

ORIGINAL

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.)	
)	

MERIT BRIEF OF APPELLANT ROMELL BROOM

(This is a Post-conviction Death Penalty Case - No Execution Date is Set)

S. Adele Shank (0022148) (Counsel of Record)
 LAW OFFICE OF S. ADELE SHANK
 3380 Tremont Road, 2nd Floor
 Columbus, Ohio 43221-2112
 (614) 326-1217
shanklaw@att.net

Timothy F. Sweeney (0040027)
 LAW OFFICE OF TIMOTHY FARRELL SWEENEY
 The 820 Building, Suite 430
 820 West Superior Ave.
 Cleveland, Ohio 44113-1800
 (216) 241-5003
tim@timsweeneylaw.com

COUNSEL FOR APPELLANT ROMELL BROOM

Timothy J. McGinty (0024626)
 Cuyahoga County Prosecutor
Katherine Mullin (0084122)
T. Allan Regas (0067336)
 Assistant Prosecuting Attorney
 1200 Ontario Street, 8th Floor
 Cleveland, OH 44113
 (216) 443-7800

COUNSEL FOR THE STATE OF OHIO

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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. Broom was to be executed that day for the 1984 aggravated murder of Tryna Middleton. Broom has always maintained, and still maintains, his innocence.

Nevertheless, the state and federal courts upheld Broom's conviction and death sentence. This Court did so in direct appeal in State v. Broom, 40 Ohio St. 3d 277 (1988). Federal habeas relief was denied in Broom v. Mitchell, N.D. Ohio, Case No. 1:99 CV 0030 (Aug. 28, 2002), and affirmed by the Sixth Circuit in Broom v. Mitchell, 441 F.3d 392 (2006).

On April 22, 2009, this Court set Broom's firm execution date for September 15, 2009.

Before that date, Broom was still litigating issues concerning a Brady v. Maryland, 373 U.S. 83 (1963), claim that he had been unable to present in his first state-post-conviction proceedings. On July 30, 2009, he won a unanimous victory on that issue in the Eighth District Ohio Court of Appeals. State v. Broom, 2009 Ohio 3731 (Ohio App. July 30, 2009). But on September 11, 2009, this Court reversed, 6-1, after expedited proceedings, in State v. Broom, 123 Ohio St. 3d 114 (2009).

Broom's efforts to obtain further federal review of that Brady issue were also denied. Broom v. Mitchell, N.D. Ohio, Case No. 1:99 CV 0030 (Sept. 14, 2009); Broom v. Mitchell, Case No. 09-4125, Order (6th Cir. Sept. 14, 2009). Broom's final pending legal effort to stay his September 15 execution, a request for *en banc* review in the Sixth Circuit, was denied on September 15, 2009, at approximately 12:30 P.M. Broom v. Mitchell, Case No. 09-4125, Order (6th Cir. Sept. 15, 2009).

At approximately 2:00 p.m. that afternoon, the State proceeded with its plan to execute Broom. 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," to September 22, 2009.

Following the failed execution, Broom filed a petition for habeas corpus in this 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 second execution then 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 (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. In re Broom, 127 Ohio St. 3d 1450 (2010), cert. denied, Broom v. Bobby, 179 L. Ed. 2d 1193 (2011).

Broom, on September 15, 2010, filed a petition for post-conviction relief under Ohio Rev. Code §§2953.21 and Ohio Rev. Code §2953.23 and for declaratory relief in the Cuyahoga County Court of Common Pleas (hereinafter "Petition"). He asserted four claims for relief, including that a second execution attempt would violate his rights against cruel and unusual punishments and double jeopardy as set forth in the Ohio and U.S. Constitutions. All proceedings in Broom's common pleas case were stayed pending disposition of Broom's habeas corpus petition in this Court. The stay was lifted January 5, 2011.¹

The State, on February 14, 2011, filed a response to Broom's post-conviction petition. On

¹ Also on September 14, 2010, Broom filed a habeas petition in the federal court, and that action has been stayed and held in abeyance in deference to these Ohio state court proceedings.

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. 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 was applicable.

The Ohio Court of Appeals affirmed on February 16, 2012, in a two to one decision. State v. Broom, 2012 Ohio 587 (2012) (Appx. 004). The majority adopted *sua sponte* “the ‘deliberate indifference’ standard developed for conditions-of-confinement claims” as a required allegation for stating a substantive claim for violation of Broom’s Eighth Amendment rights. (Op. p.25 (Appx. 027).) The majority did not explain why or how an intent standard applicable to situations where the prison has a duty to keep the inmate safe, healthy and alive could ever be meaningfully applied 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 majority then mistakenly found that Broom had not made the newly required allegation. The majority also rejected the dissenting judge’s view that this matter of first impression and national importance 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.

Broom sought this Court’s discretionary jurisdiction on May 14, 2012. (Appx. 001). Jurisdiction was accepted by order of this Court on May 28, 2014.

Broom v. Bobby, 2010 U.S. Dist. LEXIS 126263 (N.D. Ohio Nov. 18, 2010).

STATEMENT OF FACTS

Romell Broom is a 58 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.

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 Ohio Rev. Code §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 (Appx.043).) 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)

²The execution protocol has been changed several times since Broom's first execution attempt. It was first changed effective November 30, 2009. (See Second Biros Injunction Order at 126-30 (Broom First Submission, Exh. 1); Appx. 053.) That change provided for use of a single execution drug, although that drug was still to be administered by the non-doctors of the medical team and still inserted via IV catheters into the inmate's peripheral veins. Moreover, that change finally included 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 large dose of the drugs hydromorphone and midazolam. (Second Biros Injunction Order at 131 (Broom First Submission, Exh 1).) The most recent version, dated effective April 28, 2014, also requires IV access in the administration of "Plan A," and continues to call for intramuscular administration of hydromorphone and midazolam in "Plan B." (Appx. 064). Broom claims in his Petition that the State is barred from attempting to execute him again by any means or methods (Petition), including any adopted after the State's failed attempt to execute him on September 15, 2009.

medical. (E. Voorhies Depo. (Broom First Submission, Exh. 12) at 115-17; Second Biros Injunction Order at 4-6 (Broom First Submission, Exh. 1).)

The “security” members comprise the majority of the team, and their principal functions are security and transport. (E. Voorhies Depo. 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). Broom’s medical team was comprised of Team Members (“TM”) #9 (a phlebotomist and prison employee), TM #17 (a part-time EMT and prison employee), and TM #21 (a 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 injecting the drugs into the IV tubing established on the inmate’s body, 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 Hrg.) (Broom First Submission, Exh. 4).)

For many years, the State knew 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 in 1993 and made lethal injection its exclusive means of execution in 2001. Ohio Rev.

Code §2949.22. On April 22, 2009, this Court set September 15, 2009 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 that it establish 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 could be delivered to the body, and monitor and maintain that IV access until death. (Exh. 4 to Broom Reply/Second Submission (Appx. 043-052).) The process of establishing and maintaining 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 cannot be delivered effectively and the inmate suffers and/or the execution will go on interminably, or cannot 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. (Collins Depo (Broom First Submission, Exh 11) at 100-01; HT Mark Dershwitz, M.D. (Broom First Submission, Exh. 9) at 61-62; HT Mark Heath, M.D. (Broom First Submission, Exh. 8) at 49-50; Voorhies Depo (Broom First Submission, Exh. 12) at 34-36, 51-56; Second Biros Injunction Order at 90, 120, 131-33 (Broom First Submission, Exh 1).) Even so, members of the execution team failed to attend required trainings and their supervisors excused them. (P. Kerns Depo (Broom First Submission, Exh. 13) at 163-67; Second Biros Injunction Order at 186-87 (Broom First Submission, Exh 1); Cooey (Smith) v. Kasich, 801 F. Supp. 2d 623, 633-35 (S.D. Ohio 2011) ("Ken Smith Injunction Order").)

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.; Ken Smith Injunction Order, 801 F. Supp. 2d at 633-35, 655-56; Second Biros Injunction Order at 185-87 (Broom First Submission, Exh. 1).)

In the twenty-four hours before his scheduled execution, Broom went through the deeply emotional and terrifying process of confronting his imminent death. He said good-bye to his sister. In an emotional call with his brother, Broom said he was "tired of being in prison" and was ready for "it to be over." He gave his few items of personal property to his lawyer (Shank) (with instructions for its disposition. Broom made a final call to his other lawyer (Sweeney) to say good-bye. In a final, emotional meeting with his lawyer, he faced and accepted the fact that his death was going to occur that day. (Broom Execution Timeline, Broom First Submission, Exh. 20.)

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 a stay. (P. Kerns Depo. (Exh. 13 to Broom First Submission) at 23.) Thus, Broom's execution did not begin until approximately 90 minutes after the Sixth Circuit denied relief. At about 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 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 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 other DRC employees present 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. His deposition and the timeline were also filed with the court below.⁴ The facts recited here are, or should be, undisputed.

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. Second Biros Injunction Order at 135-36 (Broom First Submission, Exh. 1); HT Mark Heath, M.D. (Second Biros Hrg.) at 53-55 (Broom Reply/Second Submission, Exh. 1.) Others were unsuccessful from the outset. Another medical member, TM #17, entered the cell and tried to establish an 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.

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).

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, 801 F. Supp.2d 623.)

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. Team members punctured Broom that day at the antecubital area, the biceps, the forearm and hand on both arms. (See references cited *id.*)

More than an hour into the execution, it was suggested and then decided that one of the institution's medical doctors would 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 Submission, Exh. 18).) The reaction of TM # 9 to the doctor's presence speaks volumes: **"I look up and she's present [in the holding cell]. And I'm like, dear God, what is she doing here?"** As Judge Frost noted in the Cooley litigation, "[t]hat is a question that requires an answer." Ken Smith Injunction Order, 801 F. Supp. 2d at 650. Moreover, while Dr. Bautista was participating, no one supervised her! As Judge Frost found: "failing to exercise any oversight over that non-execution team member's activities in the execution house is inexcusable." *Id.* Nevertheless, by the time the doctor exited the holding cell, Broom had two additional puncture wounds; one on the top of the left

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

foot and one directly into the ankle bone on the inside of the foot. Dr. Bautista's deposition too was filed with the court below. (C. Bautista Depo (Broom First Submission, Exh. 18).)

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 the execution process began. During this second break, the team members met again with Director Collins and other high-ranking officials. This time, the team members expressed 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. In that second call, 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) at 34-36, 51-56, 88-215; 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 19 puncture wounds at myriad places over his four extremities. But this meant many more than

18-19 unsuccessful needle probes had occurred: “Dr. Heath explained . . . that although Broom exhibited eighteen to nineteen needle entry points, the actual number of attempts to obtain IV access was far greater because, according to Broom, the team on numerous occasions utilized a single entry point to make numerous attempts to actually insert an IV catheter.” Second Biros Injunction Order at 135 (Broom First Submission, Exh. 1); see also HT Mark Heath, M.D. (Second Biros Hrg.) at 50-55 (Broom Reply/Second Submission, Exh. 1.) 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 Hrg.) 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 Hrg.) at 129-33 (Broom Reply/Second Submission Exh. 1).)

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).)

Counsel met with Broom, delivering a copy of the governor’s reprieve, once the execution process was completed. They discussed the information that was available at the time. Broom’s personal property was returned to him. (Broom Execution Timeline, Broom First Submission, Exh. 20.) 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.

LEGAL ARGUMENT

Proposition of Law No. 1:

THE LOWER COURTS ERRED WHEN THEY FOUND THAT THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS DO NOT BAR ANOTHER ATTEMPT TO EXECUTE BROOM.

Romell Broom was subjected to a painful and chaotic execution attempt that spanned at least two hours and involved multiple needle stabs including one directly into his ankle bone. The State of Ohio's execution team failed to comply with its own execution protocol: training sessions were skipped, strangers to the process were invited in to help and were not supervised, and an important required vein check was skipped. As a result, Broom suffered physical pain far in excess of the pain a normal execution entails and emotional trauma greater than what is part of every execution. He also had to face the unknown duration of the relentless and repeated needle stabs he suffered and, after that ended, being told that the State would try again to kill him in a week and then someday. The Court of Appeals erred when it found that the cruel and unusual punishments clauses of the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution do not bar another attempt to execute Broom.

A. The Eighth Amendment prohibition against "cruel and unusual punishments" bars any further execution attempts upon Broom because the State did not follow its own execution protocol or take the reasonable steps that would have prevented the unnecessary pain and suffering inflicted on Broom in its first botched execution attempt and any further attempt would be unusual, would build on the cruelty Broom has already suffered, and would be cruel in and of itself.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Ohio Constitution similarly provides that "cruel and unusual punishments" may not be imposed. Ohio

Const. art. I, §9. See also Ohio Rev. Code §2949.22 (execution is to be quick and painless). 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). And the Fourteenth Amendment requires fundamental fairness even in the final step of the criminal justice process.

1. A second execution attempt would be an “unusual” punishment.

Broom’s case is unique. The Court of Appeals recognized that, “Never before has the state failed to execute an inmate after beginning the execution process.” State v. Broom, 2012 Ohio 587, ¶28. The effort to try a second time to kill Broom is equally rare and certainly “unusual.” Ohio law makes no provision for multiple execution attempts but instead requires that “the warden . . . or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.” Ohio Rev. Code §2949.22(A). “A death sentence shall be executed . . . on the day designated” by the court. Ohio Rev. Code §2949.22(B). See also Ohio Rev. Code §2949.24.

It is the norm for executions, once started and carried forward for a significant amount of time and where bodily intrusions have been made, to be completed on the date set. What happened with Broom is different than a case where a stay is issued before the execution process has begun. And when a last minute stay is granted, the inmate has caused the stoppage by his legal proceedings and multiple needle insertions over several hours have not been endured in the execution process. It is an “unusual punishment” to be facing execution for a second time because the State of Ohio failed to complete the first execution process on the date set due to its own failure to comply with its own execution protocol. No other death-sentenced inmate in Ohio has ever faced this prospect and it is likely that no other ever will.

2. A second attempt to execute Broom would be cruel.

A second attempt to execute Broom would be “cruel” within the constitutional meaning of

that word. What Broom endured during the first execution attempt went beyond the time, beyond the pain, beyond the emotional anguish entailed in a normal execution. And Broom cooperated throughout, even helping his would-be-executioners find veins only to be rewarded with the negligent removal of one established vein access, repeated painful needle insertions, and a chaotic, torturous process that did not follow the law. And through it all, Broom was alone in a room full of people whose only goal that day was to kill him, facing a stranger called in to help, being stabbed in the ankle bone by that stranger, suffering poorly handled vein punctures that were spurting blood, and with no idea how long it would go on.

It is noteworthy that at least one judge on the Sixth Circuit has suggested that what happened to Broom on September 15, 2009, may constitute an Eighth Amendment violation depending upon the facts developed concerning the failed attempt. Reynolds v. Strickland, 2009 U.S. App. LEXIS 21816, *3 (6th Cir. Oct. 5, 2009)(Cole, J., concurring)(“[An argument that the Broom execution was stopped as per the protocol] overlooks the possibility that Broom has already suffered an Eighth Amendment violation by being subjected to this failed execution attempt.”).

But even if that first day could somehow be viewed as something less than cruel, allowing the State another try would be cruel. Having been through the process on September 15, 2009, Broom will never be able to face a second attempt as if it were the first. He cannot set aside the suffering he has already endured and anticipate the quick and painless death Ohio intends. He faces a unique and uncalled for psychological terror by being put through the execution process another time. And the needle insertions he must endure in a second attempt will not be the first or second needle jabs he faces but the twenty-first or twenty-second. And every other aspect of the execution process will be suffered a second time by him, and by him alone among all death-sentenced prisoners, if another attempt at execution is allowed. And there is no reason to presume a second attempt will go any

better than the first did because two critical factors remain the same: Broom still has the same veins, and Ohio still uses the same team of non-doctors and the same methods for accessing those veins.

The psychological and emotional impact of a punishment have long been recognized as aspects of cruelty that the Eighth Amendment prohibits. In Trop v. Dulles, 365 U.S. 86 (1958), the court found that “denationalization as a punishment” violated the Eighth Amendment even though it involved “no physical mistreatment” because “[i]t subjects the individual to a fate of ever-increasing fear and distress.” Id. at 101-02. Broom has been denied, by the State’s failure to abide by its own protocol and the resulting failed attempt, the confidence that any execution attempt on him will be humane. The possibility that a new execution date will be set leaves him in a constant state of “ever-increasing fear and distress.” If a date is set, as it grows near, as the process begins, that fear and distress can only increase. A second execution attempt under these circumstances would be a denial of fundamental fairness and a constitutionally intolerable cruelty.⁵ U.S. Const. amends. VIII & XIV.

3. There is no dispute that Broom’s botched execution was not his fault.

Broom’s situation is exceptional, was not his fault, and is likely never to be repeated. There is no dispute that the State of Ohio failed to follow its own execution protocol. The execution team did not abide by the training and practice requirements of the protocol. They did not do a final check of

⁵ The suffering Broom endured, because it included intense physical pain in addition to prolonged psychological torment, is even worse than a “mock execution.” Yet, mock executions constitute cruel, inhuman, or degrading punishment. See, e.g., U.S. Army Field Manual FM 2-22.3 (FM 34-52), Human Intelligence Collector Operations at 5-74, 5-75 (Department of the Army, September 2006) (available at <http://fas.org/irp/doddir/army/fm2-22-3.pdf>); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, 1465 U.N.T.S. 85 (1988) (entered into force on Nov. 20, 1994), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; D. Miller, Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action, 17 Geo. Immigr. L.J. 299, 320 (2003) (“Psychological torture [under U.N. Convention Against Torture] includes mock executions.”).

Broom's veins on the day of the intended execution even though problems on one arm had been noted the day before. And when the execution process did not go well, they did not behave as the disciplined professionals they were supposed to be, but instead failed repeatedly to get the job done. At one point they had an IV line established and then pulled it out by failing to use reasonable care to secure it. They violated the protocol again by calling in a non-team member who stabbed Broom in the ankle with a needle. They persisted far too long when these foreseeable (and previously encountered, e.g., Joseph Clark, Christopher Newton) vein access problems occurred. And Broom cooperated throughout and even helped his would-be-executioners in their search for a viable vein.⁶

The Court of Appeals recognized that, "The fact is that Broom's execution went awry," ¶40, and that this "unfortunate outcome manifested after several violations of the Protocols," *id.*

⁶ Broom presented unrebutted evidence that problems with establishing and maintaining peripheral IV's had happened before in the executions of Joseph Clark and Christopher Newton, in May 2006 and May 2007, respectively. (The timelines of the Clark and Newton executions were 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." 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, and 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. An IV was eventually established in one of Clark's arms and the execution was completed. The 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).

at ¶53, but wrongly denied relief for other reasons, as is discussed *infra*.

