

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ROMELL BROOM,

Defendant-Appellant.

CASE NO.: 12-0852

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

Court of Appeals Case No. 96747

REPLY BRIEF OF APPELLANT ROMELL BROOM

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

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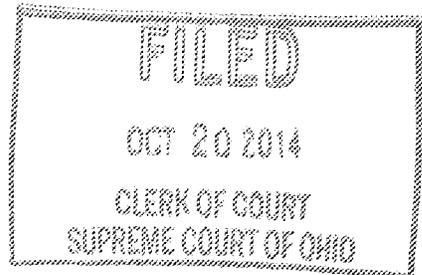


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LEGAL ARGUMENT

Proposition of Law No. 1:

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

Broom asserts that the execution attempt to which he was subjected on September 15, 2009, imposed upon him foreseeable, unnecessary, and excessive physical pain and emotional trauma. The facts underlying that claim, in summary, are:

- The State of Ohio knew that its chosen execution method – lethal injection – required that intravenous access be properly established and maintained. Protocol Number 01-COM-11, VI. B. 1. b. (Eff. May 14, 2009) (Appx 043-52)
- The State of Ohio knew that it had experienced significant problems obtaining and maintaining IV access in executions prior to Broom's, including during Joseph Clark's execution, and knew that Clark had as a result been subjected to a painful, lengthy, and inhumane execution.
- The State of Ohio knew, and had been warned by its own expert and others, that a back-up plan was needed in order to allow for the humane and prompt completion of an execution in the event peripheral IV access could not be obtained or maintained, and yet the State failed to implement the required back-up plan in advance of Broom's execution.
- The written execution protocol required execution team members to attend training sessions before conducting an execution but team members did not attend all training sessions. Protocol Number 01-COM-11, VI. B. 1. b. (Eff. May 14, 2009) (Appx 045)
- The execution protocol required that the inmate's veins be evaluated at least three times in the 24 hours before the execution was to take place. Protocol Number 01-COM-11, VI, B. 4. b. (Eff. May 14, 2009) (Appx 047). Broom's veins were evaluated twice. The second evaluation showed there were problems with the veins on his left arm. (R. Clagg Depo (Broom First Submission, Exh. 16) at 74-76; 79-80.) The final evaluation was never done. *Id.*; Second Biros Injunction Order at 185-87 (Broom First Submission, Exh. 1)

- Having failed to comply with the training requirements and vein assessments, the State of Ohio went forward with Broom's execution on September 15, 2009.
- During the execution attempt, the State was unable to efficiently, without unnecessary pain, or successfully establish and maintain IV access on Broom. When one IV line was finally established, it was negligently pulled out of Broom's arm by an execution team member.
- Carmelita Bautista, a doctor under contract with the prison who was neither an execution team member nor trained in Ohio's execution protocol, was summoned to help with the execution in violation of Ohio's execution protocol and she inexplicably stabbed Broom in his ankle bone in an effort to establish an IV through a method not included in Ohio's execution protocol. (C. Bautista Depo. (Broom First Submission, Exh. 18))
- Despite the State's failures to implement a back-up plan, meet training requirements, conduct vein assessments, maintain the single line that was established, and limit the participants in the execution to execution team members, this process continued for nearly two hours during which time Broom suffered 18-19 painful needle jabs, including the excruciating stab to his ankle bone by Carmelita Bautista, and the psychological terror not only of the effort to kill him but the uncertainty of knowing how long it would go on and how far outside the parameters of Ohio's execution protocol the State would go in its effort to kill him.
- And then Broom was told he would have to endure another attempt in one week, and, while awaiting that fate, he was housed in the same prison (SOCF) where many of those involved in the failed attempt to execute him are employed.

Broom also asserts these and the additional facts set out in his brief and in the record of this case show that what happened to him on September 15, 2009 violated the cruel and unusual punishments clauses of the United States and Ohio Constitutions, and also, whether or not what happened on September 15 constitutes a freestanding constitutional violation, a second attempt to execute him would do so. The State intermingles its response to these two arguments in its response brief. Broom attempts to sort them in this reply.

