

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 12-0852

Plaintiff-Appellee, : Appeal taken from the Cuyahoga

v. : County Court of Appeals, Eighth

: Appellate District

ROMELL BROOM, : C.A. Case No. 96747

:

Defendant-Appellant. :

MERIT BRIEF OF AMICUS CURIAE
THE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT BROOM

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FILED
 AUG 11 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender has an interest in preventing the type of psychological torture that Romell Broom endured on September 15, 2009, and that he will endure if he is subjected to another execution attempt. This Court has before it a case that presents an opportunity to define the scope of Eighth Amendment jurisprudence in Ohio, because there is no clear authority that applies to this situation. In fact, there is little clarity when it comes to Eighth Amendment cases. “The Supreme Court’s Eighth Amendment jurisprudence has already been aptly characterized as an ‘enigma’ and a ‘mess.’” *Tinkering Around the Edges: the Supreme Court’s Death Penalty Jurisprudence*, 49 Am. Crim. L. Rev. 1913, 1921 (2012).

One phrase, however, that has been consistently used by the Supreme Court of the United States is the “evolving standards of decency.” Those evolving standards inform the decisions of the Supreme Court, and they should inform the decision of this Court in this case. No person deserves to be subjected to the psychological and physical pain that Broom is experiencing, much less under the color of law. The damage caused is no less severe, even if the State actors acted as carefully as they knew how. Broom felt no less pain and trepidation if they had the best of intentions in all 18-20 of their attempts to properly place the IV. Broom can have no confidence that they will easily “succeed” the next time the State begins the execution process.

This Court should find that the Court of Appeals applied a mens rea requirement where none belongs. While “deliberate indifference” is relevant in the context of prison conditions cases, it does not have a place in this type of case.

“[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” *Furman v. Georgia*,

408 U.S. 238, 288 (1972). Some “mental pain” is inevitable with even a properly carried-out execution. But “the process of carrying out a verdict of death” cannot reach the point where it is “so degrading and brutalizing to the human spirit as to constitute psychological torture.” *Id.* (internal citation omitted). The amount of mental anguish inflicted upon an inmate must stop short of “psychological torture,” regardless of whether the State actors are well-intentioned or careful in administering that inmate’s execution. There should be no requirement that the State actors act with “deliberate indifference” before there is a recognition that an inmate such as Broom is experiencing cruel and unusual punishment.

This Court has stated that “[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.” *State v. Hairston*, 118 Ohio St. 3d 289, 295 (2008) (internal citations omitted). The terms of the applicable statute in Broom’s case are that “a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage **to quickly and painlessly** cause death.” R.C. § 2949.22(A) (emphasis added). Broom experienced psychological and physical pain on September 15, 2009, and he has continued to experience psychological pain while anticipating another execution attempt. This sentence being inflicted upon Broom falls far outside R.C. § 2949.22. Thus, the reverse of this Court’s “general rule” should also hold true: a sentence that falls outside the terms of a valid statute amounts to a cruel and unusual punishment.

II. STATEMENT OF CASE AND FACTS

The Office of the Ohio Public Defender adopts the Statement of Case and Facts submitted by Appellant Romell Broom.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 2: The Lower Courts Erred When They Found That The Cruel And Unusual Punishments Clauses Of The Eighth And Fourteenth Amendments To The United States Constitution, And Article I, § 9 Of The Ohio Constitution Do Not Bar Another Attempt To Execute Broom.

The question before this Court should be whether what happened to Broom, and what is continuing to happen to Broom, comports with the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The standard of “deliberate indifference” used by the lower court has no place in a case when it is the prisoner's sentence that is unconstitutional. Broom's execution process constitutes cruel and unusual punishment, regardless of the intent of the executioners.

The execution process for Broom began on September 15, 2009, and without this Court's intervention, will continue until another execution attempt is made on Broom. What happened on September 15, 2009, can only be described as both psychologically and physically torturous. Broom's execution day came upon him, and he was subjected to 45 minutes of unsuccessful attempts to establish an IV. Then he waited while the execution team took a break. Then came another hour-plus of attempts to establish an IV catheter in Broom's antecubital area, biceps, forearms, hands, top of left foot, and one directly into the right ankle bone. Then Broom waited while the execution team took another break. After two hours and 18 to 20 needle insertions, Broom was swollen and bleeding, while he sat and waited for the team to come back from its break.

Finally, Broom was informed that the process would stop. He would get to wait longer in anticipation of what was to come. The new execution date was one week away. And although that date came and went, Broom still waits knowing that he will have to endure that execution process all over again.