The fact that no aspect of the botched execution is Broom's fault is important for several reasons. First, it distinguishes the situations that may arise on occasion, for example, where a last minute stay is issued. Though still infrequent, in that situation the inmate cannot complain because he brought about the termination of the execution process. Second, it establishes the rarity and truly unusual nature of Broom's situation. The State is solely responsible for what happened. "It was the statutory duty of the state officials to make sure that there was no failure." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 477 (1947) (Burton, J., dissenting). Broom should not be made to suffer for the State's failure of duty that allowed the execution to go "awry." And, third, it raises the question of the role of responsibility. As is addressed below, there is some limited authority for the view that, even though the inmate suffered physical and emotional pain in a botched execution, it need not be viewed as cruel if it was not deliberate on the part of the executioner or was the result of his innocent mistake. Resweber, 329 U.S. at 462 (plurality). But if the inmate has not caused the execution to be stopped, that alone should end the inquiry. "The intent of the executioner cannot lessen the torture or excuse the result." Resweber, 329 U.S. at 476-77 (dissent). The infliction of substantial pain and torment in the conduct of an aborted execution is no less a violation of the Eighth Amendment if delivered with a smile or a pure heart. There is no need to know the mind-set underlying the actions or inactions that caused the execution to go "awry." The fact that the State failed in its duty and the inmate was not at fault should be enough to preclude a second try.

4. The Court of Appeals' ruling that there was no attempt to execute Broom and thus no issue as to whether a second attempt is constitutional is in error.

The Court of Appeals majority "agree[d] that the state's use of multiple execution attempts needs to be tempered" but declined to create a "per se" rule declaring every successive attempt an

Eighth Amendment violation. State v. Broom, 2012 Ohio 587, ¶25. It held instead that, “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.” Id. As is discussed in Proposition of Law II, below, the majority then imposed new pleading and proof requirements on such a claim, but declined to remand the case to give Broom the opportunity to prove his case

The Court of Appeals majority said further, that “[W]e cannot hold that establishing the IV access is part of the punishment of execution,” and that only when the lethal drugs start flowing into the inmate’s body has an execution attempt been made. Id. at ¶22. Despite that single comment, the Court of Appeals refers to what happened to Broom as an attempted execution numerous times in its decision. See, for example, id. at ¶19 (“the failed execution attempt”), ¶26 (“another attempt to execute Broom”), ¶36 (“prior to the attempt to execute Broom”), ¶39 (“the September 15, 2009, execution attempt”), ¶52 (“the failed execution attempt”). The Court of Appeals’ legal line-drawing did not alter its real and human perception that the first execution attempt had been made. Moreover, the Court of Appeals majority said that Broom’s claim could have been reviewed had he met the newly adopted pleading requirement. Id. at ¶52, ¶53. If the first effort to execute Broom had not been an attempt, this could not be true even if the new pleading requirement applies.

5. The State’s actions on September 15, 2009 were an attempt to execute Broom.

The Court of Appeals’ view that the lethal drugs must be flowing into the condemned inmate before the attempt to execute has begun rejects common sense. The drugs go through the IV line directly into the prisoner’s veins. Once that happens the process is essentially irreversible and will virtually always result in death. There could never be an attempt if poison running into the inmate’s body sets the standard for when the attempt begins. Ohio law is also inconsistent with this view.

a. Ohio Law on Attempt

The Court of Appeals' view also ignores common understanding. The concept of attempt is well defined in Ohio law. Once the State took a substantial step towards carrying out the execution, the attempt to execute Broom had begun. Where, as in this case, bodily intrusions for the purpose of causing death had been made, the execution process was clearly 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 execute Broom should be subjected to any lesser or different standard.

This Court said in State v. Group, 98 Ohio St. 3d 248, 261 (2002) citing State v. Woods, 48 Ohio St. 2d 127, syl. 1 (1976), that 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. And in State v. Brooks, 44 Ohio St. 3d 185 (1989), this 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 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 law of battery makes it clear that the process begins **at least** at the time of contact with the first needle. A "person is subject to liability for battery when he acts intending to cause a harmful

or offensive contact, and when a harmful contact results.” Love v. City of Port Clinton, 37 Ohio St.3d 98, 99 (1988); Stafford v. Columbus Bonding Ctr., 177 Ohio App. 3d 799, 810 (2008); Harris v. United States, 422 F.3d 322, 330 (6th Cir. 2005). An execution, at least initially, is a battery with legal excuse. See Love, 37 Ohio St.3d at 99 (officer subduing and handcuffing is battery unless privileged). 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. And to take it one step further back, “an assault is the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact.” Stafford, 177 Ohio App.3d at 810. The reading of the death warrant meets these requirements and may well be the beginning of the attempt. The court of appeals erred when it held that attempting to establish IV lines in Broom’s veins is not a part of the process of execution.

b. Another “attempted” execution from the past: Francis v Resweber.

In the only other case where a court has had reason to consider when an attempt to execute had begun, the court recognized that the attempt started with the execution process. The second consideration was when enough of the process had taken place for a second attempt to be cruel.

In 1946, the State of Louisiana tried to execute Willie Francis by electrocution but the electric chair failed to deliver the required voltage. Francis lived and sought an order precluding a second execution attempt. Resweber, 329 U.S. 460-61.

On review, it was uncertain whether any electricity ever reached Willie Francis’s body. The plurality, in this 4-1-4 decision, found that it had. Resweber, 329 U.S. at 461 (the State represented that “no ‘current of sufficient intensity to cause death’ passed through petitioner's body”), id. at 464 (“Even the fact that petitioner has already been subjected to a current of electricity does not make his

subsequent execution any more cruel.”) (plurality). The dissent found that the fact had not been established and would have remanded to allow Francis to do so. *Id.* at 479 (“We believe that if the facts are as alleged by the relator the proposed action is unconstitutional.”), *id.* at 480 (recommending remand so “the conflict of testimony” could “be resolved.”).

The plurality said that even if the electricity had reached Francis’s body, a second execution attempt was not cruel and unusual. *Id.* at 463-64. The dissent said that if it had, a second attempt to execute would be cruel and unusual. *Id.* at 475 (“There can be no implied provision for a second, third or multiple application of the current.”), *See also id.* at 476 (“two separate applications are sufficiently ‘cruel and unusual’ to be prohibited.”).

But even without knowing how much electricity was delivered, all the Justices referred to Francis’s failed execution as an attempt. *Id.* at 465 (discussing that others have “not experienced a nonlethal current in a prior attempt at execution.”) (plurality), *id.* at 465 (“since others do not go through the strain of preparation for execution a second time or have not experienced a nonlethal current in a prior attempt at execution, as petitioner did”) (concurrence), *id.* at 472 (“electric current was applied to the relator during his attempted electrocution on May 3, 1946.”) and *passim* (dissent).

The next question was whether anything had happened in the context of that attempt to make another execution attempt cruel and unusual. The plurality said it did not matter if Francis suffered. The attempt was like any other accident (a fire in the prison, for example). *Id.* at 464 (plurality). The dissent said that whether Francis suffered at all is the only thing that matters. *Id.* 476 and *passim* (dissent). Thus the question under the dissenters’ analysis is not whether there was an attempt but when did the attempt reach the point where a second attempt would be cruel?

There are logistical problems in comparing electrocution (short time frame, quick application of electricity, no need for needles or invasion of the body other than the electricity, the pain of

electrocution is in the application of electricity) and lethal injection (a longer process, needles and bodily invasion required to deliver the drugs, the pain of lethal injection usually is in establishing IV lines with needles). But despite the awkward comparison, the common answer derived from Resweber is clear. When pain has been inflicted and will have to be repeated in a second execution attempt, a second attempt will be cruel. Id. at 479. “How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment? . . . It is not difficult, . . . as we here contend, to draw the line between the one continuous application prescribed by statute and any other application of the current.” Id. at 476. (dissent) (emphasis added)

Under the Resweber analysis, both Francis and Broom underwent execution attempts. A comparison between Broom’s ordeal and that suffered by Francis clearly demonstrates that Broom suffered more and greater injuries and over a much longer period of time. Francis was prepared for execution and the witnesses were assembled. He was strapped into the electric chair, a hood was placed over his head, the switch was thrown and, after a few **minutes**, when it became clear that the chair was not working, the execution was promptly stopped. Id. at 460 (Reed, J. for the plurality). Before it was stopped Francis asked for the hood to be removed: “Take it off. Let me breath.” Id. at 480 n.2 (Burton, J., dissenting). The hood was then removed, Francis was unstrapped from the chair, and he walked back to the nearby holding cell. Francis himself reportedly said to a jailer that the electric current had “tickled him.” Id. The Governor of Louisiana issued a six-day reprieve. Id. at 460 (Reed, J. for the plurality).

Broom, too, was prepared for execution, spending the day before it was to happen in the death house undergoing periodic (though not all that were required) vein assessments, filling out paperwork for the disposal of his body, and saying good-bye to family and friends. The death warrant

was read, the witnesses assembled, the video feed for their viewing was started, and the execution began. But, by contrast to Francis's short ordeal, Broom was subjected to **two hours** of physical and mental torment with no expected end but his eventual death. It was only at the end of those **two hours** that the Ohio governor issued a seven-day reprieve. Unlike with Francis, there is **no question** that the executioners inflicted substantial pain upon Broom. He suffered **18-19** painful wounds at multiples places on his body, his ankle bone was jabbed with a needle, he bled from his wounds, he cried in pain at times, he sobbed at other times. His bruises were still apparent three days later. Under any humane measure, there is no question that Broom's execution was begun, an extended and painful attempt was made, and a second attempt would be cruel.

To hold, as the Court of Appeals did, that an execution is only attempted, and thus begun, when the drugs flow so that nothing before that can be considered in deciding whether another execution process will be cruel, ignores the terrifying reality of the experience of an execution for the human being subjected to it. It is like saying that execution by firing squad does not begin until the bullet strikes the inmate's chest, or execution by guillotine has not been attempted until the blade touches the inmate's neck. For a measure of commencement to give proper respect to the enormity of the uniquely human experience of enduring an execution attempt, the focus must be on the point, not when the drugs flow, but when the inmate is entrusted to the executioners for the purpose of allowing them to imminently cause his death by invading his body with the instruments of the execution, which for lethal injection begins with insertion of the needles. To suggest an attempt to execute Broom **never** occurred ignores the terrifying reality of the trauma and pain imposed on Broom by the State that day and fails to accord proper respect to the enormity of the human experience through which both the inmate and his executioners were then passing.

6. Due to the rarity of Broom’s situation there is little applicable case law, but what there is supports precluding further execution attempts on Broom.

No state or federal court, prior to Broom’s case and since the Fifth and Eighth Amendments have applied to the states, has addressed a claim that the “cruel and unusual punishments” prohibition bars a second attempt to carry out a death sentence after a first attempt failed. The few cases that have touched upon similar issues, though not directly on point, support Broom’s right not to be subjected to a second execution attempt.

a. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 477 (1947)

Although the Resweber court allowed Willie Francis’s execution to go forward, the decision viewed under today’s law, would prevent a second attempt to execute Broom. In Resweber, the plurality, though they agreed that neither the Fifth nor the Eighth Amendment was applicable to the states, 329 U.S. at 462, n.2, assumed applicability for purposes of discussion. Id. at 462. They said that a failed execution caused by “an accident for which no man is to blame” would not preclude a second execution attempt. Id. They “assume[d] that the state officials carried out their duties under the death warrant in a careful and humane manner,” 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 four dissenters, also assuming that the Eighth Amendment applied, found that a second execution attempt would violate the Eighth Amendment regardless of the executioner’s mental state. Id. at 473-74, 477 (Burton, J. dissenting, joined by Douglas, J., Murphy, J., and Rutledge, J.). They, unlike the Broom majority, which avoided deciding whether Broom’s Eighth Amendment rights were violated by imposing a new pleading requirement (addressed below in Proposition of Law II), condemned the “death by installments” that would be perpetrated with a second execution attempt:

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 . . .**

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 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, 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.

Ohio’s statute, Ohio Rev. Code §2949.22(a), expressly promises a quick and painless death. Regardless of whether this provision creates an enforceable individual right, it establishes the limits of the authority granted to Ohio’s executioners by the Ohio General Assembly.

The Resweber dissenters also **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? 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.

Resweber, 329 U.S. at 476-77 (dissent) (emphasis added).

Willie Francis's fate hinged on one vote: that of Justice Felix Frankfurter. Justice Frankfurter did not decide the constitutional questions presented but voted not to grant relief because neither the Eighth Amendment nor the Fifth Amendment's Double Jeopardy Clause were then applicable to the states and thus felt the decision belonged to the state. *Id.* at 469, 470. Since Resweber, both have been held to be applicable to the states. Robinson v. California, 370 U.S. 660 (1962), Benton v. Maryland, 395 U.S. 784 (1969).

“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). Thus, the narrowest point of agreement in Resweber, that the Fifth and Eighth Amendments did not apply to the states, is no longer valid. Decided today, the dissent would be the controlling opinion and it should be viewed in that light.

b. Baze v. Rees, 553 U.S. 35 (2008)

More recently, in Baze v. Rees, 553 U.S. 35 (2008), the Supreme Court in deciding whether a lethal injection protocol presented a risk of severe pain that would bar its use altogether, noted that “a hypothetical situation” where a protocol resulted in “a series of abortive attempts” at execution “*would present a different case.*” *Id.* at 50. The Court said 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).

c. Punishment must comport with human dignity

A punishment allowed under the Eighth Amendment must not offend the conscience of the community or the legal principles upon which it is built. Chief Justice Earl Warren, wrote that “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 (1958). In Furman v. Georgia, 408 U.S. 238 (1972), Justice Brennan wrote that the “primary principle” in determining whether a punishment is cruel and unusual “is that a punishment must not, by its severity, be degrading to human dignity.” Id. at 281. A punishment also violates the Eighth Amendment if it is “wholly arbitrary,” “clearly and totally rejected throughout society,” or “patently unnecessary.” Id. A second execution attempt on Broom would not comport with human dignity. The spectacle of it alone assures that. And it would be “wholly arbitrary” – a punishment that has never happened before in the State of Ohio and will almost certainly never happen again.

d. Principles drawn from the case law

These cases establish principles and provide guidance in evaluating Broom’s case. First, they show 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, that, 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).”).

Second, where the inmate is not at fault, the State must bear responsibility for the botched execution on the basis that the State failed in its duty “to make sure that there was no failure.” Resweber, 329 U.S. at 477 (dissent).

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. Resweber, 329 U.S. at 476-77 (dissent).

Fourth, the inmate already once subjected to a failed execution attempt should be presumptively entitled to relief. If the State wants to make a second execution attempt, the burden should be on the State to make the required showing that the first attempt was not cruel and was not the State's fault. The State is in complete control of the execution process and has sole access to all of the relevant documents and execution personnel. And any law relevant to a second attempt should be "construed strictly" against the State. Resweber, 329 U.S. at 474-75 (dissent). The State's burden should be an elevated one, by clear and convincing evidence.

Fifth, the State's past failure to meet its duty in carrying out Broom's execution in a humane way creates an "objectively intolerable risk" that the same thing will happen again. Baze, 553 U.S. at 50. Two key factors in the failed first attempt have not changed: Broom still has the same veins, and Ohio still has non-doctor medical team members who are charged with accessing those veins. Ohio's most-recent botched execution must also be considered. Dennis McGuire took 26 minutes to die using Ohio's lethal injection concoction of hydromorphone and midazolam. See DRC After-Action Review of D. McGuire Execution dated April 28, 2014 (as filed in Ohio Execution Protocol Litigation, Case No. 11-cv-1016, at ECF No. 454-2 (available on Pacer from S.D. Ohio's ECF system).) And it was this same drug combination that Arizona chose to use in the shameful spectacle of Joseph Wood's execution on July 23, 2014, where Wood was gasping for some two hours before he died. See E. Eckholm, Arizona Takes Nearly 2 Hours to Execute Inmate (New York Times, July 23, 2014) (available at http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html?_r=0). In view of this recent history and the State's past failure with Broom, the risk of a repeat or worse failure is likely.

Sixth, forcing Broom to face the intolerable risk that he will suffer again what he went through before, or worse, does not comport with human dignity or societal values. Trop v. Dulles,

356 U.S. 86 (1958), Furman v. Georgia, 408 U.S. 238 (1972). The people of Ohio have entrusted the State to impose in their names the death penalty. When the State fails in that job, societal values of fairness and responsibility and humanity preclude another attempt.

B. Because the “cruel and unusual punishments” clause of the Ohio Constitution should be held to provide even greater protection to Broom than the U.S. Constitution, Broom is entitled to relief under the Ohio Constitution regardless of whether the U.S. Constitution provides such relief or not.

The Ohio Constitution “is a document of independent force.” Arnold v. Cleveland, 67 Ohio St. 3d 35 (1993), paragraph one of the syllabus. As this Court explained in Arnold:

In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, **state courts are unrestricted in according greater civil liberties and protections to individuals and groups.**

Id. (emphasis supplied). See also Minnesota v. Natl. Tea Co., 309 U.S. 551, 557 (1940); People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494 (1986); William J. Brennan, State Constitutions and the Protections of Individual Rights, 90 Harv. L. Rev. 489 (1977).

Although the cruel and unusual punishments clause of the Ohio Constitution, art. I, §9 uses the same words as its federal counterpart, this Court has “never determined that these words mean the same thing.” State v. Scott, 91 Ohio St. 3d 1263, 1264 (2001) (Pfeifer, J., concurring). To the contrary, the Court has insisted that Ohio’s version “**provides unique protection for Ohioans.**” In re C.P., 131 Ohio St. 3d 513, 529 (2012) (emphasis supplied). Indeed, it provides “protection independent of the protection provided by the Eighth Amendment.” Id. Moreover, “this [C]ourt is not bound by federal court interpretations of the federal Constitution in interpreting our own Constitution.” Humphrey v. Lane, 89 Ohio St. 3d 62, 68 (2000).