A. A second attempt to execute Broom would violate the Eighth Amendment prohibition against cruel and unusual punishments.

1. *Whether or not the first attempt to execute Broom violated the Eighth Amendment, a second attempt would do so.*

The State asserts that a second attempt to execute Broom would not be cruel and unusual arguing that the State's first attempt on September 15, 2009 was not cruel and unusual. To begin, Broom's claim that a second execution attempt is constitutionally prohibited does not hinge on whether the first attempt violated the cruel and unusual punishments clause. U.S. Const. amend. VIII. As Broom said in his opening brief, even if the first execution attempt was not cruel and unusual, a second attempt would be. Broom's Brief, p. 14.

The State makes its claim that the first effort to execute Broom was not cruel by citing the dissenting opinion in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) for the proposition that the dissenters would have found no Eighth Amendment violation so long as Willie Francis did not suffer "death by installments-caused by electric shocks administered after one or more intervening periods of complete consciousness." State's Brief, p. 16, citing Resweber, 320 U.S. at 474. The State then argues that Broom never received any of the lethal drugs and says that Broom underwent only an unsuccessful execution "preparation" and that "the execution was not implemented." Id. at p. 16. Broom has addressed in his initial brief the fact that the execution was underway at least when the State began piercing Broom's skin and veins with the needles necessary to place the catheters used to deliver the execution drugs. Broom Brief, p. 18-23. The State seeks to equate entry into Broom's body of the lethal drugs with the application of electricity to Wille Francis's body. But that analysis misconstrues the Resweber dissenters' assessment. Their concern was not a hairsplitting analysis defining when the

execution process began: it was whether Willie Francis had endured pain during the first attempt to execute him. (“The intent of the executioner cannot lessen the torture or excuse the result.” Resweber, 320 U.S. at 477.) And on September 15, 2009, Broom endured pain far beyond what is entailed in a normal execution.

The State attempts to minimize the pain Broom suffered, claiming that, “On a daily basis, patients across the world are subjected to multiple ‘needle sticks’ when medical personnel are unable to secure vein access.” State’s Brief, p. 17. There is no evidence in the record to support this claim and in fact the record evidence refutes it. Indeed, the record evidence is that what the State did to Broom would **never** be tolerated in a health care setting. See Second Biros Injunction Order at 132 (Cooey (Biros) v. Strickland, 2009 U.S. Dist. LEXIS 122025, *216 (S.D. Ohio Dec. 7, 2009)) (“Dr. Heath explained that what happened to Romell Broom--attempts to obtain intravenous access that spanned two hours and involved eighteen to nineteen needle ‘sticks,’ many of which contravened accepted practices for inserting a peripheral IV catheter--would never be permitted in a clinical health care setting.”); HT Mark Heath, M.D. (Second Biros Hrg.) at 41 (Broom Reply/Second Submission, Exh. 1).

Moreover, common sense dictates the State’s claim is not true. If patients were undergoing what Broom went through – 18-19 needle jabs including one in the ankle bone, blood spurting into the air from unsuccessful tries, a successfully established IV pulled from the vein thus requiring more needle sticks - on a daily basis all over the world, patients would seek care in only the most dire of circumstances and elective surgeries would rarely if ever be performed. And even were such antics commonplace in medical practice, the patients would know that their suffering was to alleviate pain, cure an illness, or improve their lives. Suffering to achieve a desired health benefit is not the same in terms of physical tolerance or mental ability to cope as is

suffering inflicted to cause the sufferer's imminent death against his will. The State's claim that what happened to Broom was not cruel because medical patients suffer the same is not borne out by the record or common sense.

Furthermore, the State's view ignores the unnecessary psychological suffering Broom endured during the two hours of lawless chaos on September 15, 2009 when the State attempted to kill him. The Eighth Amendment prohibits the infliction of unnecessary "fear and distress." Trop v. Dulles, 365 U.S. 86, 101-02 (1958). Broom was trapped in the holding cell not knowing how long the process would continue and having no confidence and no reason to have confidence that the State of Ohio would comply with its own law – and it was apparent to all that the State would not follow the execution protocol once Bautista entered the death chamber.

