

ORIGINAL

NO. 2012-0852

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 96747

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROMELL BROOM

Defendants-Appellant

MERIT BRIEF OF PLAINTIFF-APPELLEE

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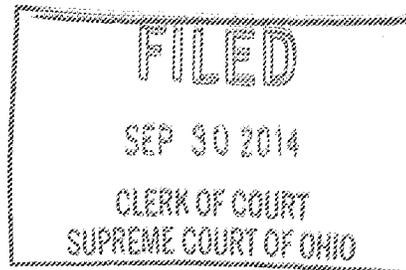


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INTRODUCTION AND SUMMARY OF ARGUMENT

Rommel Broom was not deprived of any of his constitutional rights. His death sentence has been routinely upheld by reviewing courts. During his September 15, 2009, scheduled execution, the state was unable to secure IV access. While there were admittedly deviations from the execution protocol, no lethal drugs were ever injected. Broom's planned execution was stopped and a stay was granted. He initiated legal challenges both in federal and state courts. Broom submitted five volumes worth of documents to the trial court in support of his claim. However, none of those documents indicated "deliberate indifference" on the part of the state and the trial court properly denied Broom's petition for postconviction relief. On appeal, a majority of the Eighth District affirmed. *State v. Broom*, 8th Dist. No. 96747, 2012-Ohio-587 (Keough, J., dissenting).

Broom preyed on young girls. He raped and murdered fourteen-year-old Tryna Middleton in September 1984. This occurred during a string of incidents where Broom was abducting girls. *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988). Execution by lethal injection has been deemed constitutional. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008). While the preparation for Broom's execution did not go as planned, the Eighth Amendment is not violated because "***the Constitution does not demand the avoidance of all risk of pain in carrying out executions.***" *Id.* at 47. The fact that the process was previously halted does not change the outcome. *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374 (1947).

Broom's claims were properly denied below. His death sentence is warranted for his horrendous crimes and any future execution is supported by precedent. Therefore, the State requests this Court reject Broom's propositions of law.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. Trial and Direct Appeals.

In 1985, a Cuyahoga County Jury found Romell Broom guilty of aggravated murder with two capital punishment specifications, rape, kidnapping, and two counts of attempted kidnapping. Broom was subsequently sentenced to death for the aggravated murder, rape, and kidnapping of fourteen year-old Tryna Middleton, and received a fifty four to eighty year prison term on the remaining counts. The Eighth District Court of Appeals thereafter affirmed Broom's convictions and death sentence in *State v. Broom*, (July 23, 1987), 8th Dist. No. 51237. The Ohio Supreme Court affirmed the convictions and death sentence in *State v. Broom*, (1988), 40 Ohio St.3d 277, 533 N.E.2d. 682. Broom then filed an application for a writ of certiorari to the United States Supreme Court that was denied on May 15, 1989 in *Broom v. Ohio*, (1989), 490 U.S. 1075, 109 S.Ct. 2089.

B. Post Conviction Relief Petition I

On February 9, 1990, Broom filed a petition for post conviction relief in the Cuyahoga County Court of Common Pleas (Case No. 196643). Broom's petition, which was amended three times, was ultimately dismissed on October 31, 1996. The Eighth District Court of Appeals affirmed the Common Pleas Court's denial of Broom's post conviction petition in *State v. Broom*, (May 7, 1998), 8th Dist. No. 72581 and the Ohio Supreme Court thereafter declined jurisdiction in *State v. Broom*, (1998), 83 Ohio St.3d 1430, 699 N.E.2d 946.

C. Federal Habeas Corpus review: actual guilt

Broom filed a petition for a writ of Habeas Corpus in the United States District Court for the Northern District of Ohio in 1999, which was denied on August 28, 2002. *Broom v. Mitchell*, (N.D. Ohio, Aug. 28, 2002), Case No. 1:99 CV 0030. Broom then filed a Rule 59(e)

motion to alter or amend the judgment, which too was denied. During the federal habeas proceeding, Broom sought and obtained permission to DNA test semen samples taken from Tryna Middleton's body. The District Court explained:

Broom's free-standing claim of actual innocence was essentially gutted when the Court permitted DNA testing during the discovery phase of this habeas proceeding. The results of this testing most definitely did not prove that Broom is "probably innocent." On that contrary, the test results determined that:

Broom and the killer share DNA statistics that occur in one of 3.2[sic]¹ million African-Americans [According to the United States Census Bureau there were 235,405 African-Americans in Cleveland as of 1992. As of 1990, there were 154,826 African-Americans living in Ohio and 29,986,060 in the entire country. Thus, Broom's [DNA] profile statistically eliminates other African-Americans in Cleveland and Ohio. . . . Broom shares a genetic profile with eight or nine other African-Americans in the country.

While the Court acknowledges the malleability of statistical evidence, **it finds the statistical elimination of all but eight or nine other African-Americans in the country from the list of potential perpetrators staggering.** The Court finds, in such circumstances, that any claim of actual innocence must fail.

Id., at 92-5 (emphasis added). The District Court then went on to completely reject Broom's freestanding and gateway actual innocence claims, holding that:

There is no meaningful evidence supporting Broom's claim of innocence with respect to the murder with which he was charged—indeed, compelling evidence elicited by Broom himself during the course of this proceeding seems to confirm the contrary. There is, moreover, substantial probative evidence from which reasonable jurors could conclude that the murder occurred during the course of

¹The Cellmark report to the District Court indicates that the statistical probability is 1 in 2.3 million. The Cellmark DNA testing results confirmed the presence of a partial DNA profile in the sperm fraction of two samples taken from Tryna's body, both of which belonged to a single contributor.

and in conjunction with a kidnapping and rape; the mere fact that some new evidence could be offered to rebut those conclusions is insufficient. Here, **even if the jury had all of the East Cleveland Police Department records before it, the Court finds that the evidence of kidnapping and rape would still greatly outweigh evidence of their absence.** Accordingly, the Court finds that Broom has failed to establish by clear and convincing evidence that "no reasonable juror would have found [him] eligible for the death penalty."

Id., at 95-6 (emphasis added).

The Sixth Circuit Court of Appeals affirmed the district court's denial on March 17, 2006. *Broom v. Mitchell*, 441 F.3d 392 (6th Cir. 2006). The U.S. Supreme Court then denied certiorari on February 26, 2007. *Broom v. Mitchell*, (2007), 549 U.S. 1255.