In determining the scope of the “unique protection” of Ohio’s constitutional protection against cruel and unusual punishments, the Court takes into account the unique history and character of the State and its progressive people:

Our Constitution is not the product of the deeply conservative South or of the liberal Northeast. The Ohio Constitution is the product of Ohio, an enlightened, progressive state. When Ohioans consider the countries that still practice slavery, we call them uncivilized; when Ohioans consider the countries that do not permit women to vote, we call them repressive; when Ohioans consider the countries that commit state-sponsored torture, we call them barbaric.

State v. Scott, 92 Ohio St. 3d 1, 11 (2001) (Pfeifer, J., dissenting).

Historically Ohio has not been a strong supporter of capital punishment. In 1912 Ohio convened a constitutional convention which, among other things, considered an amendment to Article I, section 9, to be presented to the voters at a special election, that would abolish capital punishment altogether.⁷ After spirited debate, the convention **adopted** the abolition amendment by a vote of **63-31**. See Proceedings and Debates at pp. 1247-62 (April 16, 1912), 1268-79 (April 17, 1912), 1819-24 (May 27, 1912), 1953 (May 31, 1912) (available on Ohio Supreme Court website at link cited at fn. 7, *supra*). The proposed constitutional amendment later failed with that era’s all-male electorate in a relatively close vote, 54-46%⁸ The amendment nonetheless reflects Ohio’s

⁷ The proposal would have added to Article I, Section 9 the following language:

nor shall life be taken as a punishment for crime. Until otherwise provided by law, persons convicted of crimes heretofore punishable by death shall be punished by imprisonment in the penitentiary during life.

See Proceedings and Debates of the Constitutional Convention of the State of Ohio - 1912 (“Proceedings and Debates”), Appendix, at page 2101 (Ohio Supreme Court website at <http://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/1912Convention.asp>).

⁸ The vote was 303,246 to 258,706, against the amendment, which means it failed by only 44,540 votes. Id., Appendix at 2112.

progressive soul and its historic ambivalence toward capital punishment. This history must in part inform the scope of the unique protection provided by Ohio's cruel and unusual punishments clause in the context of multiple execution attempts against an inmate condemned to die at Ohio's hands. See, e.g., Arnold v. Cleveland, 67 Ohio St. 3d at 43-46 (considering history of Ohio's constitutional provisions on right to bear arms in construing scope of current version of Article I, Section 4).

Also informing that question is the fact that the four-Justice dissent in Resweber was authored by Justice Harold Burton, who was ordinarily a reliable vote for the conservative wing of the Court.⁹ Significantly for these purposes, Justice Burton was the former Republican-mayor of Cleveland and a former U.S. Senator from Ohio. He was revolted by what Louisiana was proposing to do to Francis, and "death by installments" is **his** vivid description, echoing to this day and equally applicable to Broom. Justice Burton's strong views as expressed in his thoughtful dissent reflect the familiar common-sense traditions and values of Ohio and the Midwestern United States.¹⁰

The scope of Ohio's cruel and unusual punishments clause in the context of multiple execution attempts is also informed by Ohio's long-adherence, via statute, to the mandate that death

⁹For informative history on the Willie Francis case and the Court's deliberations, see A. Miller and J. Bowman, Death by Installments: The Ordeal of Willie Francis (Greenwood Press 1988); G. King, The Execution of Willie Francis: Race, Murder, and the Search for Justice in the American South (Basic Civitas 2009).

¹⁰Joining in Justice Burton's dissent were fellow Midwesterners, Justice Frank Murphy of Michigan (where he had been Governor and Detroit's Mayor) and Justice William O. Douglas originally of Minnesota. The fourth dissenter was Justice Wiley Rutledge of Kentucky. The deciding vote against Francis, by Justice Felix Frankfurter, was cast **not** because Frankfurter **approved** of the cruelty Louisiana sought to inflict upon Francis – indeed, Frankfurter, like Burton, was revolted by the spectacle, and, in the wake of the Court's 5-4 decision, Frankfurter asked a prominent Louisiana attorney, an old Harvard classmate, to appeal to the Governor of Louisiana to spare Francis the second attempt. See A. Miller and J. Bowman, supra, Death by Installments at 123-30. But, because the 8th Amendment was not then applicable to the states, Justice Frankfurter was reluctant to let his personal views determine an issue he believed was for Louisiana to decide under its own laws. Resweber, 329 U.S. at 471 (Frankfurter, J., concurring).

by lethal injection shall be “**quick and painless.**” Ohio Rev. Code §2949.22(A). That mandate has been included in every version of the relevant Ohio statute since 1993. See 1993 Ohio HB 11 (version of R.C. §2949.22(A) effective 10-1-93). It is a bold and humane acknowledgement that Ohio’s authorization of the ultimate punishment of death against another human being also entails the corresponding obligation that the death shall be quick and painless. Of the 33 death penalty states, **only Ohio** requires that death be caused “painlessly,” and only **one** other, Kansas, also mandates that it occur quickly.¹¹ Ohio’s legislative will on this issue is exceptional. It is another revealing reflection of the State’s core values and historic ambivalence about the death penalty.

So too is the objective evidence of the significantly reduced number of death sentences sought and imposed by modern Ohio prosecutors and juries. Ohio prosecutors are today seeking death sentences much less frequently than ever before. See, e.g., The Race Lottery: How Race and Geography Determine Who Goes to Death Row at pp. 2 (Ohioans to Stop Executions 2014) (“OTSE Report”) (“In 2013, capital indictments hit an all-time low since the death penalty’s reintroduction. Twenty-one new indictments were filed, indicating a 28% decline from 2012 and a 63% decline from 2011.”).¹² Ohio juries too are recommending death in far fewer cases than ever before. See Ohio

¹¹ Alabama (Code of Ala. §§ 15-18-82.1, 15-18-82); Arizona (A.R.S. § 13-757); Arkansas (A.C.A. § 5-4-617); California (Cal Pen Code § 3604); Colorado (C.R.S. § 18-1.3-1202); Connecticut (Conn. Gen. Stat. § 54-100); Delaware (11 Del. C. § 4209); Florida (Fla. Stat. § 922.105); Georgia (O.C.G.A. § 17-10-38); Idaho (Idaho Code § 19-2716); Indiana (Ind. Code Ann. § 35-38-6-1); Kansas (K.S.A. § 22-4001(a)); Kentucky (KRS § 431.220); Louisiana (La. R.S. § 15:569); Mississippi (Miss. Code Ann. § 99-19-51); Missouri (R.S.Mo. § 546.720); Montana (MCA § 46-19-103); Nebraska (R.R.S. Neb. §§ 83-964, 83-965); Nevada (Nev. Rev. Stat. Ann. § 176.355); New Hampshire (RSA 630:5(XIII)); New York (NY CLS Correc § 658); North Carolina (N.C. Gen. Stat. §§ 15-187, 15-188); Oklahoma (22 Okl. St. § 1014); Oregon (ORS § 137.473); Pennsylvania (61 Pa.C.S. § 4304); South Carolina (S.C. Code Ann. § 24-3-530); South Dakota (S.D. Codified Laws § 23A-27A-32); Texas (Tex. Code Crim. Proc. art. 43.14); Utah (Utah Code Ann. §§ 77-18-5.5, 77-19-10); Vermont (13 V.S.A. § 7106); Virginia (Va. Code Ann. § 53.1-234); Wyoming (Wyo. Stat. § 7-13-904).

¹² The OTSE Report is available at:

Attorney General, Capital Crimes Annual Report for 2013 at pp. 26-30 (April 1, 2014) (“OAG 2013 Report”).¹³ For example, in 1985 when Broom was sentenced to death, there were **24** death sentences imposed that year in Ohio. In 2013 there were only **4**; in each of 2011 and 2012, only **3**. See OAG 2013 Report at 26, 29. In each of the 10-year periods from 1984-1993 there were **149** death sentences, from 1994-2003 there were **114**, and from 2004 to 2013 there were **41**. It is thus indisputable that the community’s willingness to subject fellow citizens charged with and/or convicted of the most horrible crimes to even a **first** attempt is on a sharp and prolonged decline, and that compels the obvious inference that the tolerance in this community for a compelled **second** attempt does not now exist if it ever did.

In 1947, the **federal** constitution and **Louisiana** law may well have permitted Louisiana to strap Willie Francis to the electric chair a second time even though Louisiana’s failure at the first attempt was not Francis’s fault. But there is a legitimate question whether **Ohio’s** constitution, as the reflection of the will of a progressive and tolerant people, would **ever** have permitted what Louisiana did to Francis in 1947, and history might indeed have been different had Francis’s crime happened here and not in the Deep South. That provocative hypothetical is now actually presented in this Court. Would the **Ohio** constitution have protected Francis from the second attempt? Does it so protect Broom? The answer in both cases is “yes,” and in Broom’s case the “yes” is more obvious including because Ohio’s standards of decency have continued to evolve since 1947, as reflected, for example, in the dramatically reduced numbers of death sentences and in the “quick and painless” requirement uniquely, yet characteristically, imposed by Ohio as part of **its** death penalty statute.

<http://www.otse.org/wp-content/uploads/2014/04/OTSE-Report-The-Death-Lottery.pdf>.

¹³ The OAG 2013 Report is available at:
<http://www.ohioattorneygeneral.gov/Files/Publications/Publications-for-Law->

This Court said that punishments which are “cruel and unusual” under Ohio’s constitution will be “rare,” and are those punishments that “under the circumstances would be considered shocking to any reasonable person.” McDougle v. Maxwell, 1 Ohio St. 2d 68, 70 (1964). What Ohio proposes to do to Broom, subjecting him again to execution after he already faced one abortive attempt, is “rare” and “shocking,” unique in this country’s experience over the past century, save for Willie Francis’s case. These cases “probe[] our common conscience,” to ensure that “the delivery of death does not needlessly inflict severe pain upon those we have condemned.” Scott v. Houk, 127 Ohio St. 3d at 324 (Brown, C.J., dissenting). Or, as Justice Burton said in Resweber: “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.**” Resweber, 329 U.S. at 473-74 (Burton, J., dissenting). A second execution attempt upon Romell Broom would be contrary to this community’s sense of justice. Broom is entitled to relief from the second attempt under Article I, Section 9 of Ohio Constitution, regardless of what the U.S. Constitution may permit.

Proposition of Law No. 2:

THE LOWER COURTS ERRED WHEN (1) THE APPELLATE COURT, 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 AND (2) WHEN THE TRIAL COURT DENIED HIM DISCOVERY AND A HEARING.

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). Due Process requires notice and an opportunity to obtain redress in the

Enforcement/Capital-Crimes-Annual-Reports/2013-Capital-Crimes-Annual-Report.

courts. U.S. Const., amend. XIV. Broom received none of these protections in the courts below.

A. The Court of Appeals required that Broom plead and prove the deliberate indifference of the state actors who attempted to carry out his execution when no such standard existed at the time of filing.

After being denied a hearing and discovery in the trial court, Broom appealed. The divided appellate court adopted a new pleading standard never before applied to the rare claims Broom presented, and it refused to remand the case to give Broom any chance to meet that newly announced standard. This is all the more notable since the trial court's opinion (like the State's own trial court filings) did not mention the "deliberate indifference" standard adopted by the Court of Appeals much less hold that such a standard applied to the constitutional claims in a unique situation like Broom's.

In order to decide whether the first execution attempt on Broom was cruel and unusual, the Court of Appeals majority determined that it was required to "inquire into the state actor's state of mind," to decide whether the state through its agents/actors "had the requisite intent to cause unnecessary pain." State v. Broom, 2012-Ohio-587, ¶46, ¶48. They then decided to "adopt" as the requisite intent, "the 'deliberate indifference' standard developed for conditions-of-confinement claims." Id. at ¶48. After establishing this standard the majority 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 ¶52.

But, as is addressed below, Broom's allegations and the facts and documentation he provided in support of his petition demonstrated deliberate indifference. But this was not required at the time he filed his petition. The Court of Appeals should not have denied relief based on a purported failure to meet an *ex post facto* pleading requirement.

B. The deliberate indifference standard is not appropriate for Broom's claims.

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

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.

The treatment of Broom’s constitutional claims by the appellate court majority is illuminated by the historical backdrop against which Broom’s claims arose. 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. Nationwide, Willie Francis in 1946 is the only reported case where a prisoner survived a botched execution attempt and then faced a second execution date. The universe of litigants with claims like Broom’s over the past century is two: Willie Francis and Romell Broom.

The two-judge appellate court majority presented with exceedingly rare claims 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.

Not only did the appellate court majority import into the "no multiple attempts" context a "mental state" arising in an antithetical setting, but also it did so for the first time in history, not just in Ohio, but in the United States. And 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 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 then assume that he could not meet that new standard and then fail to take into account his allegations and evidence.

C. The dissenting Court of Appeals judge supports remand.

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 post-conviction 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).

D. The Court of Appeals erred when it found that Broom had not alleged "deliberate indifference."

The Court of Appeals majority also said that "Broom does not allege any deliberate indifference on the part of the specific state actors." Op. p. 28. But, in fact, Broom had alleged just that. He pleaded that the State was "deliberately indifferent" to the risks of pain and suffering its

execution procedures, and the failure to follow them, would cause. Petition, p. 20, ¶77. Broom also 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. And he had alleged that the State demonstrated “reckless indifference” to his suffering. Petition, p. 20, ¶76.

In fact, 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 Clark and Newton, of the very defects in its procedure that caused the pain and suffering Broom endured. The uncontested documentation showed that the State knew there were problems with Broom’s veins the night before the execution was scheduled. They showed that in spite of that knowledge the State failed to follow its own protocols and skipped the vein check that should have taken place on the morning of the scheduled execution. (See Broom Affidavit, attached to the Petition; DRC Timeline of Broom’s Execution (Exh. 20 to Broom’s First Submission); Depo. of Terry Collins (Exh. 11 to Broom’s First Submission); Depo. of E. Voorhies (Exh. 12 to Broom’s First Submission); Depo. of Phillip Kerns (Exh. 13 to Broom’s First Submission); Depo. of C. Bautista (Exh. 18 to Broom’s First Submission); Depo. of R. Clagg (Exh. 16 to Broom’s First Submission).) Broom met the new pleading requirement despite the lack of notice.

E. The appellate court erred when it found that Broom had not previously attempted to raise facial challenges to the Protocol.

The appellate court majority found that Broom’s “facial challenges” to the protocols should have been raised by Broom prior to September 15, 2009. State v. Broom, 2012 Ohio 587, ¶34 (Ohio App. July 30, 2009). But Ohio did not then and does not now provide a vehicle for such challenges. In Scott v. Houk, 127 Ohio St.3d 317, 318 (2010) this Court said,

The Ohio General Assembly has not yet provided an Ohio-law cause of action for Ohio courts to process challenges to a lethal-injection protocol, and given the review available on this issue through Section 1983, Title 42, U.S. Code, for injunctive relief against appropriate officers or federal habeas corpus petitions, we need not judicially craft a separate method of review under Ohio law.

And Broom has challenged various aspects of Ohio's execution protocol in a Section 1983 action since 2007, when he joined the Cooey v. Strickland litigation. So, Broom **did** make challenges to the State's execution protocols **prior** to September 15, 2009, with the result being that the State persistently maintained that the challenges were groundless and that nothing needed to be changed.

Moreover, the appellate court majority's conclusion that Broom's "facial challenges" to the protocols should have been raised prior to September 15, 2009, State v. Broom, 2012 Ohio 587 at ¶34, 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.

F. The Trial Court also denied Broom an adequate corrective process.

Post-conviction 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.

The trial court denied discovery and an evidentiary hearing on Broom's Petition, although he requested both. A hearing is not automatically required whenever a petition for post-conviction relief is filed. The test is whether there are substantial grounds for relief that would warrant a hearing based upon the petition. State v. Strutton, 62 Ohio App. 3d 248 (1988). An evidentiary hearing should be conducted when the allegations in the petition cannot be fully rebutted by an examination of the files

and records of the case. State v. Lawson, 9 Ohio App. 2d 129, 130 (1966), also see State v. Williams, 8 Ohio App. 2d 135, syl. 1, 136 (1966). The records and documents before the trial court did not rebut Broom's claims but supported them. And his claims were substantial and of first impression.

Broom's death sentence was issued by the trial court. The purpose of Ohio's post-conviction statute is "to provide judicial review of the allegations raised in a prisoner's petition, in order to provide a remedy for violation of constitutional rights." State v. Lester, 41 Ohio St. 2d 51, 56 (1975). When the trial court found that it could not grant relief on the basis of the record before it, it should have granted discovery and a hearing to let Broom prove his case. This is important not only for the past error but, if this case is remanded, Broom will need to rely on those rights again.

Broom sought review not only under Ohio's post-conviction law, Ohio Rev. Code 2953.23(A), but also under the Declaratory Judgment Act. Ohio Rev. Code §2721.03. All of the prerequisites for declaratory relief were 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). Having met these requirements Broom should have been given his day in court.

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. 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 so Broom could develop facts and evidence to meet that new standard (a standard he had easily met on the pleadings, but which was disregarded by the appellate court majority).

Proposition of Law No. 3:

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.

A. Broom is Entitled to Relief Under the Double Jeopardy Clause of the U.S. Constitution.

The double jeopardy clause of the federal constitution “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 (1989) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (emphasis supplied)). See also United States v. DiFrancesco, 449 U.S. 117, 129 (1980). Broom’s case involves the protection against “multiple punishments.”

The aspect of double jeopardy proscribing multiple punishments has “deep roots in our history and jurisprudence”:

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).

Halper, 490 U.S. at 440 (emphasis supplied).

The separate and independent aspect of double jeopardy's protection against multiple punishments was recognized as long ago as 1874 in Ex parte Lange:

The argument seems to us irresistible, and we do not doubt that the Constitution was designed **as much to prevent the criminal from being twice punished** for the same offence as from being twice tried for it.

Ex parte Lange, 18 Wall. at 168 (emphasis supplied). This decision remains established precedent.

The theory of double jeopardy, applicable most directly in the multiple punishments context, is that a person must not be required to run the gauntlet more than once. North Carolina v. Pearce, 395 U.S. at 727 (Douglas, J., concurring). **All or part of a maximum permissible punishment having been once endured, need not be endured again for the same offense.**

That is a core and fundamental component of the constitutional guarantee. It mandates, for example, that a punishment **already endured** for an offense must be fully credited upon a new conviction for the same offense. North Carolina v. Pearce, 395 U.S. at 717 (“We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully ‘credited’ in imposing sentence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. . . . Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.”).