Dr. Bautista's involvement with the execution was intolerable and in violation of the protocol. She was a complete stranger to the process. The Cooey court's observation that a "supervising or attending physician at an execution . . . could help ensure that [it] proceed as smoothly and painlessly as possible" is hardly an endorsement of what happened here: a protocol-defiant decision to summon, after the execution had already been underway for more than an hour, a physician who just happened to be at the prison that day working on other things and even though that physician had no prior experience with executions, was not on the execution team, and had never even seen let alone received training about the execution protocol, and to then allow that person to participate in the process with no oversight.

Broom believes that the first attempt to execute him was cruel and unusual and that an appropriate remedy for that constitutional violation would be to prohibit another attempt. But whether or not the first attempt violates the Eighth Amendment, a second attempt would. As noted in his initial brief, because he endured the process on September 15, 2009, Broom cannot

face a second execution attempt as if it were the first. He cannot ignore the suffering he has already endured. Broom faces a unique and uncalled for psychological terror if he is put through the execution process another time. And the needle insertions he would endure in a second attempt would not be the first or second needle jabs he faced but the twentieth or twenty-first.

2. *The validity of a second execution attempt on Broom must be assessed in light of what Broom has already suffered in the first attempt.*

The State claims that there would be no Eighth Amendment violation in going forward with a second execution attempt and cites the Resweber plurality for the proposition that the first execution attempt was no different than an unrelated “other occurrence,” such as a cell fire that involved “anguish and physical pain.” State’s Brief, p. 15 citing Resweber, 329 U.S. at 464. Evolving standards of decency, advances in psychology, and common human experience show that this is not true. See generally Diagnostic and Statistical Manual of Mental Disorders, DSM-IV-TR, (4th Ed.) American Psychiatric Association (2011), pp. 463-72. The character of a traumatic event deeply influences its psychological impact. Suffering a true accident, a fire caused by a lightning strike for example, may cause the victim to fear lightening in the future but it would not create fear of unrelated events. But Broom did not suffer a lightning strike or a fire caused by one. Putting him in the same situation – another execution attempt - in which he suffered unnecessary pain and psychological trauma is cruel and unusual. The Resweber plurality’s *dicta* defies common sense, human experience, and current psychology.

The State next appears to urge that the question to be resolved is not whether another attempt to execute Broom would be a cruel and unusual punishment, but instead is whether Ohio’s current execution protocol is constitutional as written. To that end, the State asserts that, “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.” State’s Brief, p. 18. The State then discusses a

series of cases in which courts have addressed whether various lethal injection protocols might in the future result in cruel and unusual punishments when administered on an inmate for the first time; State v. Webb, 252 Conn. 128 (2000), Ex Parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978); Ritchie v. State, 809 N.E. 2d 258 (Indiana 2004), and Cooey (Biros) v. Strickland, 589 F.3d 210 (6th Cir. 2009). In each of these cases, just as in Baze v. Rees, 553 U.S. 35 (2008), the courts found that the prisoner had failed to show, in making a prospective challenge to the state's lethal injection process, that the execution process would be cruel and unusual punishment. Webb, 252 Conn. at 146; Ex Parte Granviel, 561 S.W. 2d at 510; Ritchie, 809 N.E.2d at 263, Cooey (Biros), 589 F.3d at 233-34. None of these cases address the circumstances presented in Broom's case. None of the prisoners had already been subjected to a botched execution and faced a possible second attempt.