D. Post Conviction Relief II

On August 16, 2007 Broom filed a successive petition for post conviction relief pursuant to R.C. § 2953.21(A)(1). Broom's petition raised the exact same arguments that he raised before the District Court and Sixth Circuit Court of Appeals. On March 17, 2008, this Court denied the Broom's successive petition, filing its findings of fact and conclusions of law on the same day. The trial court held that it lacked jurisdiction to hear the successive petition under R.C. 2953.23 because Broom failed to meet the time requirements for filing. The trial court also found that Broom "had failed to overcome his burden of showing clear and convincing evidence that no reasonable fact finder would have found Broom guilty of aggravated murder or that no reasonable fact finder would have found Broom eligible for the death sentence." (March 17, 2009 Op. at 9, concl. 4). The Ohio Supreme Court then set an execution date of September 15, 2009. As a result, the Ohio Parole Board held a supplemental clemency hearing on August 20, 2009. The parole board issued an opinion on August 28, 2009 unanimously recommending against clemency. The Parole Board's Supplemental

Clemency Recommendation is available for download at: <http://www.drc.state.oh.us/public/Broom%20Clemency%20Supp.pdf> (last viewed September 3, 2009).

On July 30, 2009, this Court announced its decision reversing the trial court and dismissed the successive petition for post conviction relief. *State v. Broom*, Cuyahoga App. No. 91297, 2009-Ohio-3731. The State then sought discretionary review in the Ohio Supreme Court. The Court accepted jurisdiction on September 2, 2009, and scheduled expedited briefing, with all briefing to be completed by September 9, 2009. On September 11, 2009, the Ohio Supreme Court reversed the Eighth District and dismissed Broom's second petition for post conviction relief. *State v. Broom*, (2009), 123 Ohio St. 3d 114, 2009-Ohio-4778, 914 N.E.2d 392.

E. Broom's Litigation in Federal Court Under Rule 60(b)(6).

On September 10, 2009, Broom filed a motion in the U.S. District Court under Fed. R. Civ. P. 60(b)(6) seeking relief from the federal court's earlier judgment dismissing Broom's habeas petition. Along with this motion, Broom also filed a motion for a stay of his execution date, which was scheduled for September 15, 2009. Both motions were denied by the District Court. Broom again appealed these denials to the Sixth Circuit Court of Appeals which affirmed both decisions on September 14, 2009.

F. September 15, 2009 Execution Procedure

On September 15, 2009, after Broom had exhausted all available legal challenges to his sentence, the State of Ohio proceeded with preparation for the execution of Romell Broom. The execution procedure, however, never began because execution team members were never able to establish a site for IV access. After attempting numerous times to

establish the successful insertion of an IV into Broom's body, the execution was postponed by a reprieve issued by the Governor of Ohio. Broom's execution procedure never got beyond the preparation stage. At no time during this procedure did the State actually administer any lethal chemicals that could harm Broom.

G. Broom's State Court and Other Litigation to Prevent any Further Attempt by the State of Ohio to Carry Out the Execution of Romell Broom By Any Means or Methods.

On September 18, 2009, Broom filed a petition for a writ of habeas corpus with the Ohio Supreme Court based on the same facts and allegations he raises in the instant matter. On the same day, Broom filed an action in the U.S. District Court for the Southern District of Ohio under 42 U.S.C. §1983. *Broom v. Strickland*, Case No. 2:09-cv-823 (S.D. Ohio, August 27, 2010) (hereinafter "Section 1983 Action"). That day, the district court in the 1983 Action issued a temporary restraining order (TRO) preventing the defendants (State of Ohio) from executing Broom on the rescheduled date of September 22, 2009. The TRO on Broom's execution was later stayed by the district court, without objection from the State, pending further review of Broom's complaint.

In response to Broom's State habeas action, the State argued to the Supreme Court that the petition be dismissed because the Section 1983 Action was an available alternative remedy. Broom subsequently filed an application with the Ohio Supreme Court to dismiss without prejudice his state habeas petition under Rule 41(A) of the Ohio Rules of Civil Procedure. The State did not oppose Broom's application and the Ohio Supreme Court granted his application for dismissal without prejudice. Broom then filed an amended complaint in his 1983 Action, raising the same claims that he raises in the instant matter,

namely, that the State of Ohio may not carry out Broom's death sentence by any means or methods.

On August 27, 2010, the federal court in the Section 1983 Action granted in part and denied in part the State of Ohio's motion to dismiss. The district court held that Broom's "Fifth Amendment and Eighth Amendment no-multiple-attempts challenges are not properly before this Court." *Broom v. Strickland*, Case No. 2:09-cv-823 (S.D. Ohio, August 27, 2010), 2010 WL 3447741, at 7.

On September 14, 2010, Broom re-filed his state habeas action in the Ohio Supreme Court raising the same claims that he raised in his earlier action that had been dismissed by the Ohio Supreme Court in November of 2009. On December 2, 2010, Broom's state habeas action was dismissed. *In re Broom*, 127 Ohio St.3d 1450, 2010-Ohio-5836, 937 N.E.2d 1039. Broom also filed a federal habeas action under 28 U.S.C. § 2254, raising the same federal constitutional claims that he raised in his state habeas action and that he is now raising in the instant matter.

On September 15, 2010, Broom filed his postconviction petition and request for declaratory relief urging the trial court to vacate or set aside his sentence and to ban the State from ever again attempting to carry out Broom's sentence by any means or methods. On February 14, 2011, the State filed its response to Broom's Petition for Postconviction Relief.

On April 7, 2011, the trial court issued its journal entry denying Broom's petition for postconviction relief and request for declaratory relief. The trial court found no precedent for a claim similar to Broom's "in which a sentence was vacated based upon failures in

execution preparation as occurred in the case at bar.” (April 7, 2011 Opinion and Judgment Entry at 2). The trial court continued:

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 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 not such that 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 invasion and discomfort than even multiple needle sticks. Thus, Broom’s constitutional claims’ must fail.

(April 7, 2011 Opinion and Judgment Entry at 4).

H. The Eighth District affirmed the trial court’s denial of postconviction relief.

On May 3, 2011, Broom appealed the trial court’s denial of his petition for postconviction relief. On February 16, 2012, the Eighth District affirmed the denial. *State v. Broom*, 8th Dist. No. 96747, 2012-Ohio-587 (Keough, J., dissenting).

The lower court rejected Brooms argument that the trial court was required to hold an evidentiary hearing. The court noted that the “state is not disputing the facts as advanced by Broom, leaving no issue of fact to be resolved at an evidentiary hearing.” *Id.* at ¶15. Broom failed to state what evidence he would have provided in addition to his five volumes of documentary evidence, he conceded 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," and he conceded at oral argument that the trial court had enough evidence to rule in his favor. *Id.* Because there were no facts in dispute and the issues raised were legal rather than factual, the trial court did not abuse its discretion when it did not hold an evidentiary hearing. *Id.* at ¶16.