It also mandates that a criminal sentence, once its service has commenced and there is a reasonable expectation of its finality, may not later be **increased or augmented** without violating double jeopardy's proscription against multiple punishments. See, e.g., United States v. DiFrancesco, 449 U.S. at 127-28, 134-37; United States v. Fogel, 829 F.2d 77, 87 (D.C. Cir. 1987) (Bork, C.J.). See also United States v. Benz, 282 U.S. 304, 307 (1931); Reid v. Covert, 354 U.S. 1, 37-38, n. 68 (1957).

In the unique context of a death sentence – the ultimate gauntlet – these principles most certainly apply with equal force. And they apply **even if** they will rarely if ever be tested, under the multiple punishments aspect of double jeopardy, due to the obvious fact that once the infliction of a death sentence commences it is virtually **always** successfully completed, and is, therefore, the final gauntlet which that deceased person is forever **incapable** of again enduring all or any part. But in that **rare** situation where the infliction of a death sentence has started yet been aborted midway through, as with Willie Francis and Romell Broom, and the State insists upon trying to complete that death sentence again later, these constitutional principles are squarely presented and must be applied.

For purposes of the double jeopardy analysis in such a unique and rare context, Broom has already been punished up to the last moment, the brink of his actual death. All that a death-sentenced prisoner must endure up to the brink, and more, has already been endured by Broom, including: (1) prolonged confinement under his sentence of death, (2) receipt of his firm execution date, (3) relocation from his long-term regular housing on Ohio's death row to SOCF on the day before his execution, (4) confinement in the holding cell at SOCF awaiting his execution the next day, (5) enduring the torment of what he believed was his last night on earth, (6) eating his last meal, arranging for the disposition of his meager personal property, and attending to his personal and spiritual affairs including final painful goodbyes to family and friends on the day before, the day of, and in the minutes before his execution commenced, (7) the commencement of his execution with the reading of the death warrant and start of the video feed to the assembled witnesses, (8) his complete and abject surrender to the execution team as they took control of his body and began his execution by invading his body with needles, (9) enduring two hours of painful needle insertions, including one stabbing into his ankle bone, by the execution team and even by persons **not** on the team, (10) enduring the agony and terror as an expected "quick and painless" execution became

unconscionably long and unendurably painful, physically and mentally, and continued into the second hour with no end expected until eventual death, and (11) enduring the unanticipated relief of the execution being halted after two hours but then being told the State will try again in one week.

Requiring Broom to endure another execution attempt, under these rare circumstances, would be doubling up on his punishment. It would repeat all of the previous parts of the punishment he has already suffered and require him, as well, to again relive the terror, torment and pain he has already once endured. The “slate” of what Broom has once endured can never be wiped clean; by the common humanity we share, we all know this to be true. No legal “fiction” can clean that slate because it is, indeed, indelible. Cf. Pearce, 395 U.S. at 721. A second attempt in these circumstances thus violates the core constitutional principle that **no part of a maximum permissible punishment having been once endured, need be endured again for the same offense.**

Broom also had a reasonable expectation in the “finality” of his death sentence, with “finality” for these purposes meaning that **his death would occur that day**, such that double jeopardy forever bars the State from any further attempt to augment that death sentence, super-adding to it, by requiring Broom to serve a substantial part of the sentence all over again, a second time. Reasonable expectation of “finality” in the circumstances of a commenced but failed death sentence will depend upon the facts. A condemned person who physically obstructs the process while underway, thereby intentionally causing its failure, would ordinarily be unable to demonstrate a reasonable expectation in the finality of a death sentence whose infliction commenced that day. Nor could a person for whom the execution process never actually commenced, i.e., never went beyond the reading of the death warrant and beginning of the video transmission to witnesses. The line of reasonable expectation will almost always be crossed, however, once the executioners have taken physical control of the condemned prisoner’s body and actually invaded it with the instruments of

execution. And once the pain inflicted by the State in seeking to complete the death sentence is substantial, and the time it has expended in the task has exceeded that which is reasonably contemplated by a “quick” execution, the expectation in finality is firmly established, thereby forever barring any later attempt.

Yet, wherever that line of reasonable expectation of finality is drawn, it was crossed in Broom’s case. Under any fair test, Broom had a reasonable expectation on September 15, 2009, that his execution would be completed that day, and that expectation was reinforced throughout two hours of painful efforts to insert needles into his body, culminating with the State’s protocol-defying and lawless enlistment of the doctor/non-team member who stabbed Broom in his ankle, and all of the other facts and circumstances summarized above.

Translating these principles, for the rare context of multiple execution attempts, into the familiar “attachment/termination” framework courts often employ in addressing double jeopardy issues, the original “jeopardy” as to Broom’s service of his death sentence “attached” no later than that point where the line of reasonable expectation in finality was crossed, and was “terminated” at least by the time the State chose to abort the execution later that same day after two hours of failed attempts. See generally Serfass v. United States, 420 U.S. 377, 388 (1975) (observing that the concept of “attachment of jeopardy” defines a point in criminal proceedings at which the purposes and policies of the Double Jeopardy clause are implicated); Sattazahn v. Pennsylvania, 537 U.S. 101, 106 (2003); Richardson v. United States, 468 U.S. 317, 325 (1984). Stated more bluntly, Broom’s life was already once in “jeopardy” of being taken by the State, including by virtue of the physical pain and mental torment actually inflicted by the State in the process of trying to end it, and **that** jeopardy must be deemed to have run its full course when Broom’s execution progressed for as long as it did and under all the circumstances, and even though his death was not ultimately achieved.

And because jeopardy as to the service of his death sentence has thus terminated, Broom may not again be required to run the gauntlet of a death sentence for the subject offense. DiFrancesco, 449 U.S. at 131 (noting that where the double jeopardy clause applies, “its sweep is absolute”) (quoting Burks v. United States, 437 U.S. 1, 11, n.6 (1978)).

Nor can there be any argument that Ohio’s legislature “intended” the multiple punishments that would be inflicted upon Broom if he is again required to endure the gauntlet of a death sentence being attempted upon him. Cf. Missouri v. Hunter, 459 U.S. 359, 366-69 (1983) (analyzing legislative intent regarding multiple punishments in a double jeopardy context). Any such “intent” would flout the core double jeopardy protection applicable to this unique situation, and would thus be unenforceable as violative of the clause. But, in any event, the intent of Ohio’s legislature is directly contrary to an allowance of multiple punishments here. Indeed, Ohio’s legislature requires that a death sentence shall be executed to “quickly and painlessly cause death” (Ohio Rev. Code §2949.22(A)), and is to commence and be completed on the **single day** set forth in the death warrant. See O.R.C. §2949.22(B) (“A death sentence shall be executed . . . on **the day** designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or post-conviction proceedings.”) (emphasis supplied). There is in Ohio no legislative authorization of “death by installments.” And these Ohio statutes, “should be construed strictly. There can be no implied provision for a second, third or multiple [execution attempts].” Resweber, 329 U.S. at 475 (Burton, J., dissenting).

It is true that the four Justices in the Resweber majority addressed double jeopardy issues and failed to grant relief to Willie Francis. However, **most** of the modern principles of double jeopardy addressed here by Broom were decades away from being adopted by the Court when Resweber was decided in 1947. And, of course, at that time in 1947 the double jeopardy clause was not even

applicable to the states under the Court's then-recent precedent, Palko v. Connecticut, 302 U.S. 319 (1937). That precedent would not change for another 22 years, until **1969**, with Benton v. Maryland, 395 U.S. 784 (1969). The double jeopardy analysis of the four justices who joined with Justice Frankfurter, all *dictum* in any event, is thus of very limited if any relevance in this modern setting.

Nevertheless, the State has before relied on a statement in Resweber that says a second effort to carry out a previously failed execution is like a retrial after a 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 analogy to a retrial in Resweber hinges on "[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence." Here, as addressed at length throughout this Brief, the Broom debacle was not an "unforeseeable accident." It was instead the State's fault.

Indeed, in the federal court Cooley 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. First Biros Injunction Order at 123 ("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."), 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).) See also Reynolds v. Strickland, 583 F.3d 956, 957 (6th Cir. 2009) (noting Ohio has “experienced serious and troubling difficulties in executing **at least three inmates**, most recently Romell Broom”); 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; State v. Rivera, Judgment Entry (Lorain C.P. June 10, 2008) (Broom First Submission, Exh. 24).

Despite the clear recognition by both federal and state courts that Ohio’s 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. What happened to Broom was thus not 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.

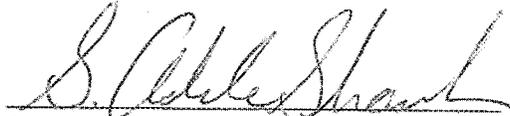
B. Broom is Entitled to Relief Under the Double Jeopardy Clause of Ohio’s Constitution Regardless of What the U.S. Constitution May Require.

For many of the same reasons addressed earlier in this Brief as to cruel and unusual punishments, Ohio’s constitutional guarantee against double jeopardy in Article 1, Section 10, should be held, in this unique context, to provide even more protection to Broom than its federal counterpart. Thus Broom is entitled to relief against a second execution attempt under the double jeopardy clause of Ohio’s Constitution, for all the reasons addressed in subpart A, above, regardless of what the U.S. Constitution may require.

CONCLUSION

For all of these reasons, and in the interests of justice, the judgment of the lower court should be reversed and relief granted in Broom's favor forever barring another execution attempt on the subject capital conviction. In the alternative, the case should be remanded to the trial court for further proceedings and/or an evidentiary hearing on Broom's claims.

Respectfully Submitted,



S. Adele Shank (0022148) (COUNSEL OF RECORD)
LAW OFFICE OF S. ADELE SHANK
3380 Tremont Road, Second Floor
Columbus, Ohio 43201-2112
614-326-1217

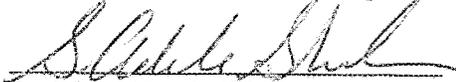


Timothy F. Sweeney (0040027)
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113
216-241-5003

COUNSEL FOR ROMELL BROOM

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT ROMELL BROOM was served by regular U.S. Mail, first-class postage pre-paid on Timothy J. McGinty, Prosecuting Attorney, and Katherine Mullin and T. Allan Regas, Assistant Prosecuting Attorneys, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, this 11th day of August, 2014.



S. Adele Shank (0022148)
One of Broom's Attorneys

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
)
Plaintiff-Appellee,)
vs.)
)
ROMELL BROOM,)
)
Defendant-Appellant.)
)

12-0852

On Appeal from the Court of Appeals of
Ohio, Eighth Appellate District,
Cuyahoga County

Court of Appeals Case No. 96747

NOTICE OF APPEAL OF APPELLANT ROMELL BROOM

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

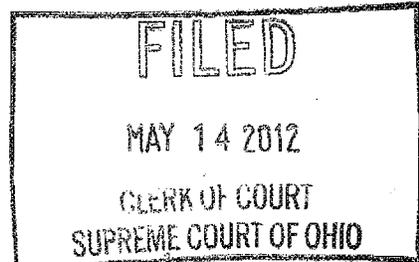
S. Adele Shank, Esq. (0022148) (Counsel of Record)
LAW OFFICE OF S. ADELE SHANK
3380 Tremont Road, 2nd Floor
Columbus, Ohio 43221-2112
(614) 326-1217

Timothy F. Sweeney, Esq. (0040027)
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
(216) 241-5003

COUNSEL FOR APPELLANT ROMELL BROOM

William Mason
Cuyahoga County Prosecutor
Matthew E. Meyer, Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR THE STATE OF OHIO



NOTICE OF APPEAL OF APPELLANT ROMELL BROOM

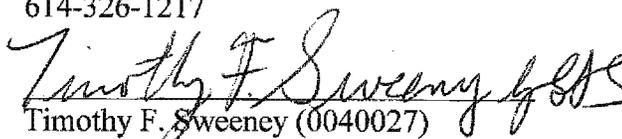
Appellant Romell Broom hereby gives notice of his appeal to the Supreme Court of Ohio from the opinion and judgment entry of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, entered in Court of Appeals Case No. 96747, filed and journalized on February 16, 2012. A timely application for reconsideration and reconsideration en banc was filed by Appellant on February 27, 2012. The application for reconsideration was denied by the panel of the Court of Appeals (by a 2-1 vote) on March 29, 2012. The application for reconsideration en banc was denied by the Court of Appeals on April 5, 2012 (with two dissents).

This case involves a felony and a sentence of death, raises a substantial constitutional question under the Ohio and United States Constitutions, and is one of public or great general interest.

Respectfully Submitted,



S. Adele Shank (0022148) (COUNSEL OF RECORD)
LAW OFFICE OF S. ADELE SHANK
3380 Tremont Road, Second Floor
Columbus, Ohio 43201-2112
614-326-1217



Timothy F. Sweeney (0040027)
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113
216-241-5003

COUNSEL FOR ROMELL BROOM

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF APPEAL 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 14 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

APPX 004

ATTORNEYS FOR APPELLANT

Timothy F. Sweeney
Law Office-Timothy Farrell Sweeney
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, OH 44113

S. Adele Shank
Law Office of S. Adele Shank
3380 Tremont Road
Second Floor
Columbus, OH 43221-2112

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Matthew E. Meyer
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

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 Coeey v. Strickland*, 610 F.Supp.2d 853 (6th Cir.2009); *Coeey 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.



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
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

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 *Cooey (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.

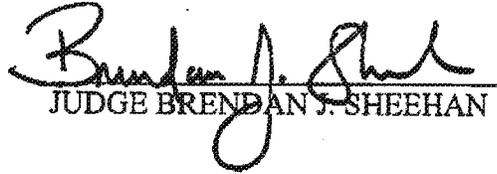
Upon consideration of the arguments and evidence presented, the Court finds that the State's first attempt at effectuating Broom's sentence does not constitute cruel and unusual punishment or otherwise deprive Broom of his rights so as to give rise to constitutional violations. Although certainly a set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

S. Adele Shank
3380 Tremont Road, 2nd Floor
Columbus, OH 43221

Timothy F. Sweeney
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, OH 44113

William Mason
Matthew Meyer
Cuyahoga County Prosecutor's Office
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

STATE OF OHIO



DEPARTMENT OF REHABILITATION
AND CORRECTION

SUBJECT:	PAGE <u>1</u> OF <u>10</u>
Execution	NUMBER: 01-COM-11
RULE/CODE REFERENCE: ORC 2949.22	SUPERSEDES: 01-COM-11 dated 10/11/06
RELATED ACA STANDARDS:	EFFECTIVE DATE: May 14, 2009
	APPROVED: <i>Taney J. Collins</i>

I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Ohio Department of Rehabilitation and Correction the authority to manage and direct the total operations of the Department and to establish such rules and regulations as the Director prescribes.

II. PURPOSE

The purpose of this policy is to establish guidelines for carrying out a court-ordered sentence of death.

III. APPLICABILITY

This policy applies to all individuals involved in carrying out a court-ordered death sentence in accordance with all applicable policies, administrative regulations and statutes.

IV. DEFINITIONS

Critical Incident Debriefing Team: A group selected by the SOCF Warden, and including the Religious Services Administrator available to assist any persons involved in the execution process. A psychological debriefing process is available via DRC clinical staff and others to recognize stressors associated with executions and to work through them with affected staff as follows:

- Worker's own experiences of the execution including reactions and perceptions;
- Review any negative aspects and feelings.
- Review any positive aspects and feelings.
- Relationships with workers and/or family.
- Empathy (sharing) with others.
- Disengagement from execution experience.
- Integration of this experience into the professional work role for a positive future contribution to the overall team effort.
- Exploring Religious Convictions and feelings.

Execution Team: A team consisting of no less than twelve (12) members, designated by the Warden of the Southern Ohio Correctional Facility (SOCF) and the Religious Services Administrator. Their duties

also include preparation and testing of equipment carrying out pre- and post-execution activities; and counseling with the inmate.

Lethal Injection: The form of execution whereby a continuous intravenous injection of a series of drugs in sufficient dosages is administered to cause death.

Reprieve: The postponement of an execution.

Stay: A court-ordered suspension or postponement of a legal execution.

V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction to carry out the death penalty as directed by Ohio Courts of Law. All execution processes shall be performed in a professional, humane, sensitive and dignified manner. It is the responsibility of the Director to designate a penal institution where death sentences shall be executed. The Warden of that facility, or Deputy Warden in the absence of the Warden, is responsible for carrying out the death sentence on the date established by the Ohio Supreme Court.

VI. PROCEDURES

A. General Guidelines

1. All offenders sentenced to death by a court of law will be transported to a reception center within the Ohio Department of Rehabilitation and Correction for initial processing. Upon completion of the reception process the offender will immediately be transferred to the designated institution: Mansfield Correctional Institution (MANCI) or Ohio State Penitentiary (OSP) for male offenders or Ohio Reformatory for Women (ORW) for female offenders.
2. All court-ordered executions shall be carried out at the Southern Ohio Correctional Facility (SOCF) at 10:00 a.m. on the scheduled execution date.
3. Unless otherwise designated by the Director or designee, the condemned inmate will remain on death row until transferred to the Death House at SOCF for scheduled execution.
4. The Ohio Supreme Court shall designate the date of execution. Upon receipt of a scheduled execution date, the Warden of the institution housing the inmate shall notify the Director, the Religious Services Administrator and the SOCF Warden.
5. Attendance at the execution is governed by the Ohio Revised Code, section 2949.25 and includes:
 - a. The Warden or Acting Warden of the institution where the execution is to be conducted, and such number of correction officers or other persons as the Warden or Acting Warden thinks necessary to carry out the death sentence.
 - b. The Sheriff of the county in which the prisoner was tried and convicted.