“[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” *Furman v. Georgia*, 408 U.S. 238, 288 (1972). Some “mental pain” is inevitable with even a properly carried-out execution. But “the process of carrying out a verdict of death” cannot reach the point where it is “so degrading and brutalizing to the human spirit as to constitute psychological torture.” *Id.* (internal citation omitted). The amount of mental anguish inflicted upon an inmate must stop short of “psychological torture,” regardless of whether the State actors are well-intentioned or careful in administering that inmate’s execution. There should be no requirement that the State actors act with “deliberate indifference” before there is a recognition that an inmate, such as Broom, is experiencing cruel and unusual punishment.

The appropriate way for this Court to evaluate Broom’s case is to consider all the facts of what he endured and determine whether it comports with the “evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 101. It should consider the physical pain of the needle insertions into swollen flesh and even into bone, but it should especially consider that Broom endured each needle stick with the thought that it would be the one that would lead to his death. He waited through breaks, and he watched the execution team’s frustration as they tried very hard to kill him. This Court should consider the psychological torture of that day, and the days ever since in which he has waited for the State to do it again.

A. The Supreme Court has interpreted the Eighth Amendment in a flexible manner, using the evolving standards of decency.

The Supreme Court of the United States “has not confined the prohibition embodied in the Eighth Amendment to barbarous methods that were generally outlawed in the 18th century, but instead has interpreted the Amendment in a flexible and dynamic manner.” *Stanford v.*

Kentucky, 492 U.S. 361, 369 (1989) (internal citations omitted). The Court first noted the “evolving standards of decency” in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), as a manner of determining whether a particular form of punishment is acceptable under the Eighth Amendment. It has continued to use it, often to restrict the use of the death penalty. “Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

The Court has been consistent in its application of those “evolving standards of decency” to various Eighth Amendment questions. Its view on the evolution of society is evident by its contrasting opinions as time goes on. One of the most notable examples is the Court’s opinion regarding the death penalty and mental retardation.

In 1989, the Supreme Court stated that “we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry’s ability convicted of a capital offense simply by virtue of his or her mental retardation alone.” *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). But in less than 15 years, the Court changed its mind because of the evolving standards. “Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (internal citations omitted).

This is but one example of the Court’s changing opinions over time.

In Broom’s case, the State relied upon *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 466 (1947), in stating that lower court’s adopted standard of deliberate indifference is

proper to Broom. But *Resweber* is an outdated case that would likely be decided differently if it were in front of the Supreme Court today. In fact, at the very least, the inmate Willie Francis would have avoided execution due to the “evolving standards of decency” — he was only 16 years old. See *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

B. Deliberate indifference is not the appropriate standard here.

The lower court relied upon *Estelle v. Gamble*, 429 U.S. 97 (1976), in determining that it was appropriate to impose the “deliberate indifference” requirement upon Broom. But an analysis using *Estelle* should not be used for Eighth Amendment claims that are not specifically part of the inmate’s sentence. *Hudson v. McMillian*, 503 U.S. 1, 10 (1992) (“*Estelle*, we noted, first applied the Cruel and Unusual Punishments Clause to deprivations *that were not specifically part of the prisoner’s sentence.*”)(emphasis added).

In *Estelle*, the Court extended the force of the Eighth Amendment beyond simply evaluating the cruelty of a sentence given for a crime. See 429 U.S. at 102. The Amendment also protected those who were already serving their sentence, and who argued that the prisons were not providing them with the medical care they required.

But *Estelle* involved the question of whether an inmate had cognizable claims to file a § 1983 lawsuit against the prison officials for deprivations he was experiencing. The Court decided that “deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.” *Id.* at 105. Broom’s claim concerns his sentence, not the liability of the State actors. A cause of action under 42 U.S.C. § 1983 is about liability:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, **shall be liable to the party** injured in an action at law, suit in equity, or other

proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia..

42 U.S.C. § 1983 (emphasis added).

The Supreme Court in *Estelle* explained that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Estelle*, 429 U.S. at 106. It is not automatically a constitutional violation if the inmate is subjected to medical malpractice; the inmate must show deliberate indifference.

But the opposite is true here. If an inmate establishes that his sentence is in violation of the Eighth Amendment, the Court should find in his favor. “While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Trop*, 356 at 100. And “any technique outside the bounds of these traditional penalties is constitutionally suspect.” *Id.*

Punishment outside the bounds of the Eighth Amendment does not first require “deliberate indifference” on the part of the State actor in order to be constitutionally prohibited. If a juvenile is subjected to the death penalty, that is a violation of the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005). If a person is subjected to the death penalty for rape of a child, that is a violation of the Eighth Amendment. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008). If a “mentally retarded offender” is subjected to the death penalty, that is a violation of

the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). If Romell Broom is forced to endure another execution attempt, that will be a violation of the Eighth Amendment.