The court first considered Broom's double jeopardy claim. Broom argued that double jeopardy was implicated because his claim implicated multiple punishments for the same offense. *Id.* at ¶19. The court found that the state had "not yet punished Broom so as to implicate the Fifth Amendment prohibition against punishing an individual twice for the same crime." because "establishing the IV access is [not] part of the punishment of execution." *Id.* at ¶22-23. The court held that Ohio's execution process "legislatively begins with the application of the lethal drugs." *Id.* at ¶23 citing R.C. 2949.22(A).

The court next considered Broom's Eighth Amendment challenge and held 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." *Id.* at ¶24. The Eighth District refused to create a bright line rule and instead found that the appropriate remedy needs to be based on a case-specific inquiry. *Id.* at ¶25. The court made the following findings:

- The "forbidden punishments" that the Eighth Amendment has historically prohibited are those where there is a "deliberate infliction of pain for the sake of pain-'superadd[ing]' pain to the death sentence through torture and the

like.” *Id.* at ¶30 citing *Baze v. Rees*, 553 U.S. 35, 48, 128 S.Ct. 152, 170 L.Ed.2d 420 (2008).

- Broom’s facial constitutional challenge to the lethal injection protocol failed because it was untimely raised and because it was continuously upheld as constitutional. *Id.* at ¶35-38 citing *Cooley v. Strickland*, 610 F.Supp.2d 853 (6th Cir., 2009); *Cooley v. Strickland*, 589 F.3d 210 (6th Cir., 2009); *Baze v. Rees*, 553 U.S. 35, 48, 128 S.Ct. 152, 170 L.Ed.2d 420 (2008)(upholding Kentucky’s similar procedure).
- A standard was necessary to review violations and errors in the execution process. *Id.* at ¶40. The court found that *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374 (1947), resulted in two branches of legal theory: (1) method of execution cases and (2) condition-of-confinement claims. Applying *Resweber* and its progeny, the court found that when faced with a retrospective Eighth Amendment challenge “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.” *Broom*, 2012-Ohio-587, ¶46.
- Finding Broom’s claim analogous to a condition-of-confinement claim, the court adopted the “deliberate indifference” standard that was developed and applied by the United States Supreme Court for Eight Amendment condition-of-confinement challenges. *Id.* at ¶48 citing *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115

L.Ed.2d 2321 (1991); *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

- The court found that the appropriate inquiry was the *Brennan* criminal recklessness standard on the part of the state actors. This standard requires less than knowledge but more than negligence and is concerned with whether the state actor “disregards a risk of harm of which he is aware.” *Id.* at ¶50.
- Applying this well-established standard to Broom’s claim, a majority of the court found that Broom did not allege any deliberate indifference on the part of specific state actors. *Id.* at ¶52.
- The majority also rejected Broom’s claim pursuant to R.C. 2949.22(A) and held that the statute “does not create a right to a quick and painless execution process, only a right to have a sufficient dosage of drugs cause a quick and painless death.” *Id.* at ¶56.

The dissenting judge wrote that she would have remanded the matter back to the trial court for a hearing on Broom’s petition. *Id.* at ¶60. The dissent opined that remand was necessary in order to develop the record under the adopted “deliberate indifference” standard. *Id.* at ¶64.

Broom appealed to this Court and this Court granted jurisdiction over three of his propositions of law. The State respectfully requests this Honorable Court affirm the decisions of the trial court and Eighth District Court of Appeals. Broom has not suffered either and Eighth Amendment or Fifth Amendment violation as a result of the initiation of the prior execution process nor would a constitutional violation prospectively exist

because of the earlier unsuccessful IV access. This Court should apply the same well-established legal principles and affirm.

LAW AND ARGUMENT

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

I. Summary of Argument

Neither the United States nor Ohio Constitutions prohibit Broom's execution. Lethal injection has been repeatedly upheld. Broom claims that because the September 15, 2009, execution did not go as planned, the state should now be constitutionally prohibited from carrying out his lawful sentence. His argument is unsupported by precedent and could lead to bad policy which "could invite the sort of needless pain and suffering that Broom seeks to avoid." *State v. Broom*, 8th Dist. No. 96747, 2012-Ohio-587, ¶24. Therefore, the State respectfully requests this Court affirm the decision of the lower courts and find that Broom has not been subjected to cruel and unusual punishment.

II. Broom has not been subjected to cruel and unusual punishment.

A. Broom's claim fails under the United States Constitution

"Some risk of pain is inherent in any method of execution-no matter how humane-if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 152, 170 L.Ed.2d 420 (2008). (Emphasis added).

As the trial court in this case recognized, "[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 or barbarous,

something more than the mere extinguishment of human life.” (April 7, 2011 Opinion and Judgment Entry at 3, quoting *In re Kemmler* (1890), 136 U.S. 436, 449).

Brooms argument below was twofold: (1) that the September 15, 2009, execution process violated the Eighth Amendment and (2) that a future attempt would violate the Eighth Amendment. The context of Broom’s arguments are important because it impacts the analysis. Regardless, Broom’s argument lacks merit under either standard. While there is limited precedent on this issue, the cases that exist support the decisions of the lower courts.

B. *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374 (1947)

In *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374 (1947), Willie Francis, a capital defendant, sought an order from the United States Supreme Court prohibiting Louisiana from proceeding with his death sentence. Francis was previously sentenced to death by electric chair but, when the executioner threw the switch, the execution was unsuccessful. Francis argued that relief was appropriate because a future execution attempt would violate the Fifth and Eighth Amendments. For the purpose of that case, the Court assumed that those constitutional provisions applied to Louisiana.

The Court found that when an “accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state’s subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution.” *Id.* at 463. Just as in *Resweber*, Broom did not present any evidence of malevolence on the part of the state actors. At the time of Broom’s scheduled 2009 execution, the relevant protocol was written as follows:

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

Ohio Dep't of Rehabilitation and Correction Policy Directive No. 01-COM-11, ¶ VI.B.7.f (Effective May 14, 2009).

The protocol was “designed to correct a problem that emerged during a prior execution, the Clark execution, in which the State also had trouble running an IV line on the inmate.” *Reynolds v. Strickland*, 583 F.3d 956, 960 (6th Cir., 2009) (Sutton, J., dissenting). As Judge Sutton noted, “[v]iewed from this perspective, the Broom execution may have “failed” by one measure because Broom was not executed. But, by another measure, the Governor's decision not to proceed with the execution of Broom, after two hours of attempting to run IV lines on him, confirms the virtue of the procedure and the Governor's responsible behavior in implementing it.” *Id.*

The *Resweber* Court went on to reject Francis's Eighth Amendment challenge. Francis, like Broom, suggested that “because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment.” *Resweber* at 464. The Court found that the “**cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.**” The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. ***There is no purpose to inflict unnecessary pain nor any***

unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty." *Id.* (Emphasis added).