- c. The Director of the Department of Rehabilitation and Correction, or his designee and any other person selected by the Director or his designee to ensure that the death sentence is carried out.
 - d. Such number of physicians of the institution where the execution is to be conducted and medical personnel as the Warden or Acting Warden thinks necessary.
 - e. The prisoner may select one of the following persons: the Religious Services Administrator, minister-of-record, clergy, rabbi, priest, imam, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination or sect, subject to the approval of the Warden.
 - f. Three persons designated by the prisoner who are not confined in any state institution subject to the approval of the Warden or Acting Warden based on security considerations.
 - g. Three persons designated by the immediate family of the victim, subject to the approval of the Warden or Acting Warden based on security considerations, as detailed in Department Policy 03-OVS-06, Victim Involvement in the Execution Process.
 - h. Representatives of the news media as the Director/designee authorizes which shall include at least one representative of the following: a newspaper; a television station; and a radio station.
6. The SOCF Warden shall establish procedures for conducting executions consistent with all applicable laws, administrative codes and DRC policies. This will include the establishment of a communication system between the Governor's Office and the SOCF Command Center.
- a. Primary communications will be via a telephone line opened directly to the SOCF Command Center from the execution chamber. This line will be tested one (1) hour prior to the scheduled execution. Other than testing, this line will remain open.
 - b. Secondary communications will be via cellular telephone.
 - c. In the event that both the primary and secondary communications are inoperable, the execution will be delayed until communications are established.

B. Execution Procedures

1. Approximately thirty (30) days prior to the scheduled execution date:
 - a. The MANCI, OSP or ORW Warden will notify the Director by memo, with copies going to the Regional Director, DRC Chief Counsel, Assistant Director, APA, Ohio State Highway Patrol (Portsmouth and Jackson), and the Office of Victim Services.
 - b. The SOCF Execution Team will begin conducting training sessions no less than once per week until the scheduled date of execution. Training in the following topics will be provided for every member of the execution team prior to service and at least once per year thereafter:
 - i. the general nature and effects of the drugs that are used during the execution process,
 - ii. the insertion of the IV needles,
 - iii. signs of IV incontinence, and

- iv. any legal developments of significance.
 - c. The Religious Services Administrator (RSA) shall make contact with the inmate to establish counseling and family contact information.
 - d. Prior to commencement of the initial training session, the warden or the team leader will verify and document that the execution team includes persons who are currently qualified under Ohio Law to administer and prepare drugs for intravenous injections, and that the persons have at least one year experience as a certified medical assistant, phlebotomist, EMT, paramedic or military corpsman. Medical team members shall provide evidence of certification status at least once per year and upon any change in status.
 - e. All persons assigned to the execution team will be provided with a copy of this policy directive, to include subsequent revisions, and shall sign for its receipt.
2. Approximately seven (7) days prior to the execution:
- a. The MANCI, OSP or ORW Warden will have the Execution Information Release (DRC1808) completed by the condemned prisoner. This information will verify information on the condemned prisoner, visitors, witnesses, spiritual advisor, attorney, requested witness, property, and funeral arrangements.
 - b. The names of official witnesses/media witnesses will be supplied to the SOCF Warden, as outlined in this Policy.
 - c. The names and relationships of the victim's witnesses will be supplied to the SOCF Warden.
 - d. The RSA will provide family information from inmate to warden at SOCF
3. Approximately twenty-four (24) hours prior to the scheduled execution:
- a. The condemned prisoner will be transferred from Death Row and housed in the Death House at SOCF. The condemned inmate will be constantly monitored by at least three (3) members of the execution team. A log will be maintained including, but not limited to, visitors, movement, mood changes, meals served, showers, telephone calls, etc.
 - b. An authorized independently licensed mental health professional will interview the prisoner periodically and submit progress reports to the Warden. All inmate files shall be maintained in the Warden's office at SOCF.
 - c. The Warden will establish a line of communication with DRC legal staff and the Attorney General's Office for notice of case status and/or other significant legal changes.
 - d. The RSA will provide counseling and spiritual support unless the inmate requests not to have contact.

- e. Beginning with his arrival at SOCF, the inmate will not be forced to meet with non-staff visitors that he does not wish to see.
4. The following events will take place upon the inmate's arrival at the Death House:
 - a. Once the condemned inmate is at SOCF, the Death House will be restricted to the following:
 - Director/designee(s)
 - Warden
 - Chief Public Information Officer(s)
 - Institution Deputy Warden
 - Administrative Assistant to the Warden
 - Chaplain
 - Physician
 - Independently licensed Mental Health Professional
 - Chief of Security
 - Maintenance Superintendent
 - Any other person as deemed necessary by the Warden.
 - b. Every possible effort shall be made to anticipate and plan for foreseeable difficulties in establishing and maintaining the intravenous (IV) lines. The condemned prisoner shall be evaluated by appropriately trained medical staff on the day of arrival at the institution, to evaluate the prisoner's veins and plan for the insertion of the IV lines. This evaluation shall include a "hands-on" examination as well as a review of the medical chart, to establish any unique factors which may impact the manner in which the execution team carries out the execution. At a minimum, the inmate shall be evaluated upon arrival, later that evening at a time to be determined by the warden, and on the following morning prior to nine a.m. Potential problems shall be noted and discussed, and potential solutions considered, in advance of the execution.
 - c. SOCF chaplains will make periodic visits to the condemned prisoner, if requested by the inmate.
 - d. The Deputy Warden of Operations will assign security personnel to staff entrances, checkpoints and to assist the Ohio State Highway Patrol (OSHP).
 - e. The Execution Team Leader will ensure that the prisoner's property is inventoried in front of the prisoner. The condemned prisoner will have previously, per paragraph 2, specified who is to receive his or her personal effects.
 - f. The condemned prisoner will, per paragraph 2, specify in writing his/her request for funeral arrangements.
 - g. The Execution Team Leader will ask the condemned inmate to identify his or her last special meal request. The last meal will be served at approximately 4:00 p.m. the day prior to the scheduled execution.

- h. The condemned prisoner will be allowed contact visits with family, friends and/or private clergy, as approved by the Warden, between the hours of 4:30 p.m. and 7:30 p.m. on the day prior to the scheduled execution. Cell front visits will be permitted between the hours of 6:30 a.m. and 8:00 a.m. on the day of the scheduled execution. The attorney and spiritual advisor may continue to visit with the condemned until 8:45 a.m. The Warden may increase the visiting opportunities at their discretion, considering the needs of the team and the interests of the prisoner.
 - i. All communication equipment will be tested, including primary and secondary communication with the Governor's Office.
 - j. Key personnel will be briefed by the Warden, including medical and mental health, in order to allow intake information to be obtained.
 - k. The Warden will receive updates from security personnel and the OSHP on crowd control, demonstrations, pickets, etc.
 - l. The Chief of Security will brief the Warden on the level of tension within the remainder of the prison population.
 - m. The Warden will relay any out of the ordinary activity to the South Regional Director.
 - n. The Execution Team will continue to drill/rehearse.
 - o. The Warden shall consider the needs of the condemned inmate, visitors and family members, the execution team, prison staff and others, and may make alterations and adjustments to this or other policies as necessary to ensure that the completion of the execution is carried out in a humane, dignified and professional manner.
5. Approximately one (1) hour prior to the scheduled execution:
 - a. The prisoner will be permitted to take a shower and dress in the designated clothing for the execution.
 - b. Official witnesses to the execution will report to the institution. The victim's witnesses will report to the Portsmouth Highway Patrol Post for escort to the institution by designated SOCF personnel.
 - c. The RSA will be present to counsel and provide spiritual support to the inmate and staff.
6. Approximately fifteen (15) minutes prior to the scheduled execution:
 - a. The warden shall read the death warrant to the condemned prisoner.
 - b. All authorized witness groups will be escorted to the death house separately by designated staff.
7. These procedures shall be followed concerning the medications used in the execution.

- a. Upon notification to the Warden of a firm execution date, a person qualified under Ohio law to administer medications shall order a quantity of the following drugs in a timely manner from the institution's licensed pharmacist: thiopental sodium, pancuronium bromide and potassium chloride. A sufficient quantity shall be ordered as a contingency against the contamination or other inadvertent loss of any of the drugs.
- b. On the day of the execution, the person qualified under Ohio law to administer medications shall take possession of the drugs thiopental sodium, pancuronium bromide and potassium chloride from the institution pharmacy, and shall document possession of the drugs by signing a receipt or log. The person qualified under Ohio law to administer medications shall deliver the drugs to the death house.
- c. The person qualified under Ohio law to administer medications shall, in the presence of a second medically qualified person, give possession of the drugs to a person qualified to prepare intravenous injections. This transfer shall be documented by a receipt signed by these three parties. The person qualified under Ohio law to administer medications shall notify the command center upon the delivery of drugs and the command center shall log the time of delivery, the quantity, name and type of drugs delivered.
- d. The drugs shall be prepared for injection by a person qualified under Ohio law to administer and prepare drugs for intravenous injections. The preparation of the drugs shall be monitored by a similarly qualified witness who shall independently verify the preparation and dosage of the drugs. Both medical professionals shall document and sign a written verification of the preparation and dosage of the drugs, which may be noted on the medication receipt referred to above. When the drugs are prepared, the command center shall be notified and the time of the preparation recorded. The command center shall also record what drugs were prepared, the quantity, name and dosage of the prepared drugs.
- e. The execution team shall enter the holding cell to prepare the IV sites. The member(s) of the execution team who inserts the needle and starts the intravenous connection shall be a person trained and licensed under Ohio law to administer intravenous medications. This team member and any others performing duties related to the administration of the drugs shall have at least one year of experience as a certified medical assistant, phlebotomist, EMT, paramedic or military corpsman. 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. This step shall be accomplished in the holding cell, and the staff shall utilize heparin locks to create the sites and keep them open. The team shall test the viability of the IV site with a small amount of saline, to be flushed through the heparin lock.
- f. 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. The warden, upon consultation with the Director and others as necessary, will make the decision whether or how long to continue efforts to establish an IV site. The Director shall also consult with legal

counsel, the office of the Governor or any others as necessary to discuss the issue and alternatives.

- g. Following the establishment of two IV sites, the inmate will be escorted to the chamber and secured to the table. The team shall roll up the inmate's sleeves or take other steps to insure that the IV sites are plainly visible to persons in the chamber and to those in the equipment room.
- h. Once the inmate has been escorted to the chamber, a low-pressure saline drip shall be connected to the IV sites.
- i. The drugs shall be prepared as follows:
 - i. Four grams of Thiopental Sodium prepared with 25 mg/cc concentration for a total of 160cc which are placed in **four** syringes labeled "1," "2," "A" and "B." Syringes 1 and 2 will be used as the primary dose; syringes A and B will be considered backup doses for contingent use if the initial IV site fails.
 - ii. 100 mg of Pancuronium Bromide is prepared with 2mg/ml concentration for a total of 50cc which is placed into two 25cc syringes labeled "three" and "four."
 - iii. 100 milliequivalents of Potassium Chloride are prepared with 2 meq/cc concentration for a total of 50cc. The preparation is placed in a syringe labeled "five."
 - iv. Depending upon the form and concentration of drugs delivered, it may be necessary to modify the preparation of syringes. In the event of any modification for any reason, a qualified witness shall review any modifications and the command center shall be notified and any changes recorded.
 - v. The arm veins near the joint between the upper and lower arm will be utilized as the preferred site for the injection. The team may utilize a non-invasive device such as a light, if desired, to assist in locating a vein. In the event that the execution team is unable to prepare the inmate's veins at the preferred site to receive the intravenous dose of drugs, a qualified medical person authorized to administer intravenous drugs shall use an alternative site to deliver the drugs as they may be authorized by law.

8. Execution:

- a. The Warden and Execution Team will escort the condemned prisoner to the execution chamber, place the condemned prisoner on the lethal injection bed, secure the straps and insert the intravenous injection tubes. Upon the prisoner's entry into the chamber, a member of the medical team in the equipment room will announce each step or action taken by any member of the medical team for the purposes of having those steps recorded in the written record. The Warden, Team Leader and medical team members will all confirm the visibility of the IV sites.

- b. The Warden will ask the condemned prisoner if he has any last words. If the prisoner has a last statement, he will be allowed to make it while the witnesses are present in the adjacent viewing chambers, and are able to see him and hear him via microphone. There will be no restriction on the content of the condemned prisoner's statement and no unreasonable restriction on the duration of the prisoner's last statement.
- c. Upon the Warden's signal, the injections shall be administered in the order described above by a person qualified under Ohio law to administer intravenous injections. One additional person who is qualified to administer intravenous injections shall be present in the control room to observe the administration. The start and finish time of each syringe shall be reported to the command center and recorded in a log. The low-pressure saline drip shall be allowed to flush saline through the lines for at least ninety seconds between syringes two and three, between syringes four and five, and again after syringe five.
- d. Following the administration of syringes one and two of the thiopental and before the administration of more thiopental or the pancuronium, the warden or other execution team member shall assess the prisoner's consciousness by calling his or her name; by gently shaking the prisoner's shoulder; and by pinching the prisoner's arm or some other noxious stimulus. If the offender fails to respond, and the warden determines he is unconscious, the Warden shall give the signal to resume the process. If the offender remains conscious, the IV site shall be checked and the medication protocol and sequence must be started again.
- e. The execution team leader, the person who administers the drugs and the warden shall observe the inmate throughout the time that the drugs are being administered to the inmate. The team leader, the drug administrator and the warden will watch during the injection process to look for signs of swelling or infiltration at the IV site, blood in the catheter, and leakage from the lines and other unusual signs or symptoms. The person who connects the medication lines shall reenter the chamber following administration of the first medication to inspect the IV site for evidence of incontinence or infiltration. If problems are detected during the administration of the drugs, the problem shall be corrected or the injection site changed. Whenever it appears necessary to any person involved that it is necessary to switch IV sites, the matter shall be communicated to the Warden and the medical team member who administers the drugs. The Warden and the drug administrator shall confer before switching sites. If they decide to switch sites, that fact shall be announced and recorded. In the event that both IV sites become compromised, the team shall take such time as may be necessary to establish a viable IV site. Whenever it is necessary to change IV sites during the execution process due to a deficiency in the initial IV site, the medication protocol and sequence must be started again.
- f. At the completion of the delivery of drugs the curtain will be closed and an appropriate medical professional will evaluate the offender to confirm the fact of his or her death. The curtain will then be re-opened and the warden will announce the time of death.
- g. The RSA or the inmate's Spiritual Advisor will anoint the body of the inmate if requested by the inmate.

STATE OF OHIO



DEPARTMENT OF REHABILITATION
AND CORRECTION

SUBJECT:	PAGE <u> 1 </u> OF <u> 11 </u>
Execution	NUMBER: 01-COM-11
RULE/CODE REFERENCE: ORC 2949.22; 2949.25	SUPERSEDES: 01-COM-11 dated 05/14/2009
RELATED ACA STANDARDS:	EFFECTIVE DATE: November 30, 2009
	APPROVED: <i>Tony J. Collins</i>

I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Ohio Department of Rehabilitation and Correction the authority to manage and direct the total operations of the Department and to establish such rules and regulations as the Director prescribes.

II. PURPOSE

The purpose of this policy is to establish guidelines for carrying out a court-ordered sentence of death.

III. APPLICABILITY

This policy applies to all individuals involved in carrying out a court-ordered death sentence in accordance with all applicable policies, administrative regulations and statutes.

IV. DEFINITIONS

Critical Incident Debriefing Team - A group selected by the SOCF Warden, and including the Religious Services Administrator available to assist any persons involved in the execution process. A psychological debriefing process is available via DRC clinical staff and others to recognize stressors associated with executions and to work through them with affected staff as follows:

- Worker’s own experiences of the execution including reactions and perceptions.
- Review any negative aspects and feelings.
- Review any positive aspects and feelings.
- Relationships with workers and/or family.
- Empathy (sharing) with others.
- Disengagement from execution experience.
- Integration of this experience into the professional work role for a positive future contribution to the overall team effort.
- Exploring Religious Convictions and feelings.

Death Row – (1) A housing area at OSP that has been designated by the Director of the Department of Rehabilitation and Correction to house male inmates who are committed to the Department with a sentence of death; (2) a housing area at ORW that is similarly designated to house female inmates

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committed to the Department with a sentence of death; (3) A housing area at MANCI that has been designated by the Director of the Department of Rehabilitation and Correction to house male inmates who are committed to the Department with a sentence of death who are determined to be seriously mentally ill pursuant to the criteria set forth in Department Policy 67-MNH-27, Transfer of Offenders to the Ohio State Penitentiary, or whose medical needs are inconsistent with assignment to OSP pursuant to Department Policy 68-MED-13, Medical Classification. Death Row is also a reference to a housing status for inmates sentenced to death; it is not a security classification.

Execution Team - A team consisting of no less than twelve (12) members, designated by the Warden of the Southern Ohio Correctional Facility (SOCF) and the Religious Services Administrator. Their duties also include preparation and testing of equipment, carrying out pre- and post-execution activities, and counseling with the inmate.

Lethal Injection - 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.

Reprieve - The postponement of an execution.

Stay - A court-ordered suspension or postponement of a legal execution.

V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction to carry out the death penalty as directed by Ohio Courts of Law. All execution processes shall be performed in a professional, humane, sensitive, and dignified manner. It is the responsibility of the Director to designate a penal institution where death sentences shall be executed. The Warden of that facility, or Deputy Warden in the absence of the Warden, is responsible for carrying out the death sentence on the date established by the Ohio Supreme Court.

VI. PROCEDURES

A. General Guidelines

1. All offenders sentenced to death by a court of law will be transported to a reception center within the Ohio Department of Rehabilitation and Correction for initial processing. Upon completion of the reception process the offender will immediately be transferred to the designated institution: Mansfield Correctional Institution (MANCI) or Ohio State Penitentiary (OSP) for male offenders or Ohio Reformatory for Women (ORW) for female offenders.
2. All court-ordered executions shall be carried out at the Southern Ohio Correctional Facility (SOCF) at 10:00 a.m. on the scheduled execution date.
3. Unless otherwise designated by the Director/designee, the condemned inmate will remain on death row until transferred to the Death House at SOCF for scheduled execution.