The State claims that the possibility of error is present in every execution and implies that what happened to Broom falls into that category of constitutionally acceptable human error. This argument fails for several reasons. First, what happened to Broom was not mere error. The failure to heed the lessons of the Clark and Newton debacles, which made international news, was not "human error," but reckless indifference. Missing training sessions did not happen by accident and the fact that those training sessions were skipped was known not only by the team members who failed to attend but by their supervisors and thus the State. There has been no explanation for this omission of a vital step in the execution protocol. But what was clearly not mere error was going forward, knowing that the final assessment had not been done and knowing the assessment before had shown that there were problems. And it was not simply error when the protocol was actively violated by calling in a non-team member who inflicted additional pain by stabbing Broom in the ankle. A conscious decision to violate the protocol was made by the

Director, not on the spur of the moment, but after discussion with the execution team members.

If by some stretch of credulity, this series of conscious decisions to proceed in contravention of the specific requirements of Ohio's execution protocol can be viewed as "human error" or "accident," it is not the type of error or accident that may be constitutionally acceptable. The kind of error or accident that may be constitutionally excusable is unknowing error or, as the State notes citing Resweber, State's Brief p. 14, "unforeseeable accident"—like the failed wiring in the electric chair used in Louisiana's first attempt to kill Willie Francis. There a connection was loose or a wire frayed. No one there had decided to go forward knowing that the requirements for carrying out the execution had not been met.

In Broom's case, the execution team and the State of Ohio knew that they had encountered in previous executions serious problems with obtaining and/or maintaining IV access which made those executions traumatic and painful for the inmates involved. They knew that team members had not attended all required training sessions. They knew that the third vein assessment had not been done. They knew that Bautista was not trained at all in Ohio's execution protocol and was not a member of the execution team and had no business being in the room. (TM#9: "Dear God, what is she doing here?"). And, to the extent the State claims the execution protocol was "designed to correct a problem that emerged during [Clark's] execution" State's Brf., p. 14 citing Reynolds v. Strickland, 583 F.3d 956, 960 (6th Cir. 2009), the State's failure to follow those unidentified aspects of the protocol allegedly designed to avoid the earlier problems made the problems that arose in Broom's execution "foreseeable" and the decision to disregard this known risk did not result in an "accident" but instead in the foreseeable consequence of failing to comply with the protocol.

Moreover, the most obvious change required after the problematic Clark and Newton

executions was a back-up plan that allowed for the prompt and humane completion of the sentence in the event IV access could not be promptly obtained or maintained: the State failed to adopt any such backup until **after** Broom's failed execution, and, even then, the backup Ohio chose to adopt (intramuscular injection of hydromorphone and midazolam) is reliant on drugs that are totally unsuitable for use in a humane execution as demonstrated, most recently, by the famously botched executions of Dennis McGuire in Ohio on January 16, 2014, and Joseph Wood in Arizona on July 23, 2014.

The State devotes three pages of its brief to addressing a quote that purportedly appears at "pages 29-30 of Broom's brief." State's Brief, p.22. The State then quotes at length from Broom v. Strickland, 2010 WL 3447741 (S.D. Ohio 2010) regarding an equal protection argument raised in that §1983 action. State's Brief, p. 22-24. The purported quote does not appear in Broom's brief. The claims being litigated in the §1983 action are not at issue in this proceeding.

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

The State has largely ignored or disregarded Broom's argument under the Ohio Constitution, art. I, §9. As a document of independent force, the Ohio Constitution should be held to provide more protection than its federal counterpart with respect to whether it is cruel and unusual punishment to subject an Ohioan to a continued death sentence and subsequent execution attempts, after that person has already once been subjected to a prolonged attempted execution that failed through no fault of his own.

The State misapprehends Broom's argument when it claims that this Court has "summarily rejected similar claims brought by other death row inmates challenging Ohio's death penalty statutes." (State Brief at 25-26 (citing State v. Carter, 89 Ohio St. 3d 593, 607 (2000),

State v. Fry, 125 Ohio St. 3d 163, 199 (2010), and State v. Braden, 98 Ohio St. 3d 354, 376 (2003)). These cases are inapposite; they hardly involve “similar claims.” They instead involve routine general challenges to Ohio’s death penalty statutes that were made as part of the defendants’ direct appeals. **None** involve the circumstances or claim that Broom makes here concerning multiple execution attempts. This Court has never addressed a claim like Broom’s.