Resweber, while a plurality opinion, supports the lower court's rulings. It also strongly supports the Eighth District's adoption of a standard which reviews the subjective intent of the state actors. *Id.* at 464. In his concurring opinion, Justice Frankfurter wrote that he could not bring himself to "believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice 'Rooted in the traditions and conscience of our people'." *Id.* at 471. Broom relies on that part of Justice Frankfurter opinion which states that a "hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt," may "raise different questions." However, neither Justice Frankfurter nor this Court are presented with that type of situation. When the state was unable to secure IV access, Broom's execution was halted. A deviation in procedure did not elevate Broom's situation into an Eighth Amendment violation.

The *Resweber* dissent would have remanded to the trial court for a determination of whether or not any electric current was applied to Francis during the prior attempt. *Id.* at 472. The dissent found that the lack of intent on the part of the state was immaterial but noted that "each case must turn upon its particular facts." *Id.* at 477. In reviewing the case, the dissent noted that instantaneous electrocution conformed with due process but was

concerned about “death by installments-caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim.” *Id.* at 474. That concern is not present here where, all parties agree, that Broom was never injected with lethal drugs. Broom’s execution is not piecemeal. The state was unable to complete the preparation; the execution was not implemented. *State v. Broom*, 8th Dist. No. 96747, 2012-Ohio-587, ¶22.

The Eighth District found *Resweber* to be of “limited precedential value” but that it and its progeny offered a “persuasive framework.” *Resweber* certainly provides a framework from Broom’s claim by underscoring the importance of a standard that reviews the intent of the state actors. Applying that standard to this case, Broom’s argument fails.

C. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008)

In *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008), two Kentucky death-row inmates challenged as cruel and unusual, a three drug protocol similar to the one that Broom challenged in the instant matter. There, the Supreme Court held that the risk of improper administration of the initial drug did not render the three-drug protocol cruel and unusual, and that a state's failure to adopt proposed, allegedly more humane alternatives to the three-drug protocol did not constitute cruel and unusual punishment. *Id.* at 56. While discussing the risks of improper administration of the lethal chemicals, the Court stated that “because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain.” *Id.* at paragraph one of the syllabus.

No court has ever held or even suggested that the type of pain experienced by Broom during the preparatory steps to execution can be deemed cruel and unusual punishment prohibited by the Eighth Amendment. On a daily basis, patients across the world are

subjected to multiple “needle sticks” when medical personnel are unable to secure vein access. The fact that Broom’s IV access was going to be used for his execution does not transform that fact into an Eighth Amendment violation. Rather, the Eighth Amendment requires demonstration of a “substantial risk of serious harm,” an “objectively intolerable risk of harm” that prevents prison officials from pleading that they were “subjectively blameless for purposes of the Eighth Amendment.” *Baze* at 50 citing *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). ***“Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of “objectively intolerable risk of harm” that qualifies as cruel and unusual.”*** *Id.* (Emphasis Added).

In addressing the petitioner’s claims regarding IV access, the *Baze* Court upheld Kentucky’s protocol which gave the IV team one hour to establish primary and backup IVs. *Id.* at 55. The Court noted that “merely because the protocol gives the IV team one hour to establish intravenous access does not mean that team members are required to spend the entire hour in a futile attempt to do so.” *Id.* Broom’s IV attempt lasted for approximately two hours. As the Eighth District found, the additional hour of sporadic attempts was “not so excessive as to distinguish Broom’s case from *Baze* and implicate the Eighth Amendment.” *State v. Broom*, 8th Dist. No. 96747, 2012-Ohio-587, ¶38.

Baze also provides an instructive framework for reviewing Eighth Amendment challenges. The *Baze* Court was asked to review executions in a prospective manner and did so using the “substantial risk” standard. *Baze*, paragraph one of syllabus; *State v. Broom*, 8th Dist. No. 96747, 2012-Ohio-587, at FN4. The Eighth District properly relied on *Baze* in rendering its opinion.

D. *Cooley v. Strickland*, 589 F.3d 210 (6th Cir., 2009) and other jurisdictions

While this seems to be an issue of first impression in this court, there is ample case law from other jurisdictions that reject Broom's claims. "On the rare occasion when there is difficulty in locating a vein, more than a single needle insertion may be necessary. This is hardly the cruel and unusual punishment contemplated by the Eighth Amendment." *State v. Webb*, (2000), 252 Conn. 128, 143, quoting *Hill v. Lockhart*, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992). "[Petitioner] now argues, however, that possible complications in the intravenous injection procedure might cause additional pain to the condemned prisoner. We conclude that that possibility, should it arise, does not make the means of inflicting death inherently cruel. Rather, it could be characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely." *Ex Parte Granviel* (Tex. Crim. App. 1978), 561 S.W.2d 503, 510.

In *Ritchie v. State*, 809 N.E.2d 258 (2004), the Supreme Court of Indiana rejected a challenge to the constitutionality of the state's use of lethal injection. The defendant argued two cases where the state had problems securing IV access—one which required a physician to complete a "cut down" procedure. The court found that "the two isolated cases do not establish that lethal injection is an inherently cruel or unusual method. To be sure, these two examples demonstrate that problems may occur in unusual circumstances, but that possibility does not rise to a systematic or inherent flaw in the lethal injection process." *Id.* at 262. Likewise, Broom repeatedly states in his merit brief that what happened to him is unique and likely to never be repeated.

Broom's Eighth Amendment claims are further undermined by the Sixth Circuit's decision in *Cooley (Biros) v. Strickland*, 589 F.3d 210 (6th Cir. 2009). The prisoner in *Cooley*

(*Biros*) put forth virtually identical allegations as those raised by Broom. In rejecting these claims, the Sixth Circuit made the following rulings:

1. That the possibility that maladministration of the IV sites could lead to severe pain does not set forth a basis for relief under the Eighth Amendment.
2. Ohio's requirements for the competency and training of execution personnel are constitutionally sufficient.
3. There is no constitutional requirement that Ohio employ a physician to supervise members of the execution team.
4. There is no constitutional requirement that Ohio place a time limit for accessing the prisoner's veins.
5. Ohio's intramuscular "back-up" is not unconstitutional simply because it has not been previously used.
6. There is no evidence or facts to show more than a mere possibility that the drugs used Ohio's "back-up" procedure will cause severe pain or discomfort.
7. Ohio's efforts to reduce the likelihood of discomfort for those whom it must lawfully execute cannot be seen as unconstitutionally hasty.