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4. The Ohio Supreme Court shall designate the date of execution. Upon receipt of a scheduled execution date, the Warden of the institution housing the inmate shall notify the Director, the Religious Services Administrator, and the SOCF Warden.
5. Attendance at the execution is governed by the Ohio Revised Code, section 2949.25 and includes:
 - a. The Warden or Acting Warden of the institution where the execution is to be conducted, and such number of correction officers or other persons as the Warden or Acting Warden thinks necessary to carry out the death sentence.
 - b. The Sheriff of the county in which the prisoner was tried and convicted.
 - c. The Director of the Department of Rehabilitation and Correction, or designee and any other person selected by the Director/designee to ensure that the death sentence is carried out.
 - d. Such number of physicians of the institution where the execution is to be conducted and medical personnel as the Warden or Acting Warden thinks necessary.
 - e. The prisoner may select one of the following persons: the Religious Services Administrator, minister-of-record, clergy, rabbi, priest, imam, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination or sect, subject to the approval of the Warden.
 - f. Three persons designated by the prisoner who are not confined in any state institution subject to the approval of the Warden or Acting Warden based on security considerations.
 - g. Three persons designated by the immediate family of the victim, subject to the approval of the Warden or Acting Warden based on security considerations, as detailed in Department Policy 03-OVS-06, Victim Involvement in the Execution Process.
 - h. Representatives of the news media as the Director/designee authorize which shall include at least one representative of the following: a newspaper, a television station, and a radio station.
6. The SOCF Warden shall establish procedures for conducting executions consistent with all applicable laws, administrative codes, and DRC policies. This will include the establishment of a communication system between the Governor's Office and the SOCF Command Center.
 - a. Primary communications will be via a telephone line opened directly to the SOCF Command Center from the execution chamber. This line will be tested one (1) hour prior to the scheduled execution. Other than testing, this line will remain open.
 - b. Secondary communications will be via cellular telephone.
 - c. In the event that both the primary and secondary communications are inoperable, the execution will be delayed until communications are established.

B. Execution Procedures

1. Approximately thirty (30) days prior to the scheduled execution date:
 - a. The Managing Officer of the institution where the inmate is housed will notify the Director by memo, with copies going to the Regional Director, DRC Chief Counsel,

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Assistant Director, APA, Ohio State Highway Patrol (Portsmouth and Jackson), and the Office of Victim Services.

- b. The SOCF Execution Team will begin conducting training sessions no less than once per week until the scheduled date of execution. Training in the following topics will be provided for every member of the execution team prior to service and at least once per year thereafter:
 - i. the general nature and effects of the drugs that are used during the execution process,
 - ii. medication administration procedures, including the insertion of the IV needles and administration of intramuscular injections,
 - iii. signs or symptoms of problems when administering medications, and
 - iv. any legal developments of significance.
 - c. The Religious Services Administrator (RSA) shall make contact with the inmate to establish counseling and family contact information.
 - d. Prior to commencement of the initial training session, the Warden or the team leader will verify and document that the execution team includes persons who are currently qualified under Ohio Law to administer and prepare drugs for intravenous and intramuscular injections, and that the persons have at least one year experience as a certified medical assistant, phlebotomist, EMT, paramedic or military corpsman. Medical team members shall provide evidence of certification status at least once per year and upon any change in status.
 - e. All persons assigned to the execution team will be provided with a copy of this policy directive, to include subsequent revisions, and shall sign for its receipt.
2. Approximately seven (7) days prior to the execution:
- a. The Managing Officer of the institution where the inmate is housed will have the Execution Information Release (DRC1808) completed by the condemned prisoner. This information will verify information on the condemned prisoner, visitors, witnesses, spiritual advisor, attorney, requested witness, property, and funeral arrangements.
 - b. The names of official witnesses/media witnesses will be supplied to the SOCF Warden, as outlined in this policy.
 - c. The names and relationships of the victim's witnesses will be supplied to the SOCF Warden.
 - d. The RSA will provide family information from the inmate to the Warden at SOCF.
3. Approximately twenty-four (24) hours prior to the scheduled execution:
- a. The condemned prisoner will be transferred from Death Row and housed in the Death House at SOCF. The condemned inmate will be constantly monitored by at least

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three (3) members of the execution team. A log will be maintained including, but not limited to, visitors, movement, mood changes, meals served, showers, telephone calls, etc.

- b. An authorized independently licensed mental health professional will interview the prisoner periodically and submit progress reports to the Warden. All inmate files shall be maintained in the Warden's office at SOCF.
 - c. The Warden will establish a line of communication with DRC legal staff and the Attorney General's Office for notice of case status and/or other significant legal changes.
 - d. The RSA will provide counseling and spiritual support unless the inmate requests not to have contact.
 - e. Beginning with his arrival at SOCF, the inmate will not be forced to meet with non-staff visitors that he does not wish to see.
4. The following events will take place upon the inmate's arrival at the Death House:
- a. Once the condemned inmate is at SOCF, the Death House will be restricted to the following:
 - Director/designee(s)
 - Warden
 - Chief Public Information Officer(s)
 - Institution Deputy Warden
 - Administrative Assistant to the Warden
 - Chaplain
 - Physician
 - Independently Licensed Mental Health Professional
 - Chief of Security
 - Maintenance Superintendent
 - Any other person as deemed necessary by the Warden.
 - b. Every possible effort shall be made to anticipate and plan for foreseeable difficulties in establishing and maintaining the intravenous (IV) lines. The condemned prisoner shall be evaluated by appropriately trained medical staff on the day of arrival at the institution, to evaluate the prisoner's veins and plan for the insertion of the IV lines. This evaluation shall include a "hands-on" examination as well as a review of the medical chart, to establish any unique factors which may impact the manner in which the execution team carries out the execution. At a minimum, the inmate shall be evaluated upon arrival, later that evening at a time to be determined by the Warden, and on the following morning prior to nine a.m. Potential problems shall be noted and discussed, and potential solutions considered, in advance of the execution.
 - c. SOCF chaplains will make periodic visits to the condemned prisoner, if requested by the inmate.

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- d. The Deputy Warden of Operations will assign security personnel to staff entrances, checkpoints and to assist the Ohio State Highway Patrol (OSHP).
 - e. The Execution Team Leader will ensure that the prisoner's property is inventoried in front of the prisoner. The condemned prisoner will have previously, per paragraph B2, specified who is to receive his or her personal effects.
 - f. The condemned prisoner will, per paragraph B2, specify in writing his/her request for funeral arrangements.
 - g. The Execution Team Leader will ask the condemned inmate to identify his or her last special meal request. The last meal will be served at approximately 4:00 p.m. the day prior to the scheduled execution.
 - h. The condemned prisoner will be allowed contact visits with family, friends and/or private clergy, as approved by the Warden, between the hours of 4:30 p.m. and 7:30 p.m. on the day prior to the scheduled execution. Cell front visits will be permitted between the hours of 6:30 a.m. and 8:00 a.m. on the day of the scheduled execution. The attorney and spiritual advisor may continue to visit with the condemned until 8:45 a.m. The Warden may increase the visiting opportunities at his discretion.
 - i. All communication equipment will be tested, including primary and secondary communication with the Governor's Office.
 - j. Key personnel will be briefed by the Warden, including medical and mental health, in order to allow intake information to be obtained.
 - k. The Warden will receive updates from security personnel and the OSHP on crowd control, demonstrations, pickets, etc.
 - l. The Chief of Security or designee will brief the Warden on the level of tension within the remainder of the prison population.
 - m. The Warden will relay any out of the ordinary activity to the South Regional Director.
 - n. The Execution Team will continue to prepare as needed.
 - o. The Warden shall consider the needs of the condemned inmate, visitors and family members, the execution team, prison staff and others, and may make alterations and adjustments to this or other policies as necessary to ensure that the completion of the execution is carried out in a humane, dignified and professional manner.
5. Approximately one (1) hour prior to the scheduled execution:
- a. The prisoner will be permitted to take a shower and dress in the designated clothing for the execution.

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- b. Official witnesses to the execution will report to the institution. The victim's witnesses will report to the Portsmouth Highway Patrol Post for escort to the institution by designated SOCF personnel.
 - c. The RSA will be present to counsel and provide spiritual support to the inmate and staff.
 6. Approximately fifteen (15) minutes prior to the scheduled execution:
 - a. The Warden shall read the death warrant to the condemned prisoner.
 - b. All authorized witness groups will be escorted to the death house separately by designated staff.
 7. These procedures shall be followed concerning the medications used in the execution.
 - a. Upon notification to the Warden of a firm execution date, a person qualified under Ohio law to administer medications shall order a quantity of the following drugs in a timely manner from the institution's licensed pharmacist: thiopental sodium, midazolam and hydromorphone. A sufficient quantity shall be ordered as a contingency against the contamination or other inadvertent loss of any of the drugs.
 - b. On the day of the execution, the person qualified under Ohio law to administer medications shall take possession of the drugs thiopental sodium, midazolam and hydromorphone from the institution pharmacy, and shall document possession of the drugs by signing a receipt or log. The person qualified under Ohio law to administer medications shall deliver the drugs to the death house.
 - c. The person qualified under Ohio law to administer medications shall, in the presence of a second medically qualified person, give possession of the drugs to a person qualified to prepare intravenous and intramuscular injections. This transfer shall be documented by a receipt signed by these three parties. The person qualified under Ohio law to administer medications shall notify the command center upon the delivery of drugs and the command center shall log the time of delivery, the quantity, name and type of drugs delivered.
 - d. The drugs shall be prepared for injection by a person qualified under Ohio law to administer and prepare drugs for intravenous and intramuscular injections. The preparation of the drugs shall be monitored by a similarly qualified witness who shall independently verify the preparation and dosage of the drugs. Both medical professionals shall document and sign a written verification of the preparation and dosage of the drugs, which may be noted on the medication receipt referred to in paragraph c. above. When the drugs are prepared, the command center shall be notified and the time of the preparation recorded. The command center shall also record what drugs were prepared, the quantity, name and dosage of the prepared drugs.
 - e. The drugs shall be prepared as follows:
 - i. Five grams of thiopental sodium prepared with 25 mg/cc concentration, 40 cc per gram for a total of 200 cc which are placed in five syringes labeled "1" through

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“5.” Five additional grams shall be obtained and kept available in the area of the execution chamber, but need not be mixed and prepared unless the primary dose of five grams proves to be insufficient for the procedure. Five additional syringes labeled “6 through “10” shall be kept available for contingent use.

- ii. 10 mg of midazolam shall be obtained or prepared with 5mg/mL concentration. 40 mg of hydromorphone shall also be obtained or prepared with 10 mg/mL concentration. Drugs for intramuscular injection may be drawn up into syringes for use as needed if the decision is made to use an alternative method. The midazolam and hydromorphone in the amounts specified above shall be drawn into or mixed in a single syringe for intramuscular injection, which shall be labeled “A”. A second such syringe shall be prepared if needed, and shall be labeled “B.” A third syringe of 60 mg of hydromorphone only shall also be prepared if needed and labeled as “C.” These syringes shall be used if the team is unable to obtain IV sites, or if an IV injection is initiated and subsequently abandoned before the procedure is concluded.
- iii. Depending upon the form and concentration of drugs delivered, it may be necessary to modify the preparation of syringes. In the event of any modification for any reason, a qualified witness shall review any modifications and the command center shall be notified and any changes recorded.
- f. The execution team shall enter the holding cell to prepare the IV sites. The member(s) of the execution team who inserts the needle and starts the intravenous connection shall be a person trained and licensed under Ohio law to administer intravenous and intramuscular medications. This team member and any others performing duties related to the administration of the drugs shall have at least one year of experience as a certified medical assistant, phlebotomist, EMT, paramedic or military corpsman. The appropriate team member(s) shall evaluate and consider the establishment of one or two viable IV sites. The team member(s) shall make such number of attempts to establish IV sites as may be reasonable under the circumstances and shall take the amount of time necessary when pursuing this objective. This step shall be accomplished in the holding cell, and the staff shall utilize heparin locks to create the sites and keep them open. The team shall test the viability of the IV site with a small amount of saline, to be flushed through the heparin lock.
- g. The arm veins near the joint between the upper and lower arm will be utilized as the preferred site for the IV injection. The team may utilize a non-invasive device such as a light, if desired, to assist in locating a vein. In the event that the execution team is unable to prepare the inmate’s veins at the preferred site to receive the intravenous dose of drugs, a qualified medical person authorized to administer intravenous and intramuscular drugs may use an alternative site to deliver the drugs as they may be authorized by law.
- h. The team members who establish the IV sites shall be allowed as much time as is necessary to establish one or two viable sites. If, due to the passage of time, the difficulty of the undertaking or other reasons, the team members question the feasibility of establishing two or even one site, the team will consult with the Warden.

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The Warden, upon consultation with the Director and others as necessary, will make the decision whether or how long to undertake or continue efforts to establish an IV site. The Director shall also consult with legal counsel, the office of the Governor or any others as necessary to discuss the issue and alternatives.

- i. If, after consultation, the Director and the Warden decide to proceed with an alternate method of execution, further attempts to establish an IV site may be discontinued.

8. Execution:

- a. The Warden and Execution Team will escort the condemned prisoner to the execution chamber, place the condemned prisoner on the lethal injection bed, secure the straps and insert the intravenous injection tubes if intravenous injection is the method used. The team shall roll up the inmate's sleeves or take other steps to ensure that the arms are plainly visible to persons in the chamber and to those in the equipment room. The Warden, Team Leader and medical team members will all confirm the visibility of the IV sites. Once the injection tubes have been connected, a low-pressure saline drip shall be connected to the IV site(s) if the method is IV administration.
- b. Upon the prisoner's entry into the chamber, a member of the medical team in the equipment room will announce each step or action taken by any member of the medical team for the purposes of having those steps recorded in the written record.
- c. The Warden will ask the condemned prisoner if he has any last words. If the prisoner has a last statement, he will be allowed to make it while the witnesses are present in the adjacent viewing chambers, and are able to see him and hear him via microphone. There will be no restriction on the content of the condemned prisoner's statement and no unreasonable restriction on the duration of the prisoner's last statement.
- d. Upon the Warden's signal, the injections shall be administered in the order described above by a person qualified under Ohio law to administer intravenous and intramuscular injections. One additional person who is qualified to administer intravenous and intramuscular injections shall be present in the control room to observe the administration. The start and finish time of each syringe shall be reported to the command center and recorded in a log. If an IV injection is used, the low-pressure saline drip shall be allowed to flush saline through the line(s) following completion of the IV medication administration.
- e. The execution team leader, the person who administers the drugs and the Warden shall observe the inmate throughout the time that the drugs are being administered to the inmate. The team leader, the drug administrator and the Warden will watch during the injection process to look for signs of swelling or infiltration at the IV site, blood in the catheter, and leakage from the lines and other unusual signs or symptoms. The person who connects the medication lines shall reenter the chamber following administration of the IV medication to inspect the IV site for evidence of incontinence or infiltration and to listen to the inmate for breathing sounds. If problems are detected during the administration of the drugs, the problem shall be corrected or the injection site changed. The medical team member who administers the drug may change IV sites whenever it appears necessary and may confer with the

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Warden as desired. If it appears necessary to the Warden or the team leader that it is necessary to switch IV sites, the matter shall be communicated to the medical team member who administers the drugs. If the drug administrator switches sites, that fact shall be announced and recorded. In the event that the previously established IV site(s) become compromised, the team may take such time as may be necessary to establish a viable IV site or may consider the alternative method below. Whenever it is necessary to change IV sites during the execution process due to a deficiency in the initial IV site, the medication protocol and sequence must be started again.

- f. If the Director and Warden decide IV injections should not be used, or if an IV injection is commenced and abandoned, the alternative method of conducting the execution may be used.
 - i. A medical team member shall enter the chamber at the direction of the Warden and shall administer an intramuscular injection of 10 mg midazolam and 40 mg hydromorphone, labeled syringe "A," into a large muscle of the condemned prisoner, usually the deltoid or triceps muscle. Alternative sites may include the hip, thigh or other location as may be appropriate under the circumstances.
 - ii. Five minutes after injection of this medication, a medical team member shall re-enter the chamber to listen for breathing sounds. If the inmate is still breathing, the medical team member shall administer an intramuscular injection of 10 mg midazolam and 40 mg hydromorphone, labeled syringe "B," into a large muscle.
 - iii. Five minutes after injection of this medication, a medical team member shall re-enter the chamber to listen for breathing sounds. If the inmate is still breathing, the medical team member shall administer an intramuscular injection of 60 mg of hydromorphone only, labeled syringe "C," into a large muscle.
 - iv. Any additional doses shall be administered as described for syringe "C."
 - g. At the completion of the lethal injection process and after a sufficient time for death to have occurred, the curtain will be closed and an appropriate medical professional will evaluate the offender to confirm the fact of his or her death. The curtain will then be re-opened and the Warden will announce the time of death.
9. Post-Execution:
- a. The Warden, or his designee, will notify the Director that the execution has been carried out.
 - b. The RSA or the inmate's Spiritual Advisor will anoint the body of the inmate if requested by the inmate.
 - c. The RSA will coordinate the burial of the inmate's body with local chaplains if the inmate's family does not want the body.
 - d. The Execution Team will remove the deceased from the execution bed and place him or her on a gurney.

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- e. Disposition of the body will be in accordance with arrangements made prior to the execution at the prisoner's request.
 - f. The Warden will sign and return the death warrant to the court, indicating the execution has been carried out.
 - g. One member of the medical team shall properly dispose of any unused medications while another medical team member witnesses. Both medical team members shall record the disposal or return of unused medications in an incident report, which shall be submitted to the Team Leader.
10. Debriefing:
- a. The Warden will ensure that critical incident debriefings are available for the Execution Team and staff participants immediately following the execution.
 - b. The critical incident debriefing team will conduct interview in accordance with CIM guidelines.
 - c. The RSA will be available for debriefing for the staff and the family of the inmate

Related Department Forms:

Execution Information Release

DRC1808

00A00 0F 0000



D0PAR0M0000 0F R00A00L00A000 0
A0D C0RR0C0000 0

00000C0: Execution	PAG0 ___ 1 ___ 0F ___ 19 00M00R: 01-C0M-11
R0L0/C0D0 RLF0R00C0: 0RC 2949/22 2949/25	00P0R00D00: 01-C0M-11 dated 10/10/13
R0LA00D ACA 00A0DARD0:	0FF0C0000 DA00: A00il 2002014
	APPR000D: 

I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Ohio Department of Rehabilitation and Correction the authority to manage and direct the total operations of the Department and to establish such rules and regulations as the Director prescribes.

II. PURPOSE

The purpose of this policy is to establish guidelines for carrying out a court-ordered sentence of death.

III. APPLICABILITY

This policy applies to all individuals involved in carrying out a court-ordered death sentence in accordance with all applicable policies, administrative regulations, and statutes.

IV. DEFINITIONS

Auxiliary Team Member – A physician who has been designated by the Warden to provide advice and consultation as described in this policy.

