO VACATE OR SET ASIDE JUDGMENT AND/OR SENTENCE IN PART, OR GRANT OTHER APPROPRIATE RELIEF, PURSUANT TO ORC §2953.21 AND 2953.23, AND/OR FOR**

**DECLARATORY RELIEF UNDER ORC §2721.01 ET SEQ. AND CIV.R. 57 IS DENIED
IN ITS ENTIRETY.
IT IS SO ORDERED.**


JUDGE BRENDAN J. SHEEHAN

Dated: 4/6/11

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 6th day of April, 2011:

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