The Sixth Circuit considered virtually identical allegations and essentially found that the alleged deficiencies that Broom argued in the instant matter did not rise to the level of an Eighth Amendment violation. In *Cooey*, the prisoner argued that Broom's attempted execution indicates that Ohio's execution procedures were constitutionally deficient. The Court held in addition to the above rulings that "[s]peculations, or even proof, of medical negligence in the past or in the future are not sufficient to render a facially constitutionally

sound protocol unconstitutional.” *Cooley (Biros)* at 225. The Sixth Circuit’s rejection of these allegations in *Cooley* demonstrates that Broom’s claims should fail for a lack of merit.

Broom’s claim below is based on the same speculation that the *Cooley* court refused to consider. “Permitting constitutional challenges to lethal injection protocols based on speculative injuries and the possibility of negligent administration is not only unsupported by Supreme Court precedent but is also beyond the scope of our judicial authority.” *Id.* at 225.

Applying *Cooley, supra*, the trial court properly considered and rejected Broom’s argument that events of September 15, 2009 rose to the level of an Eighth Amendment violation:

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 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 not such that 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 invasion and discomfort than even multiple needle sticks. Thus, Broom’s constitutional claims’ must fail.

(April 7, 2011 Opinion and Judgment Entry at 4).

The trial court's holding was correct under *Baze, supra*. Broom faced no greater pain or discomfort than any citizen whose medical procedure required IV access before it could begin. Having technicians perform multiple attempts at IV access cannot constitute an "objectively intolerable risk of harm" or a "demonstrated risk of severe pain" that is "substantial when compared to the known and available alternatives." *Baze, supra*. Nor did the procedure go on for an unlimited amount of time. When it became apparent that technicians were unlikely to succeed in accessing Broom's veins, Ohio's governor granted Broom a reprieve.

Broom takes strong issue with the fact that authorities summoned a medical doctor, Dr. Carmelita Bautista, during the execution preparation due to the complications in finding a site for IV access. Broom cites the participation of Dr. Bautista as evidence of cruel and unusual punishment. Broom blames Dr. Bautista for causing him suffering when she attempted to gain IV access in his ankles. Yet in *Cooley*, counsel for Biros—who also serves as counsel for Broom in this case, argued that Ohio's new execution protocol was insufficient because it failed to provide for medical doctors to assist in executions. *Cooley, supra*, at 227-8. The Sixth Circuit in *Cooley* specifically explained that "[t]he presence of a supervising or attending physician at an execution by lethal injection undoubtedly could help to ensure that executions proceed as smoothly and painlessly as possible." *Id.*, at 226, fn 4. When, as here, a medical doctor did get summoned, Broom argues that the participation of a medical doctor is evidence of cruelty. This inconsistent treatment of medical participation for purposes of this analysis is unpersuasive and unmeritorious.

E. District court opinion

Broom's reliance on the District Court's August 27, 2011 opinion denying the State's Motion for Summary Judgment in the § 1983 lawsuit is also not dispositive. Simply stating a "viable" claim to get past summary judgment is not the same thing as reaching the ultimate merits of the claim, as the trial court in this case did below. Following the quoted portion of the District Court's opinion on pages 29-30 of Broom's brief, the District Court went on to find that "[t]he foregoing does not necessarily mean that this last portion of Claim One survives." *Broom v. Strickland* (S.D. Ohio 2010), 2010 WL 3447741, unreported, at *3. "In this remaining portion of Claim One, Plaintiff seeks to bar his execution on the grounds that it would constitute cruel and unusual punishment under the Eighth Amendment." *Id.* The District Court went on to find that Broom's Eighth Amendment challenge to a new execution was not even cognizable under § 1983, and instead should have submitted within a habeas corpus petition. *Id.*, at **3-5.

In analyzing the equal protection components of Broom's argument that it would be unconstitutional for the State to employ the former or current execution protocols, the District Court also seriously questioned the basic viability of Broom's claims:

Plaintiff asserts that the protocol generally and specifically violates his Fourteenth Amendment equal protection rights. Pointing to difficulties with vein access evident in the first execution attempt, Plaintiff attempts to plead facts indicating that this prior experience was not simply an unpleasant fluke or misadventure. Plaintiff asserts in his amended complaint that

[t]here *may* also exist risks and issues unique to **Broom** and his veins that contributed at least in part to the defendants' failure to obtain and maintain IV access on **Broom** on September 15, 2009, and these issues, *to the extent they exist*, would continue to prevail on any future execution date. Allowing **Broom** to be subjected to a wantonly painful execution process by failing to take into

account his unique physical circumstances would and has denied him Equal Protection as well as Due Process of Law.

(Doc. # 40 ¶ 92.) Such speculative pleading arguably falls short of meeting the mandated standard of pleading factual content that allows this Court to draw the reasonable inference that Defendants have violated or will violate the Constitution as alleged. *Iqbal*, 129 S.Ct. at 1949 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). Rather, Plaintiff’s these-facts-may-exist pleading arguably constitutes the sort of “sheer possibility” of unconstitutional conduct that the Supreme Court has held insufficient to survive a Rule 12(b)(6) motion. *Id.*

It is important to note that Defendants do not argue that the foregoing pleading is insufficient and consequently invalidates the core premise of Plaintiff’s argument as to why his equal protection claim survives dismissal. Rather, as Plaintiff emphasizes, Defendants only move for dismissal on the asserted inapplicability of the Equal Protection Clause to inmates. Plaintiff then explains why an inmate does have equal protection rights, a contention that this Court has previously accepted. Because Defendants do not attack whether the pleading asserts facts that place Plaintiff within the class he identifies as potentially applicable to himself, this Court need not and will not analyze whether the amended complaint is deficient in this regard. To do so would be to address an issue that Defendants have not raised as a ground for dismissal (and one that does not involve subject matter jurisdiction).

The Court notes, however, its concern over the sufficiency of the equal protection pleading. Plaintiff’s own briefing characterizes his equal protection claim as follows:

By failing to provide for the unique physical characteristics of each condemned prisoner, some receive quick and painless executions that comport with Ohio law and the Eighth Amendment while others do not. Broom was denied Equal Protection when the State of Ohio failed to provide the quick and painless death purportedly provided to others.