Critical Incident Debriefing Team - A group selected by the Warden, and including the Religious Services Administrator, available to assist any persons involved in the execution process. A psychological debriefing process is available via DRC clinical staff and others to recognize stressors associated with executions and to work through them with affected staff as follows:

- Worker’s own experiences of the execution including reactions and perceptions.
- Review any negative aspects and feelings.
- Review any positive aspects and feelings.
- Relationships with workers and/or family.
- Empathy (sharing) with others.
- Disengagement from execution experience.
- Integration of this experience into the professional work role for a positive future contribution to the overall team effort.
- Exploring religious convictions and feelings.

Death House - A physical location within the Southern Ohio Correctional Facility (SOCF) used for the

execution of a death-sentenced prisoner.

Death Row – (1) A housing area at the Chillicothe Correctional Institution (CCI) or Ohio State Penitentiary (OSP) that has been designated by the Director of the Department of Rehabilitation and Correction to house male prisoners who are committed to the Department with a sentence of death; (2) A housing area at the Ohio Reformatory for Women (ORW) that is similarly designated to house female prisoners committed to the Department with a sentence of death; (3) A housing area at the Franklin Medical Center (FMC) that has been designated by the Director of the Department of Rehabilitation and Correction to house male or female prisoners whose medical needs are inconsistent with assignment to CCI, ORW, or OSP pursuant to Department Policy 68-MED-13, Medical Classification; or such other facility as may be deemed appropriate by the Director. Death Row is also a reference to a housing status for prisoners sentenced to death; it is not a security classification.

Director – As used in the policy, the term “Director” refers to the current Director of the Ohio Department of Rehabilitation and Correction or the Director’s designee.

Drug Administrator - Any qualified member of the Medical Team who administers any execution drug or witnesses the preparation and administration of any execution drug. A Drug Administrator shall be currently qualified under Ohio Law to administer and prepare drugs for intravenous and intramuscular injections. A Drug Administrator may also establish or assist in establishing IV connections.

Execution Team - A group consisting of no less than twelve (12) members designated by the Warden of the Southern Ohio Correctional Facility to carry out court-ordered executions. Their duties also include preparation and testing of equipment, carrying out pre- and post-execution activities, and counseling with the prisoner.

Execution Timeline - A record of events before and during an execution to include the specific information required to be recorded by this policy and other information at the discretion of the Execution Team.

Medical Team Member – A person who is a member of the Execution Team and who is currently qualified under Ohio Law to administer and prepare drugs for intravenous and intramuscular injections, or who has at least one year experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman.

Religious Services Administrator (RSA) - The Religious Services Administrator is the coordinator and administrator for religious services for the Ohio Department of Rehabilitation and Correction (DRC). The RSA will provide counseling and support services for the offender and others consistent with the provisions of this directive.

Reprieve - The postponement of an execution.

Stay - A court-ordered suspension or postponement of a legal execution.

Support Staff – Support Staff shall mean those individuals who have specified roles in this policy including, but not limited to, medical staff, mental health staff, Health Care Administrators (HCAs), appointed designees, correction officers at DRC institutions, the RSA, SOCF Chief of Security or his/her designee, SOCF Deputy Warden(s), the Special Assistant designated in this policy, and/or other general DRC staff. Support Staff are not members of the Execution Team. Overhead management staff

at DRC are not Support Staff, and not members of the Execution Team. As defined above in this section IV, only those individuals designated by the Warden to carry out court-ordered executions shall be Execution Team members. The Director and the Warden(s) are not members of the Execution Team.

Warden – As used in the policy, the term “Warden” refers to the current Warden of the Southern Ohio Correctional Facility (SOCF), or his or her current Deputy Warden, or the Director’s designee, unless the policy uses language which indicates another Warden of another institution.

V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction to carry out the death penalty in a constitutional manner and as directed by Ohio Courts of Law. All execution processes shall be performed in a professional, humane, sensitive, and dignified manner. It is the responsibility of the Director to designate a penal institution where death sentences shall be executed. The Warden of that facility, or Deputy Warden in the absence of the Warden, is responsible for carrying out the death sentence on the date established by the Ohio Supreme Court.

The procedures set forth in this policy are to be strictly followed. Any situation that arises that would make following these policies difficult, impractical, or impossible shall be immediately reported to the Director or the Warden. Any variations of a substantial nature must be approved by the Director as described in this policy.

There will be no variations from the following requirements:

1. At least three Medical Team Members, two of whom are authorized to administer drugs under Ohio law, shall be used in the conduct of court-ordered executions.
2. The drugs required by this policy shall be used.
3. Functions required to be performed by medically-qualified persons, as described in this policy, shall be performed by Medical Team Members.
4. All Execution Team functions shall be performed by appropriately trained and qualified members of the Execution Team.
5. Only the Director can authorize a variation from the procedures stated in this policy but not a variation from the four requirements listed immediately above in subsection V.1.2.3. and 4. of this policy.

VI. PROCEDURES

A. General Guidelines

1. All prisoners sentenced to death by a court of law shall be transported to a reception center within the Department of Rehabilitation and Correction for initial processing. Upon completion of the reception process, the prisoner shall immediately be transferred to the designated institution: CCI or OSP for male prisoners or ORW for female prisoners. The Director may designate FMC or another appropriate DRC institution as necessary.

2. All court-ordered executions shall be carried out at the Southern Ohio Correctional Facility and will be planned to commence at 10:00 a.m. on the scheduled execution date, subject to developing circumstances.
3. Unless otherwise designated by the Director/designee, the prisoner shall remain on Death Row until transferred to the Death House for scheduled execution.
4. The Ohio Supreme Court shall designate the date of execution. Upon receipt of a scheduled execution date, the Warden of the institution housing the prisoner shall notify the Director, the RSA, and the Warden at SOCF.
5. Attendance at the execution is governed by Ohio Revised Code section 2949.25 and includes:
 - a. The Warden or Acting Warden of the institution where the execution is to be conducted and such number of correction officers or other persons as the Warden or Acting Warden thinks necessary to carry out the death sentence.
 - b. The sheriff of the county in which the prisoner was tried and convicted.
 - c. The Director of the Department of Rehabilitation and Correction, or designee, and any other person selected by the Director/designee to ensure that the death sentence is carried out.
 - d. Such number of physicians and medical personnel as the Warden or Acting Warden thinks necessary. A physician may be designated by the Warden as an Auxiliary Team Member whose role will be to provide consultation or advice as may be necessary. This physician shall attend such number of execution rehearsals as the Warden may consider necessary, but no less than one rehearsal per execution. The Auxiliary Team Member shall attend training sessions on topics identified in VI.B.4.b. of this policy, below. It is anticipated that the Auxiliary Team Member may not routinely attend the executions but would be available to provide consultation or advice in the event of some unanticipated circumstance.
 - e. The prisoner may select one of the following persons: the RSA, minister-of-record, clergy, rabbi, priest, imam, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination or sect, subject to the approval of the Warden.
 - f. Three persons designated by the prisoner who are not confined in any state institution subject to the approval of the Warden or Acting Warden based on security considerations.
 - g. Three persons designated by the immediate family of the victim, subject to the approval of the Warden or Acting Warden based on security consideration, as detailed in Department Policy 03-OVS-06, Victim Involvement in the Execution Process.

3. Assessment of Prisoner

- a. Every possible effort shall be made to anticipate and plan for foreseeable difficulties in establishing and maintaining the intravenous (IV) lines. The prisoner shall be evaluated by appropriately trained medical staff approximately twenty-one (21) days prior to the execution to evaluate the prisoner's veins and plan for the insertion of the IV lines. This evaluation shall include a "hands-on" examination as well as a review of the medical chart to establish any unique factors which may impact the manner in which the Execution Team carries out the execution. Potential problems shall be noted and discussed, and potential solutions considered, in advance of the execution. Concerns or potential issues shall be communicated to the Warden or designee at SOCF as soon as possible. None of the functions described in this subsection shall be governed by subsection V.3. of this policy, above.
- b. Any evaluation that is conducted by medical staff pursuant to subsection VI.B.3.a. of this policy, above shall be noted in the prisoner's medical chart.
- c. The prisoner's medical condition shall be assessed in order to identify any necessary accommodations or contingencies that may arise from the prisoner's medical condition or history. Any medical condition or history that may affect the performance of the execution shall be communicated as soon as possible to the Warden of SOCF, who shall confer with others as necessary to plan such accommodations or contingencies. The fact of the assessment and any conclusions shall be documented in the prisoner's medical chart. None of the functions described in this subsection shall be governed by subsection V.3. of this policy, above.
- d. Any concerns for establishing or maintaining IV lines and any concerns or plans for medical accommodations or contingencies shall be communicated to the Execution Team in order that these things may be discussed and addressed in execution trainings or rehearsals.
- e. An appropriate member of the mental health staff shall evaluate the prisoner approximately twenty-one (21) days prior to the execution to evaluate his or her stability and mental health in light of the scheduled execution. Any concerns or contingencies affecting the execution process shall be communicated to the Warden of SOCF as soon as possible. The fact of the assessment and any conclusions shall be documented in the prisoner's mental health chart. If the prisoner has no mental health file due to not being on the mental health caseload, the fact of the assessment and any conclusions shall be documented in the prisoner's medical chart. None of the functions described in this subsection shall be governed by subsection V.3. of this policy, above.
- f. Beginning approximately thirty (30) days prior to the scheduled execution date until the prisoner's transfer from Death Row to SOCF, the prisoner shall be evaluated by mental health staff to determine the prisoner's appropriate observation level, housing status and access to personal property. None of the functions described in this subsection shall be governed by subsection V.3. of this policy, above.

4. Training
 - a. The Execution Team shall begin conducting training sessions no less than once per week until the scheduled date of execution. The training shall address any accommodations or contingencies that might be anticipated.
 - b. Training in the following topics shall be provided for every member of the Execution Team prior to service and at least once per year thereafter:
 - i. The general nature and effects of the execution drugs that are used during the execution process;
 - ii. Drug administration procedures, including the insertion of the IV needles and administration of intramuscular injections;
 - iii. Signs or symptoms of problems when administering drugs; and
 - iv. Any legal developments of significance.
5. Other Preparations
 - a. The RSA shall make contact with the prisoner to establish counseling and family contact information.
 - b. Prior to commencement of the initial training session, the Warden or the Team Leader shall verify and document the qualifications of the Medical Team members. Medical team members shall provide evidence of certification status at least once per year and upon any change in status.
 - c. The Team Leader shall ensure that each member of the Execution Team has received a copy of the current version of this execution policy. Each member of the Execution Team shall sign for its receipt.

C. Execution Preparation - Approximately fourteen (14) days prior to the execution

1. The Warden of the institution where the prisoner is housed shall have the Execution Information Release (DRC1808) completed by the prisoner. This form will verify information on the prisoner, visitors, witnesses, spiritual advisor, attorney, requested witness, property, and funeral arrangements.
2. The names of official witnesses/media witnesses shall be supplied to the Warden, as outlined in this policy.
3. The names and relationships of the victim's witnesses shall be supplied to the Warden.
4. The RSA shall provide family information from the prisoner to the Warden.
5. Approximately fourteen (14) days prior to the execution, the Warden shall determine whether a sufficient quantity of pentobarbital (under whatever name it may be available

from a manufacturer, distributor or compounding pharmacy) is available for use at the scheduled execution.

- a. If a sufficient quantity of pentobarbital is available, then the scheduled execution shall proceed with intravenous administration of pentobarbital, in accordance with the terms of this policy.
- b. If a sufficient quantity of pentobarbital is not available, or if at any time the available pentobarbital is deemed unusable by the Medical Team, then the scheduled execution shall proceed with intravenous administration of midazolam and hydromorphone, in accordance with the terms of this policy.
- c. Notice of the Warden's determination concerning the execution drugs to be used for intravenous administration shall be provided to the prisoner.
- d. If the scheduled execution date is postponed for any reason, and:
 - i. such postponement is less than ten (10) days, then no later than four (4) days prior to the re-scheduled execution date, the Warden shall make the determination set forth above in subsection VI.C.5. of this policy.
 - ii. such postponement is between ten (10) and thirty (30) days, then no later than seven (7) days prior to the re-scheduled execution date, the Warden shall make the determination set forth above in subsection VI.C.5. of this policy.
 - iii. such postponement is more than thirty (30) days, then approximately fourteen (14) days prior to the re-scheduled execution date, the Warden shall make the determination set forth above in subsection VI.C.5. of this policy.
- e. The Warden shall ensure that sufficient quantities of the execution drugs, which have been determined to be used for the scheduled execution, have been delivered to SOCF and stocked within the Infirmary, and then notify the Director.

D. Execution Preparation - Approximately twenty-four (24) hours prior to the scheduled execution

1. The prisoner shall be transferred from Death Row and housed in the Death House at SOCF. The prisoner shall be constantly monitored by at least three (3) members of the Execution Team. An Execution Timeline shall be maintained.
2. An Authorized Independently Licensed Mental Health Professional shall interview the prisoner periodically and submit progress reports to the Warden. All prisoner files shall be maintained in the Warden's office at SOCF, unless otherwise directed by the Warden.
3. The Warden shall establish a line of communication with DRC legal staff and the Attorney General's Office for notice of case status and/or other significant legal changes.
4. The RSA shall provide counseling and spiritual support unless the prisoner requests not to have such contact.

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5. Beginning with his/her arrival at SOCF, the prisoner shall not be forced to meet with non-staff visitors that he or she does not wish to see.

E. Execution Preparation - The following events shall take place upon the prisoner's arrival at the Death House

1. Once the prisoner is at SOCF, the Death House shall be restricted to the following:
 - Director/designee(s);
 - Warden;
 - Communications Chief/designee;
 - Institution Deputy Warden;
 - Administrative Assistant to the Warden;
 - Chaplain;
 - Physician;
 - Independently Licensed Mental Health Professional;
 - Chief of Security;
 - Maintenance Superintendent;
 - Any other person as deemed necessary by the Warden.
2. The prisoner shall be evaluated by medical staff on the day of arrival at SOCF to evaluate the prisoner's veins and plan for the insertion of the IV lines. This initial evaluation shall include a "hands-on" examination as well as a review of the medical chart. At a minimum, a "hands-on" examination shall also occur later that evening. Potential problems shall be discussed, and potential solutions considered. The performance of these two evaluations shall be noted in the Execution Timeline. Any relevant portion of the medical file may be kept in the Death House for appropriate reference as needed. None of the functions described in this subsection shall be governed by subsection V.3. of this policy, above.
3. SOCF chaplains shall make periodic visits to the prisoner, if requested by the prisoner.
4. The Deputy Warden shall assign security personnel to staff entrances, checkpoints, and to assist the Ohio State Highway Patrol (OSHP).
5. The Team Leader shall ensure that the prisoner's property is inventoried in front of the prisoner. The prisoner will have previously, pursuant to subsection VI.C.1. of this policy above, specified who is to receive his or her personal effects. The Team Leader shall ensure that the Inmate Property Record Disposition and Release (DRC2055), correctly specifies this information, and the Team Leader shall sign it to confirm the review.
6. The prisoner shall, pursuant to subsection VI.C.1. of this policy above, specify in writing his/her request for funeral arrangements, which shall be recorded in the Execution Information Release, (DRC1808).
7. The prisoner shall be allowed contact visits with family, friends and/or private clergy, as approved by the Warden, between approximately 4:30 p.m. and 7:30 p.m. on the day prior to the scheduled execution. Cell front visits as approved by the Warden shall be

permitted between approximately 6:30 a.m. and 8:00 a.m. on the day of the scheduled execution. The attorney and spiritual advisor may continue to visit with the prisoner until approximately 8:45 a.m. The Warden may modify the frequency and duration of the visiting opportunities at his or her discretion.

8. The Team Leader shall ask the prisoner to identify his or her special meal request. The special meal shall be served the day prior to the scheduled execution at a time to be determined by the Warden.
9. The Warden shall brief key personnel, to include medical and mental health staff, in order to allow intake information to be obtained.
10. The Warden shall receive updates from security personnel and the OSHP on crowd control, demonstrations, pickets, etc.
11. The Chief of Security or designee shall brief the Warden on the level of tension within the remainder of the prison population.
12. The Warden shall relay any out of the ordinary activity to the Regional Director supervising SOCF.
13. The Execution Team shall continue to prepare as needed.

F. Execution Preparation – Morning of Execution Day. At any time, as determined by the Team Leader, on the morning of the execution:

1. The prisoner shall be permitted to take a shower and dress in the designated clothing the morning of the execution.
2. Vein Assessment

A “hands-on” examination of the prisoner’s veins shall be made by a Medical Team Member before the IV is established. If any potential problems are identified they shall be discussed between the Medical Team, the Warden and the Director, and potential solutions shall be considered. The performance of this evaluation shall be noted in the Execution Timeline.

3. Drugs Obtained from Infirmary

A Drug Administrator, in the presence of a second Drug Administrator, shall take possession of the execution drugs from the institution pharmacy storage area, and shall document possession of the drugs by signing form Order for Execution Medications (DRC2001). The Drug Administrator taking possession of the drugs, accompanied by a second Drug Administrator shall deliver the drugs to the Death House. These persons shall complete form Order for Execution medications (DRC2001).

4. Drug Preparation

- a. The drugs shall be prepared for injection by a Drug Administrator. The preparation of the drugs shall be monitored by a second Drug Administrator who shall independently verify the preparation and dosage of the drugs. Both Drug Administrators shall complete form Order for Execution Medications (DRC2001).
- b. If the Warden determines that a sufficient quantity of pentobarbital is available, then a Drug Administrator shall prepare the execution drugs as follows:
 - i. Syringes 1 and 2: Five (5) grams of pentobarbital (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy), 100 ml of a 50mg/mL solution, shall be withdrawn and divided into two syringes labeled "1" and "2".
 - ii. Syringes 3 and 4: Five (5) additional grams of pentobarbital (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy), 100 ml of a 50mg/mL solution, shall be obtained and kept available in the Equipment Room, but need not be withdrawn into syringes unless the primary dose of five grams proves to be insufficient for the procedure. These two additional syringes labeled "3" and "4" shall be kept available for contingent use.
- c. If the Warden determines that a sufficient quantity of pentobarbital is not available, or if at any time the available pentobarbital is deemed unusable by the Medical Team, then a Drug Administrator shall prepare the execution drugs as follows:
 - i. Syringes 1 and 2: Fifty (50) mg of midazolam (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall be obtained or prepared with 5mg/mL concentration. Fifty (50) mg of hydromorphone (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall also be obtained or prepared with 10 mg/mL concentration. The midazolam and hydromorphone in the amounts specified above shall be drawn into or mixed in a single syringe, and labeled "1." A second syringe of midazolam and hydromorphone, in the same amounts and concentrations, shall be prepared, if needed, and drawn into or mixed in a second, single syringe, and labeled "2."
 - ii. Syringe 3 and Additional Syringes: A third syringe of (60) mg of hydromorphone (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall also be obtained or prepared with 10 mg/mL concentration, if needed, and labeled "3." Additional syringes of sixty (60) mg of hydromorphone (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall also be obtained or prepared with 10 mg/mL concentration, if needed, and labeled numerically and sequentially.