In assessing the pain and trepidation felt by Broom during the failed execution, the mens rea of prison officials should not be relevant. *See Resweber*, 329 U.S. at 477 (“[t]he intent of the executioner cannot lessen the torture or excuse the result.”) (Burton, J., dissenting, joined by Douglas, J., Murphy, J., and Rutledge, J.)

C. Ohio law supports an analysis of “evolving standards of decency,” and those standards demonstrate that Broom’s death sentence should be vacated.

This Court has had the issue of “cruel and unusual punishment” argued before it many times. *See e.g. State v. Mammone*, 2014-Ohio-1942, P177 (Ohio May 14, 2014); *State v. Long*, 138 Ohio St. 3d 478, 480 (2014); *State v. Hairston*, 118 Ohio St. 3d 289, 294 (2008). It has only once, in its Eighth Amendment jurisprudence, referenced the “deliberate indifference” standard. *Waites v. Gansheimer*, 110 Ohio St. 3d 250 (2006). That case concerned a prisoner’s Eighth Amendment claim based on the deprivation of his medical needs, and notably, the Court instructed the inmate that the appropriate way of action is under 42 U.S.C. § 1983. As noted above, *Estelle v. Gamble*—the case on which the lower court relied in Broom’s case—involved the Eighth Amendment in the context of a § 1983 lawsuit.

This Court has, however, found Eighth Amendment violations in other cases, but it did not require a showing that the State officials were deliberately indifferent. For example, in *In re C.P.*, 131 Ohio St. 3d 513, 536 (2012), this Court determined that R.C. § 2152.86 violates the prohibition against cruel and unusual punishment. R.C. § 2152.86 automatically subjected some juveniles to mandatory, lifetime sex-offender registration and notification requirements, including notification on the Internet. This Court did not look for deliberate indifference by any State actor.

And in *State v. Davis*, 139 Ohio St. 3d 122, 140 (2014), the Court addressed an Eighth Amendment claim in which the inmate argued the length of time between sentencing and execution was unconstitutional. Again, the analysis did not include deliberate indifference. Instead, the Court looked to “our society's evolving standards of decency” in order to resolve the claim. *Id.* (internal citations omitted).

Other Ohio courts have employed the “deliberate indifference” standard in evaluating claims brought under the Eighth Amendment. It appears that, other than Broom’s case, that standard has only been employed when the inmate claimed that he had been deprived some type of required care that is unrelated to his sentence.

The evolving standards of decency should lead this Court to vacate Broom’s death sentence. As the dissent stated in the lower court, “the magnitude of the ultimate outcome of this case cannot be overstated.” *State v. Broom*, 2012-Ohio-587, P66 (Ohio Ct. App., Cuyahoga County Feb. 16, 2012). What happened to Broom has been widely reported upon, nationally and even internationally, because it shocks the conscience. He has already suffered one punishment—a punishment not acceptable under Ohio law—and he continues to suffer as he awaits a new execution date. None of this is acceptable under our society’s evolving standards of decency.

Moreover, it should be noted that Ohio’s statute promises “a death sentence ... of a lethal injection of a drug or combination of drugs of sufficient dosage **to quickly and painlessly** cause death.” R.C. § 2949.22(A) (emphasis added). Broom’s execution has not been quick—it began on September 15, 2009, almost five years ago. And it has not been painless. “[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the

prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” *Furman*, 408 U.S. at 288.

This Court has stated that “[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.” *Hairston*, 118 Ohio St. 3d at 295 (internal citations omitted). This sentence being inflicted upon Broom falls far outside R.C. § 2949.22. Thus, the reverse of this Court’s “general rule” should also hold true: a sentence that falls outside the terms of a valid statute amounts to a cruel and unusual punishment. “While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Trop*, 356 at 100. And “any technique outside the bounds of these traditional penalties is constitutionally suspect.” *Id.*

IV. CONCLUSION

This Court can find that the requirement of establishing “deliberate indifference” is not required or appropriate in this case. The punishment inflicted upon Broom, and that will be inflicted upon Broom, is excessive. “The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions,” regardless of the intent of the State actors involved. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

Respectfully submitted,



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V. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF AMICUS CURIAE THE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT BROOM was forwarded by regular U.S. Mail to Timothy McGinty, Prosecutor, Matthew E. Meyer, Assistant Prosecutor, Cuyahoga County, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113 and S. Adele Shank, 3380 Tremont Road, 2nd Floor, Columbus, OH 43221 and Timothy Sweeney, The 820 Building, Suite 430, 820 West Superior Avenue, Cleveland, OH 44113 on this 11th day of August, 2014.



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