(Doc. # 44, at 28.) Such an equal protection claim does *not* target apparent deviations from the protocol and procedures as equal protection violations as other inmates have alleged in related litigation. Instead, Plaintiff’s theory of an equal protection violation is that he was and will be treated differently than other death row inmates during an execution because of unique physical

characteristics; at the same time, however, Plaintiff's factual allegations are that those unique physical conditions and their associated risks "may" exist and would be problematic "to the extent they exist." An arguably reasonable end result would be that, while arguing that equal protection covers his claim and that the factual allegations of his pleading are not at issue, the speculative factual allegations of Plaintiff's amended complaint would remove his claim from the scope of the Fourteenth Amendment protections he seeks to invoke. In any event, the point is a non-dispositive one here because in arguing only against *any* theoretical application of equal protection, Defendants overreach and fail to attack application of equal protection rights based on the facts pled. Defendants have thus failed to target a possibly persuasive argument that might have been supported by Plaintiff's limiting characterization of his own claim.

Broom, supra, at **5-6. As the foregoing passage indicates, the District Court did not simply endorse the ultimate merits of Broom's Eighth Amendment challenge to subjecting Broom to another scheduled execution when it denied the State's motion for summary judgment. Broom's reliance on the District Court's opinion as persuasive authority is therefore misplaced.

The Eighth District properly applied *Resweber*, *Baez*, and similar cases in upholding the trial court's denial of Broom's petition for postconviction relief.

F. Broom's claim fails under the Ohio Constitution

Broom contends that any attempt by the State of Ohio to carry out his death sentence would violate the Ohio Constitution. Specifically, Broom alleges that any attempt to execute him would be cruel and unusual under Art I, section 9 of the Ohio Constitution.

First, Broom argues that the "cruel and unusual punishments" clause of the Ohio Constitution should be read to provide greater protection than the United States Constitution. While Broom concedes that Art. I, section 9 uses the same words as the United States Constitution, he nevertheless claims that it provides additional support. Broom relies

heavily on language from this Court's decision in *In re C.P.*, 131 Ohio St.3d 513, 967 N.E.2d 729. In that case, this Court found that automatic lifetime registration for juvenile sexual offenders was cruel and unusual under both the United States and Ohio Constitutions. In doing so, this Court recognized that "cases involving unusual punishments are rare, 'limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.'" *Id.* at ¶60. This is not the case. Broom was lawfully sentenced to death, a sentence that was routinely upheld. His manner of execution was deemed constitutional. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008). The fact that his previously scheduled execution was unsuccessful does not diminish the constitutionality of his sentence.

Outside of *In re C.P.*, Broom cites to no authority to support his position. He instead argues that Ohioans have not traditionally been strong supporter's capital punishment despite the fact that capital punishment has remained a sentencing option in Ohio. Broom additionally fails to specify how, or in what way, these specific rights would be violated by the execution of his sentence.

Further, it should be noted that this Court has summarily rejected similar claims brought by other death row inmates challenging Ohio's death penalty statutes. *State v. Carter*, (2000), 89 Ohio St.3d 593, 607, 2000-Ohio-172, ("Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution." [quoting *State v. Jenkins*, (1984), 15 Ohio St.3d 164, 179]); *State v. Fry*, (2010), 125 Ohio St.3d 163, 199, 2010-Ohio-1017, ("Fry challenges the constitutionality of Ohio's death-penalty

statutes under both the United States Constitution and the Ohio Constitution. However, these claims can be rejected”); *State v. Braden*, (2003), 98 Ohio St.3d 354, 376, 2003-Ohio-1325 (“Braden argues that Ohio's death penalty statute violates the federal and Ohio Constitutions. We reject these claims”).

Broom also claimed that under Ohio law, any further attempt to execute him will deprive him of his right to a quick and painless death pursuant to state statute. Broom however, has failed to cite to any authority supporting such a claim. In *Cooley (Biros) v. Strickland, supra*, the Sixth Circuit addressed this issue and concluded that that “[s]ection 2949.22 creates no cause of action to enforce any right to a quick and painless death.” *Cooley (Biros)*, 589 F.3d at 234, citing *State v. Riviera*, Lorain App Nos. 08CA009426, 08CA009427, 2009-Ohio-1428, at *7, (“There is no action for a quick and painless death” under R.C. 2949.22). The Eighth District also rejected Broom’s claim pursuant to R.C. 2949.22(A) and held that the statute “does not create a right to a quick and painless execution process, only a right to have a sufficient dosage of drugs cause a quick and painless death.” *Id.* at ¶56.

III. Conclusion

Neither the September 15, 2009, nor any upcoming scheduled execution violate Broom’s rights under the United States or Ohio Constitution. Broom’s proposition of law lacks merit and should be denied.

PROPOSITION OF LAW II: 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.

I. Summary of Argument

The Eighth District properly adopted the “deliberate indifference” standard for Broom’s claim; it is supported by decades of precedent. Broom was not entitled to either discovery or a hearing. He presented hundreds of pages worth of exhibits that were uncontested by the state but which did not satisfy this well-established standard.

II. The deliberate indifference standard is appropriate for Broom’s claim

In his second proposition of law, Broom claims that the Eighth District erred by adopting the “deliberate indifference” standard for his claim and then for failing to remand for further proceedings under that standard. Broom has not been denied to process. To the contrary, Broom provided the trial court with a voluminous record.

The Eighth District was right to adopt a standard that took into account the intent of state actors. Contrary to Broom’s assertion, the *Resweber* plurality was specifically concerned about whether or not the state actors had “*purpose to inflict unnecessary pain*” and that there was “*no suggestion of malevolence.*” *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 462, 464, 67 S.Ct. 374 (1947). The Eighth District correctly noted the plurality’s “repeated references to accidents and innocent misadventures...set the foundation of a subjective state-of-mind requirement on state acts or omissions.” *State v. Broom*, CITE. The United States Supreme Court has repeatedly used this type of standard. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285,

50 L.Ed.2d 251 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 2321 (1991). See also *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 294 (2004).

As the lower court explained, the *Resweber* conditions-of-confinement claims provide the best framework for the issue as those claims challenge “deprivations that were not specifically part of the punishment but were nonetheless suffered during execution of the punishment.” *Broom* at ¶47 citing *Wilson* at 297. Deviation from the execution protocols are not specifically part of the punishment of execution. *Id.*

The Ohio Public Defender’s amicus brief argues instead that Broom’s claim should be reviewed under “evolving standards of decency.” (Amicus brief, pg. 4). Amicus relies on *Troup v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). However, the “evolving standards of decency” line of cases have been historically used to determine disproportionate punishment for classes of individuals. See *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (execution of juveniles under 16); *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (execution of juveniles over 15 but less than 18); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002) (execution of mentally retarded); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (execution of individuals who were under 18 at the time of the offense). While it is true that the Eighth Amendment is reviewed in an evolving context, that alone is insufficient to provide the framework necessary to review Broom’s claims. Adopting the “deliberate indifference” standard is not inconsistent with maintaining “evolving standards of decency.” Nor has Broom provided any court with evidence that his future execution would contravene

“our society’s evolving standards of decency.” See *State v. Davis*, 139 Ohio St.3d 122, 9 N.E.2d 1031, 2014-Ohio-1615, ¶77.