- d. If the Warden, following consultation with the Medical Team and the Director, decides to proceed with intramuscular injection of midazolam and hydromorphone, in accordance with subsection VI.H.4 of this policy, below, then a Drug Administrator shall prepare the execution drugs as follows:
- i. Syringes A and B: Drugs for intramuscular injection may be drawn up into syringes for use as needed if the decision is made to use an alternative method. Ten (10) mg of midazolam (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall be obtained or prepared with 5mg/mL concentration. Forty (40) mg of hydromorphone (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall also be obtained or prepared with 10 mg/mL concentration. The midazolam and hydromorphone in the amounts specified above shall be drawn into or mixed in a single syringe for intramuscular injection, which shall be labeled "A." A second such syringe shall be prepared in the same amounts, concentrations and manner, if needed, and shall be labeled "B."
 - ii. Syringe C and Additional Syringes: A third syringe of sixty (60) mg of hydromorphone (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall also be obtained or prepared with 10 mg/mL concentration, if needed, and labeled "C." Additional syringes of sixty (60) mg of hydromorphone (under whatever name it may be available from a manufacturer, distributor or compounding pharmacy) shall also be obtained or prepared with 10 mg/mL concentration, if needed, and labeled alphabetically and sequentially.
- e. The drug preparation shall be documented as follows:
- i. The Drug Administrator who prepared the execution drugs and the Drug Administrator who witnessed the preparation shall complete form Order for Execution Medications (DRC2001).
 - ii. A Drug Administrator shall inform the Command Center when the Execution Drugs are prepared, and the Command Center shall record in the Execution Timeline the time that the drugs were prepared.
5. Official witnesses to the execution will report to the institution. The victim's witnesses shall report to the Portsmouth Highway Patrol Post, or other Post or location designated by the Highway Patrol, for escort to the institution by designated SOCF personnel.
 6. The prisoner shall be allowed to have visits as described in subsection VI.E.7. of this policy, above.
 7. The RSA shall be present to counsel and provide spiritual support to the prisoner and staff.

8. All communication equipment shall be tested, including primary and secondary communication, with both the Governor's Office and the Office of the Attorney General.
 - a. Primary communications shall be via a telephone line opened directly to the Command Center from the execution chamber. This line shall be tested one (1) hour prior to the scheduled execution. Other than testing, this line shall remain open.
 - b. Secondary communications shall be via cellular telephone.
 - c. In the event that both the primary and secondary communications are inoperable, the execution shall be delayed until communications are established.

G. Execution Preparation - Approximately fifteen (15) minutes prior to the scheduled execution

1. Witnesses Transported to Death House.

All authorized witness groups shall be escorted to the Death House separately by designated staff. Witnesses shall be escorted to viewing rooms before the death warrant is read.

2. Phone for Prisoner's Counsel

If the prisoner chooses to have his or her counsel as a witness, at all times after counsel enters the witness room, counsel shall have free access to the phone near the entrance door of the Death House.

- a. The phone in the Death House foyer will enable counsel to call into the waiting room for prisoner's counsel in the prison compound where another person, whose presence is arranged by counsel for the prisoner and whose presence satisfies the prison's security concerns, and which person is acting on behalf of the prisoner and his or her counsel, will be situated during all times after the death warrant is read.
- b. The Warden shall allow this other person to have access to his or her own laptop computer and to a phone that can connect that person to an outside line.

3. Death Warrant

The Warden shall read the death warrant to the prisoner.

4. Closed-Circuit Camera Activated

Immediately after the death warrant is read, the closed-circuit camera in the execution chamber shall be turned on so that witnesses in the witness rooms can view the subsequent activities in the execution chamber on the television screen in those rooms

5. Prisoner Enters Execution Chamber

The Warden and Execution Team shall escort the prisoner to the execution chamber, assist the prisoner onto the bed and secure the straps. The team shall roll up the prisoner's sleeves or take other steps to ensure that the arms are plainly visible to persons in the chamber and to those in the equipment room.

6. Curtain Closed

Once the prisoner is secured to the bed, the curtain shall be closed prior to the insertion of the IV needles. The closed-circuit camera shall remain on to allow the witnesses to view the establishment of IV site(s).

7. IV Site(s) Preparation & Establishment

a. The Medical Team shall enter the Execution Chamber to prepare IV site(s).

b. The Medical Team shall establish one or two viable IV sites.

i. The arm veins near the joint between the upper and lower arm shall be utilized as the preferred site for the IV injection.

ii. In the event that the Medical Team member is unable to establish an IV at a preferred site, the Medical Team member(s) may establish an IV at alternative site(s) for use by the Drug Administrator when administering execution drugs.

iii. The Execution Team may utilize a non-invasive device such as a light, if desired, to assist in locating a vein.

c. The Medical Team member(s) shall be allowed as much time as is necessary to establish viable IV site(s).

i. If the Medical Team member(s) are unable to establish viable IV site(s), the Medical Team members shall consult with the Warden.

ii. The Warden shall consult with the Director and others as necessary for the purpose of determining whether or how long to continue efforts to establish viable IV site(s) before proceeding to the alternative method of execution.

8. Confirming & Recording Establishment of IV Site(s)

a. A Medical Team member shall test the viability of the IV site with a low-pressure saline drip through IV tubing. If necessary, a heparin lock may be attached to the IV needle as an alternative to the saline drip.

b. The Warden, Team Leader, and a Drug Administrator shall all confirm the visibility of the IV sites.

- c. The Medical Team member(s) shall exit the Execution Chamber and shall announce the number of attempts made to establish viable IV site(s) to the Command Center contact who shall then inform the Command Center, for capture on the Execution Timeline.
- d. The Command Center shall record in the Execution Timeline the number of attempts.

9. Curtain Opened

The curtain shall be opened after the establishment of viable IV site(s) or upon a decision to use the alternative method. The curtain shall remain open during the remainder of the execution until the examination for the pronouncement of death, unless the execution is abandoned or halted.

10. Last Words

The Warden shall ask the prisoner if he or she has any last words. If the prisoner has a last statement, he or she will be allowed to make it while the witnesses are present in the adjacent viewing rooms, and are able to see him or her and hear him or her via microphone.

- a. There shall generally be no restriction on the content of the prisoner's statement and no unreasonable restriction on the duration of the prisoner's last statement.
- b. The Warden may impose reasonable restrictions on the length of the statement. The Warden may also terminate a statement that he or she believes is intentionally offensive to the witnesses.

H. Commencement of Execution

1. Execution by IV Injection

- a. If the Warden has determined, pursuant to subsection VI.C.5. of this policy above, to proceed with pentobarbital, then upon the Warden's signal, a Drug Administrator shall intravenously administer the previously prepared syringes 1 and 2 of pentobarbital.
- b. Alternatively, if the Warden has determined, pursuant to subsection VI.C.5. of this policy above, to proceed with midazolam and hydromorphone, then upon the Warden's signal, a Drug Administrator shall intravenously administer the previously prepared syringe 1 of midazolam and hydromorphone.
- c. The low-pressure saline drip shall be allowed to flush saline through the line(s) following completion of the IV drug administration.
- d. A second Drug Administrator shall be present in the equipment room to observe the administration of the execution drugs. This Drug Administrator shall announce the start and finish times of each injection to the Command Center contact who shall then inform the Command Center for capture on the Execution Timeline.

- e. The Command Center shall record in the Execution Timeline the start and finish times of each injection.
- f. Following administration of the IV drugs, a Drug Administrator shall reenter the Execution Chamber to inspect the IV site for evidence of incontinence or infiltration and to listen to the prisoner for breathing and heart sounds.
- g. If a sufficient time for death to occur has passed but the prisoner has not died, the Medical Team shall consult with the Warden and the Director. The Warden, after consultation with the Director, shall determine whether to proceed with any additional syringes of execution drugs, and may order the Medical Team to prepare such additional syringes, as necessary, and intravenously administer them, in accordance with the terms of this policy, above.
- h. At the completion of the process and after a sufficient time for death to have occurred, the curtain shall be closed and an appropriate medical professional shall evaluate the prisoner to confirm death. The curtain shall then be re-opened and the Warden shall announce the time of death. In the event that the appropriate medical professional cannot confirm that death has occurred, the curtain shall be reopened until an appropriate time has passed to reevaluate the prisoner.

2. Using Alternative IV Sites

- a. The Team Leader, a Medical Team member, and the Warden shall observe the prisoner during the injection process to look for signs of swelling or infiltration at the IV site, blood in the catheter, and leakage from the lines and other unusual signs or symptoms.
- b. The Execution Team shall communicate to the Drug Administrators any problems detected during the administration of the execution drugs.
- c. The Drug Administrator who is administering the execution drugs shall determine whether it is necessary to use another viable IV site.
- d. In the event that the Drug Administrator who is administering the execution drugs detects a problem in the administration of the drugs, the Drug Administrator shall use any other viable IV site. No prior consultation with the Warden or other members of the Execution Team is required.
- e. Whenever it is necessary to change IV sites, the Drug Administrator shall administer a full dosage of the execution drug through the alternate, viable IV site using additional syringes, as necessary, prepared in accordance with the terms of this policy, above.
- f. In the event the Drug Administrator changes to another viable IV site, the Drug Administrator shall inform the Command Center contact, who shall then inform the Command Center for capture on the Execution Timeline. The Command Center shall record in the Execution Timeline any change in IV site(s).

3. Establishing Other IV Sites(s)

- a. In the event there is no alternative viable IV site, the Medical Team shall consult with the Warden and Director.
- b. The Warden, following consultation with the Director, shall determine whether to proceed with execution by IV injection or whether execution by intramuscular injection should be used.
- c. In the event the Warden determines to proceed with execution by IV injection, the Execution Team shall repeat the steps in subsections VI.G.6. – 8. of this policy, above, and continue with the execution as provided for in subsection VI.H. of this policy, above.
- d. The Warden shall ensure the Command Center is informed of his decision. The Command Center shall record the Warden's decision in the Execution Timeline.

4. Alternative Execution by Intramuscular Injection

The Warden, following consultation with the Medical Team and the Director, may order an execution by intramuscular injection if execution by IV injection is unfeasible.

- a. The execution drugs used for execution by intramuscular injection shall be prepared as provided for in subsection VI.F.4. of this policy, above.
- b. A Drug Administrator shall enter the chamber at the direction of the Warden and shall administer an intramuscular injection of 10 mg midazolam and 40 mg hydromorphone, labeled syringe "A," into a large muscle of the prisoner. Sites for this injection may include the deltoid or triceps muscles, the hip, thigh or other location as may be deemed appropriate by the Medical Team.
- c. Five minutes after injection of Syringe A, a Drug Administrator shall re-enter the chamber to listen for breathing and heart sounds. After this assessment, the Drug Administrator shall consult with the Warden and the Director to determine whether to administer an intramuscular injection of 10 mg midazolam and 40 mg hydromorphone, labeled syringe "B," into a large muscle. The Warden may direct the Drug Administrator to prepare and administer this syringe.
- d. Five minutes after injection of Syringe B, a Drug Administrator shall re-enter the chamber to listen for breathing and heart sounds. After this assessment, the Drug Administrator shall consult with the Warden and the Director to determine whether to administer an intramuscular injection of 60 mg of hydromorphone only, labeled syringe "C," into a large muscle. The Warden may direct the Drug Administrator to administer this syringe. This step shall be repeated, if needed, with administration of additional syringes, until the prisoner is deceased.
- e. At the completion of the process and after a sufficient time for death to have occurred, the curtain shall be closed and an appropriate medical professional shall evaluate the prisoner to confirm the fact of his or her death. The curtain shall then be

re-opened and the Warden shall announce the time of death. In the event that the appropriate medical professional cannot confirm that death has occurred, the curtain shall be reopened until an appropriate time has passed to reevaluate the prisoner.

I. Post-Execution

1. The Warden, or his designee, shall notify the Director that the execution has been carried out.
2. The Medical Team shall remove the IV equipment and clean the IV sites.
3. The RSA or the prisoner's Spiritual Advisor shall anoint the body of the prisoner if requested by the prisoner.
4. The RSA shall coordinate the burial of the prisoner's body with local chaplains if the prisoner's family does not want the body.
5. The Execution Team shall remove the deceased from the execution bed and place him or her on a gurney.
6. Disposition of the body shall be in accordance with arrangements made prior to the execution at the prisoner's request.
7. The Warden shall sign and return the death warrant to the Court, indicating the execution has been carried out.
8. Prepared Execution Drugs
 - a. A Drug Administrator shall properly dispose of any execution drugs that have been prepared for administration but not been utilized.
 - b. A Second Drug Administrator shall witness the disposal.
 - c. Both Drug Administrators shall document the disposal in form Order for Execution Medications (DRC2001).
9. Unprepared Execution Drugs
 - a. A Drug Administrator shall properly return any unprepared execution drugs to the Infirmary.
 - b. A Second Drug Administrator shall witness the return of the unprepared execution drugs.
 - c. Both Drug Administrators shall document the return of the unprepared execution drugs in form Order for Execution Medications (DRC2001).

10. Recording Used Execution Drugs

- a. A Drug Administrator shall document the name or description, any expiration date, and any lot number of the execution drugs used, in form Order for Execution Medications (DRC2001).
- b. An Execution Team member shall save the packaging of the used execution drugs or take photographs of such packaging. None of the functions described in this subsection shall be governed by subsection V.3. of this policy, above.

11. After-Action Review

Immediately following an execution, the Execution Team and the on-site administrators directly involved in the execution process shall meet to review the process of the execution. Any unique or unusual events shall be discussed, as well as opportunities for improvement and successful procedures. Actions and documentation of the events shall be reviewed to identify any discrepancies. Discrepancies from the policy directive shall be clearly described and noted in a written record. The record shall be signed and dated by the Warden.

12. Critical Incident Debriefing

- a. The Warden shall ensure that critical incident debriefings are available for the Execution Team and staff participants immediately following the execution.
- b. The Critical Incident Debriefing team shall conduct interviews in accordance with CIM guidelines.
- c. The RSA shall be available for debriefing for the family of the prisoner.

13. Quality Assurance Review

The Director shall designate a Special Assistant for Execution Policy and Procedures. The Special Assistant shall evaluate the performance of the Execution Team, review the conduct of court-ordered executions and report to the Director of the Department. His or her duties will consist of reviewing documentation, training, and professional qualifications, to ensure compliance with the written policy directive. The Special Assistant may utilize assistants as necessary to compile or assess the information, and may consult with others consistent with the confidentiality of the process. Whenever appropriate, the Special Assistant shall consult with a properly trained medical person when reviewing the medical aspects of the execution procedures. The Special Assistant will also provide consultation and advice concerning modifications in the written directive. The Special Assistant will prepare a report to the Director following each execution, with any suggestions or recommendations that are appropriate.

Related Department Forms:

Execution Information Release	DRC1808
Order for Execution Medications	DRC2001
Inmate Property Record Disposition and Release	DRC2055

Oh. Const. Art. I, § 9 (2014)

§ 9. Bail; cruel and unusual punishments

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio.

(As amended January 1, 1998.)

Oh. Const. Art. I, § 10 (2014)

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

USCS Const. Amend. 8

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

USCS Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORC Ann. 2949.22 (2014)

§ 2949.22. Execution of death sentence

(A) Except as provided in division (C) of this section, 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. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(B) A death sentence shall be executed within the walls of the state correctional institution designated by the director of rehabilitation and correction as the location for executions, within an enclosure to be prepared for that purpose, under the direction of the warden of the institution or, in the warden's absence, a deputy warden, and on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings. The enclosure shall exclude public view.

(C) If a person is sentenced to death, and if the execution of a death sentence by lethal injection has been determined to be unconstitutional, the death sentence shall be executed by using any different manner of execution prescribed by law subsequent to the effective date of this amendment instead of by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death, provided that the subsequently prescribed different manner of execution has not been determined to be unconstitutional. The use of the subsequently prescribed different manner of execution shall be continued until the person is dead. The warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the sentence of death is executed.

(D) No change in the law made by the amendment to this section that took effect on October 1, 1993, or by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or the United States Constitution.

History:

GC § 13456-2; 113 v 123(208), ch 35, § 2; Bureau of Code Revision, 10-1-53; 144 v S 359 (Eff 12-22-92); 145 v H 11 (Eff 10-1-93); 145 v H 571 (Eff 10-6-94); 149 v H 362. Eff 11-21-2001.

ORC Ann. 2949.22

ORC Ann. 2949.24 (2014)

§ 2949.24. Execution and return of warrant

Unless a suspension of execution is ordered by the court of appeals in which the cause is pending on appeal or the supreme court for a case in which a sentence of death is imposed for an offense committed before January 1, 1995, or by the supreme court for a case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, or is ordered by two judges or four justices of that court, the warden or another person selected by the director of rehabilitation and correction shall proceed at the time and place named in the warrant to ensure that the death sentence of the prisoner under death sentence is executed in accordance with section 2949.22 of the Revised Code. The warden shall make the return to the clerk of the court of common pleas of the county immediately from which the prisoner was sentenced of the manner of the execution of the warrant. The clerk shall record the warrant and the return in the records of the case.

History:

GC § 13456-4; 113 v 123(208), ch 35, § 4; Bureau of Code Revision, 10-1-53; 144 v S 359 (Eff 12-22-92); 146 v S 4. Eff 9-21-95.

ORC Ann. 2949.24

Ohio Revised Code

2721.03 Construction or validity of instrument or legal provision.

Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

The testator of a will may have the validity of the will determined at any time during the testator's lifetime pursuant to sections 2107.081 to 2107.085 of the Revised Code.

Effective Date: 09-24-1999