It is also of no significance that Broom has not cited a case “supporting his claim that a second attempt to execute him will violate Ohio’s statutory command that lethal injection be ‘quick and painless.’” (State Brief at 26.) No Ohio inmate, besides Broom, has been subjected to a second execution attempt; it therefore cannot weaken Broom’s claim that he is unable to cite an Ohio case applying Ohio’s quick-and-painless statute to Broom’s unique circumstances.

Moreover, Broom has referenced the Ohio statute not only because a second attempt would violate its terms, but also because the statute is one of several objective facts which demonstrate that Ohio currently and historically has taken a more progressive and tempered approach to capital punishment than other states, and that standards of decency in this State as reflected in part by such objective facts would never have tolerated, and certainly at least today do not tolerate, multiple execution attempts in circumstances like Broom’s. Indeed, only Kansas has a statute similar to Ohio’s, and Kansas has not executed anyone since the 1960’s. Additional such objective facts relied upon by Broom in his main brief, but ignored by the State, are the drastically reduced number of death sentences sought and obtained in Ohio since Broom’s case, the State’s progressive history as demonstrated by its near-adoption of a constitutional amendment abolishing capital punishment, and the State’s tradition of enlightened, common sense values, as reflected, for example, in the dissenting opinion in Resweber as authored by Ohio’s one-time U.S. senator and Cleveland’s former mayor, Harold Burton. These facts all

support giving Ohio's cruel and unusual punishments clause a broader scope than the federal counterpart insofar as applied to multiple execution attempts in circumstances like Broom's (and Willie Francis's).

Finally, the State argues that Broom is unable to demonstrate that a second execution attempt would be "considered shocking to any reasonable person" given that his death sentence was upheld by the courts and lethal injection is constitutional. That might be a relevant response if Broom was seeking to prevent a **first** execution attempt. But it fails to address the issue in **this** case, which is whether the Ohio constitution bars a **second** attempt necessitated solely because the first attempt had failed through no fault of Broom. What the State proposes to do to Broom is, indeed, shocking, historic, and virtually unprecedented in this country. One measure of how shocking and troubling is that books are today still being written about Willie Francis and his ordeal. (See Broom Brief at 31 & n.9.) In Francis's case the second attempt was allowed to proceed by the slenderest of margins, 4-1-4, at a time when the relevant constitutional provisions were not applicable to the states and where the deciding justice, Felix Frankfurter, was revolted by the spectacle of a second attempt but nonetheless allowed the decision to remain in Louisiana's hands. Had Willie Francis's crime been committed in **Ohio** and not in the Deep South, and had the **Ohio** constitution been the measuring stick, the result almost certainly would have been different, as Justice Burton's opinion suggests.

Proposition of Law No. 2:

THE LOWER COURTS ERRED WHEN (1) THE APPELLATE COURT, ADOPTED A NEW CASE-SPECIFIC AND FACT-BASED STANDARD FOR ADJUDICATING BROOM'S UNIQUE AND RARE CONSTITUTIONAL CLAIMS, AND THEN REFUSED TO REMAND THE CASE TO THE TRIAL COURT AND (2) WHEN THE TRIAL COURT DENIED HIM DISCOVERY AND A HEARING.

The State argues that because Broom alleges that his pleadings and factual allegations in the trial court met the deliberate indifference standard that was subsequently adopted by the court of appeals majority, there is no issue of fact to be resolved and no need for a remand to the trial court. State's Brief, p. 29-30. But that is not so. The trial court never applied that standard. Thus, even assuming that the deliberate indifference standard adopted by the court of appeals is correct, Broom was denied due process. U.S. Const. amend. XIV; Ohio Const., art. I, §16.

Moreover, Broom's argument below that he presented enough evidence with his petition for a ruling in his **favor** is hardly a concession by Broom that such evidence is also sufficient for the court to rule **against** him. Nor has Broom ever agreed or conceded that the court may rule against him under the "deliberate indifference" standard imported from conditions of confinement cases, a standard which, in any event, Broom should always be able to meet in this unique context where the state officials are charged with causing the inmate's death against his will and are thus, by virtue of their very job, **required** to be as "indifferent" as humanly possible to the inmate's suffering.