Broom goes on to argue that the Eighth District improperly created a new standard and then failed to remand for further litigation. First, this Court has previously held that there is no state postconviction relief mode of action to litigate whether specific lethal-injection protocol is constitutional. *State v. Houk*, 127 Ohio St.3d 317, 939 N.E.2d 835, 2010-Ohio-5805. Second, postconviction review is not a constitutional right. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. Broom has no more rights to post-conviction relief proceedings than are granted by statute. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). The statute does not suggest that the trial court has the authority to conduct or compel discovery. *State v. Bays*, 2nd Dist. No. 2003 CA 4, 2003-Ohio-3234, ¶20. Therefore, Broom had no right to discovery or a hearing.

The facts conceded by Broom further belie his claim. Broom tells this Court that he alleged “deliberate indifference” in his petition. (Broom merit brief, pg. 38-39). Broom admits that he used this framework in his pleading. He also admitted to the Eighth District 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,” and he conceded at oral argument that the trial court had enough evidence to rule in his favor. *Id.* at ¶15. Because all of the evidence was before the trial court and because the state did not dispute the facts that Broom put forth, there was “no issue of fact to be resolved at an evidentiary hearing.” *Id.* Broom failed to state below, and still fails to state now, what evidence he would have provided in addition to his five volumes of documentary evidence. Because there were no

facts in dispute and the issues raised were legal rather than factual, the trial court did not abuse its discretion when it did not hold an evidentiary hearing. *Id.* at ¶16.

Broom argues that he also adequately pursued declaratory judgment relief. This is incorrect. In *Houk*, this Court found that Ohio has no state postconviction relief mode of action to litigate whether specific lethal-injection protocol is constitutional. Writing a concurring opinion, now Chief Justice O'Conner found that Ohio's Declaratory Judgment Act does not authorize relief for prospective challenges to the execution protocol. *Houk* at ¶20-27. Even if Broom's claim was unique enough to qualify for declaratory judgment, Broom failed to properly initiate that action. "Ohio's Declaratory Judgment Act, found in R.C. Chapter 2721, plainly 'contemplate[s] a distinct proceeding * * * initiated by the filing of a complaint.' Thus, '[a] 'motion' for a declaratory judgment is procedurally incorrect and inadequate to invoke the jurisdiction of [a] court pursuant to R.C. Chapter 2721." *State v. Braggs*, 1st Dist. Hamilton App. No. C-130073, 2013-Ohio-3364, ¶4 citing *Fuller v. German Motor Sales, Inc.*, 51 Ohio App.3d 101, 103, 554 N.E.2d 139 (1st Dist.1988). "Braggs sought declaratory relief declaratory relief by means of a motion filed in his criminal case. Therefore, he failed to invoke the jurisdiction conferred by the act." *Id.* Just as in *Braggs*, Broom filed a motion for declaratory relief in the trial court without properly initiating a civil proceeding. His failure to properly invoke the trial court's jurisdiction in declaratory judgment left the trial court without subject-matter jurisdiction to hear his claim.

III. Conclusion

The Eighth District applied a well-established standard for Broom's claim, one which Broom claims to have used during his initial pleadings. Broom was not entitled to a hearing on his petition where he failed to provide evidence to support that (or any other)

standard and because there was no factual issue to resolve. This Honorable Court should decline to adopt Broom's second proposition of law.

PROPOSITION OF LAW III: 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

Broom argues that a further execution attempt "would violate the Fifth Amendment's guarantee against Double Jeopardy as applied to the States through the Fourteenth Amendment." "[T]he Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment." *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072. "It protects against a second prosecution for the same offense after acquittal." *Id.* (footnotes and citations omitted). "It protects against a second prosecution for the same offense after conviction." *Id.* "And it protects against multiple punishments for the same offense." *Id.* "[T]he Supreme Court has repeatedly described the third aspect of the Double Jeopardy Clause—the protection against multiple punishments for the same offense imposed in a single proceeding—as protecting only against the imposition of punishment in excess of that authorized by the legislature." *White v. Howes* (C.A. 6, 2009), 586 F.3d 1025, 1032.

In support of his claim, Broom relies on *United States v. Halper*, (1989), 490 U.S. 435, where the Supreme Court held that the double jeopardy clause protects against multiple punishments for the same offense. In *Halper*, the defendant was convicted under a federal criminal statute of filing false claims and sentenced to two years imprisonment and fined \$5,000. The defendant was later found liable in a subsequent civil action for more than

\$130,000 for the same offense. The Supreme Court held that the subsequent penalty was a violation of the double jeopardy clause. *Halper*, 490 U.S. at 452. The type of government overreaching that the Supreme Court prohibited in *Halper* is substantially different from the situation in this case. Any discomfort or pain that Broom was subjected to on September 15, 2009 cannot be said to have constituted the “actual sanction” for the aggravated murder of Tryna Middleton. Here, the State was merely preparing to carry out a lawfully imposed sentence. When the preparation failed, Broom’s execution was halted. This type of government action is not what the Double Jeopardy Clause is intended to prevent. Where a lawfully adjudged sentence is not carried out, it cannot be said that a second successful attempt will result in multiple punishments for the same offense.

In *Louisiana ex rel. Francis v. Resweber*, *supra*, the Supreme Court held that a state’s second attempt to execute a condemned prisoner after an unsuccessful attempt was not a violation of double jeopardy. The prisoner in *Resweber*, after being subjected to non-fatal currents of electricity, alleged an identical double jeopardy claim as Broom alleges here. In *Resweber*, the failure of the first attempt was due to mechanical problems. The Supreme Court stated that “[w]hen an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state’s subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment.” *Id.* 329 U.S. at 463. Broom has not, nor is able to present any evidence that the State of Ohio maliciously or intentionally chose to postpone or prolong his execution for the purpose of subjecting him to additional physical or psychological pain. The Court in *Resweber* went on to say that “[S]o far as double jeopardy is concerned,” there is “no difference from a constitutional point of view between a new trial for error of law at the

instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment." *Id.* at 461.

Based on the above well-established law, a second attempt to carry out a lawfully imposed sentence of death is not a violation of Double Jeopardy.