But even if Broom needs additional "facts" to establish "deliberate indifference," such facts were presented by Broom and are in the record. They have been ignored by the State, and were ignored by the appellate court majority. They include:

- Dr. Heath's testimony about the team's demonstrated incompetence and troubling lack of judgment, not just in Broom's execution but in executions that occurred before Broom's, including Clark's and Newton's. See HT Mark Heath, M.D.

(Second Biros Hrg.) at 41-43, 50-55 (Broom Reply/Second Submission, Exh. 1); HT Mark Heath, M.D. (First Biros Hearing) (Broom First Submission, Exh. 8).

- The State's protocol-defiant and lawless decision to summon a non-team member, Carmelita Bautista, to participate in Broom's execution mid-way through, prompting one of the medical team members to think: "**dear God, what is she doing here?**", and Judge Frost to observe that the question demands an answer. Ken Smith Injunction Order, 801 F. Supp. 2d at 650.
- The substantial evidence that many of the problems that occurred in Broom's case had happened before, including as recently as the Clark execution in May 2006 and the Newton execution in May 2007, and yet the State failed to heed the lessons of, or make changes that would address the foreseeable problems encountered during, those difficult and lengthy executions. (See record citations at Broom's Brief at pp. 6, 16 & note 6.) Indeed, the Clark execution was so thoroughly botched, and Clark subjected to such severe pain, that Ohio's performance there rivals if not exceeds Oklahoma's recent botched execution of Clayton Lockett for sheer incompetence and indifference to human suffering.
- The State's inexplicable failure to adopt a back-up plan for humanely accomplishing the delivery of the drugs when IV access to an inmate's peripheral veins was difficult or impossible, as was known to occur from time to time. (Id.)
- The State's failure in preparation for Broom's execution to comply with even the most basic protocol requirements such as conducting all required vein checks. Second Biros Injunction Order at 186 (Cooley (Biros) v. Strickland, 2009 U.S. Dist. LEXIS 122025 at *310).
- Director Collins's admission that key decisions during Broom's execution were made **not** because of any consideration for Broom or the suffering he was enduring, but instead because of Collins's concerns for his team and his fear of the litigation ramifications of actions taken. (T. Collins Depo.. 30-38, 60-72 (Broom First Submission, Exh. 11).)

Proposition of Law No. 3:

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

Contrary to the State's argument, the constitutional prohibition against multiple punishments, as embedded in the double jeopardy clause, has not been whittled down to a meaningless check on whether a challenged punishment is authorized by the legislature or not. U.S. Const. amend. V; Ohio Const. art. I, § 10. Such an unduly narrow reading of the clause is contrary to its history and purpose, and to venerable Supreme Court authority, including Ex Parte Lange, 18 Wall. 163 (1874), North Carolina v. Pearce, 395 U.S. 711 (1969), United States v. DiFrancesco, 449 U.S. 117 (1980), and United States v. Halper, 490 U.S. 435 (1989). These cases have not been overruled and remain part of the controlling law on the meaning and scope of the double jeopardy clause in the context of multiple punishments.

Both of the following principles thus still apply as constitutional limits on multiple punishments arising from the double jeopardy clause: (1) all or part of a maximum permissible punishment having been once endured, need not be endured again for the same offense, and (2) a criminal sentence, once its service has commenced and there is a reasonable expectation of its finality, may not later be increased or augmented without violating the proscription against multiple punishments. Both of these enduring constitutional principles are fully applicable in Broom's case as detailed in Broom's main brief (Broom Brief at 42-47), but totally ignored by the State. And, because it violates these principles for the State to continue to hold Broom under a sentence of death and subject him to a second execution attempt after the State's first attempt failed for no fault of Broom's, he is entitled to relief under the multiple punishments aspects of

the double jeopardy clause.