Broom also claims that any further attempt to carry out his execution would violate his right to substantive due process under the Fourteenth Amendment. Broom, however has failed to specifically state how his rights would be violated and has further failed to cite to any case law or other authority to support this claim. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Albright v. Oliver*, (1994), 510 U.S. 206, 273, quoting *Graham v. Connor*, (1989), 490 U.S. 386, 395. The Eighth Amendment, "which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions," serves as the primary source of substantive due process protection to convicted prisoners. *Whitley v. Albers*, (1986), 475 U.S. 312, 327.

Broom's reliance on the District Court's decision in *Cooley v. Strickland* (S.D. Ohio 2009), 610 F. Supp 2d 853 for the proposition that the court "warned the State that its lethal injection system was broken and needed to be fixed" is also unavailing. (Apt. Br. At 35). In fact, the District Court explained a more nuanced and specific holding:

Today's decision therefore neither holds that Ohio's method of execution by lethal injection is constitutional nor unconstitutional. Rather, today's decision reflects only that at this juncture, Biros has not met his burden of persuading this Court that he is substantially likely to prove unconstitutionality.

Director Collins appears to recognize as much, given that he testified that the ultimate goal is for Ohio to be as humane as possible and as professional as possible in carrying out its lawful executions. These are indisputably correct goals. But Collins also testified that he believes Ohio's procedures are as humane and the best they can be right now, and he is incorrect. Thus, despite Defendants' victory on the narrow issue of injunctive relief today, the aspirations of the State would suggest that the question should not be simply what *must* be done under compulsion by the Constitution, but also what *should* be done to meet the professed laudable goals of the State of Ohio.

Id., at 938 (emphasis added).

To convince this court that he suffered a level pain that amounted to punishment sufficient to trigger double jeopardy protection, Broom criticizes the actions of the execution team. Yet in his pleadings before the federal court, Broom claimed that what happened to him was, in part, due to his own "unique physical characteristics":

Plaintiff asserts in his amended complaint that

[t]here *may* also exist risks and issues unique to **Broom** and his veins that contributed at least in part to the defendants' failure to obtain and maintain IV access on **Broom** on September 15, 2009, and these issues, *to the extent they exist*, would continue to prevail on any future execution date. Allowing **Broom** to be subjected to a wantonly painful execution process by failing to take into account his unique physical circumstances would and has denied him Equal Protection as well as Due Process of Law.

(Doc. # 40 ¶ 92.)

Plaintiff's theory of an equal protection violation is that he was and will be treated differently than other death row inmates during an execution because of unique physical characteristics; at the same time, however, Plaintiff's factual allegations are that those unique physical conditions and their associated risks "may" exist and would be problematic "to the extent they exist."

Broom v. Strickland, supra, at *6. On the one hand, Broom wants the court to believe that his experience was completely the fault of the State's "gross negligence," but on the other hand acknowledges before a different court that his "unique physical characteristics" contributed to understandable failure to find an IV site.

Regardless, Broom did not experience anything that amounted to a "punishment" for double jeopardy purposes. On this issue, the trial court specifically rejected Broom's argument that what he experienced rose to a level of pain akin to punishment. "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)." (April 7, 2011 Opinion and Judgment Entry at 4). "Broom was not subjected to a potential cut-down procedure, which clearly involves far more medical invasion and discomfort than even multiple needle sticks." *Id.*

Pushing Broom's argument to its logical conclusion demonstrates the absurdity of Broom's double jeopardy position. Assuming, for the sake of argument, that the Court were to have found, in a life-imprisonment context, that the conditions of Broom's imprisonment violated the Eighth Amendment and Ohio transferred Broom to a humane prison facility to cure the constitutional violation, Broom would insist that the double jeopardy clause required that he be set free rather than transferred. This is not a situation like *Halper, supra*, where the government sought to impose multiple separate sanctions for the same conduct. Here, government is seeking to impose the same sanction, or the one punishment, that Broom always faced: execution.

Indeed, subjecting Broom to another scheduled execution no more violates double jeopardy than requiring a criminal defendant to face retrial after his conviction and sentence were overturned on appeal due to a legal error. If a criminal defendant may be retried after a successful appeal and run the risk, on retrial, of receiving a sentence as severe as that previously imposed, or run the risk of being tried for a separate offense, then there is no double jeopardy violation to requiring Broom to face the same sentence he has always faced. Cf. *Bryan v. United States* (1950), 338 U.S. 552, 70 S.Ct. 317; *United States v. Ball* (1896), 163 U.S. 662, 16 S.Ct. 1192; *Williams v. Oklahoma* (1959), 358 U.S. 576, 79 S.Ct. 421.

Broom's Double Jeopardy claim lacks merit. He is not being sentenced twice. He was sentenced once to a lawful sentence.

CONCLUSION

The State respectfully requests this Honorable Court reject Broom's propositions of law and allow his future execution to go forward.

Respectfully submitted,

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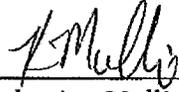
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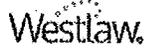
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OH Const. Art. I, § 10

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C

Baldwin's Ohio Revised Code Annotated Currentness
 Constitution of the State of Ohio (Refs & Annos)

Article I. Bill of Rights (Refs & Annos)

→→ O Const I Sec. 10 Rights of criminal defendants

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 the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

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United States Code Annotated Currentness
Constitution of the United States

▣ Annotated

▣ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annots)

→→ **Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**

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.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

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C

United States Code Annotated Currentness
Constitution of the United States

Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

→→ AMENDMENTXIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House; remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

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R.C. § 2949.22

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Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2949. Execution of Sentence

Death Sentence

→→ 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.

CREDIT(S)

R.C. § 2949.22

Page 2

(2001 H 362, eff. 11-21-01; 1994 H 571, eff. 10-6-94; 1993 H 11, eff. 10-1-93; 1992 S 359; 1953 H 1; GC 13456-2)

VALIDITY

For stay of implementation of order of execution, see *In re Ohio Execution Protocol Litigation*, 840 F.Supp.2d 1044, 2012 WL 84548 (S.D. Ohio 2012).

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Effective: July 6, 2010

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Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2953. Appeals; Other Postconviction Remedies (Refs & Annos)

Postconviction Remedies

→→ 2953.21 Petition for postconviction relief

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and 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, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or; if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, 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.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to the effective date of this amendment.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later

than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies

the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resent the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings

prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

CREDIT(S)

(2010 S 77, eff. 7-6-10; 2006 S 262, eff. 7-11-06; 2003 S 11, eff. 10-29-03; 2001 H 94, eff. 9-5-01; 1996 S 258, eff. 10-16-96; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1994 H 571, eff. 10-6-94; 1986 H 412, eff. 3-17-87; 132 v H 742; 131 v S 383)

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