But even **if** a multiple punishments analysis for double jeopardy purposes is dependent in part on whether the legislature has authorized the challenged punishment, Broom still prevails. Ohio's legislature requires that execution by lethal injection be "quick and painless," and that the execution occur on **the single day** specified in the warrant (in Broom's case, September 15, 2009). (See O.R.C. §2949.22(A), (B); Broom Brief at 47.) There is no legislative authorization for the inmate to run nearly the entire gauntlet a first time, enduring dozens of painful needle sticks and two hours of almost unimaginable physical and psychological pain, up to the brink of the last moments, and then, when the State fails to complete the task, be compelled to endure it all over again on some later date, more goodbyes, more torment, more needle sticks, more pain. Ohio does not permit death by installments.

To the extent the lower courts denied relief on the double jeopardy claim because Broom supposedly "did not experience anything that amounted to 'punishment' for double jeopardy purposes" (State Brief at 35), those courts have misapplied controlling Supreme Court authority and thoroughly disregarded common sense. The "punishment" of a death sentence is more than just the last moment when the drugs are flowing; it involves the time in prison as a condemned prisoner awaiting execution, and all of the associated deprivations unique to a sentence of death, up to and including the actual execution, as detailed in Broom's main brief. (Broom Brief at 44-45.) For all purposes relevant to the double jeopardy analysis, Broom has already been punished up to the last moment. Requiring him to endure a second attempt thus doubles up on his punishment in that he must, **unique to all other death-sentenced prisoners**, endure again that which he has already once endured, and may only be required to once endure. It is not necessary that Broom's experience during the first attempt equate to "torture" (although it did), or involve a

“cut-down,” in order to “count” as “punishment” for double jeopardy purposes, and the State cites no authority for such a drastic diminution of the Fifth Amendment protection.

The State’s reliance on language from the Resweber plurality analogizing, on the one hand, Willie Francis’s situation of an execution following a “failure of equipment” to, on the other, a new trial for error of law that results in a death sentence, also does not diminish Broom’s entitlement to relief on this claim. Not only was the double jeopardy clause not applicable to the states when Resweber was decided, but some of the legal doctrines on which Broom in part relies for his double jeopardy claim were not announced by the Court until many years after Resweber was decided and even into the 1980’s. In any event, the analogy breaks apart when applied in Broom’s case. Broom took no step comparable to seeking review on appeal. But more important, Broom’s case did not involve a “failure of equipment.” To the contrary, the State failed to complete what should have been an easily accomplished task if performed by competent and trained professionals (i.e., promptly obtaining successful access to Broom’s peripheral veins). (See HT Mark Heath, M.D. (Second Biros Hrg.) at 43 (“**And it is my opinion that the veins on Mr. Broom’s arms, other areas of his body, should be easily accessible by a competent team. He is not a person who, if you’d come into our emergency room -- the residents that I train, he is not a person that they would have any problem accessing his veins.**”) (Broom Reply/Second Submission, Exh. 1); see also id. at 41-43, 50-55.) And then, after it should have been apparent the team was not up to the task, they nevertheless spent an unconscionable amount of time subjecting Broom to unnecessary pain and suffering, all of which could have been avoided had the State heeded the suggestion of its own expert, and the lessons of the problematic executions of Joseph Clark and Christopher Newton, by adopting a back-up plan to allow for drug delivery in the event peripheral IV access failed and/or was unreasonably

difficult for the team in a given case, as was **known** to happen from time to time. (Id. at 41-55.) The failure in Broom's case was thus not an "accident," nor a "failure of equipment," but the inevitable result of the State's own indifference, recklessness, arrogance, and hubris.

The State inexplicably castigates Broom for an allegation in his Section 1983 complaint in federal court that there may too have been unique physical characteristics that contributed to the State's inability to obtain IV access. (State Brief at 34-35.) To the extent Broom may have possessed unique physical characteristics complicating venous access, their presence does not excuse the State's failure here. Indeed, such evidence would provide additional support for a conclusion that the failure was **solely** the State's fault and not an innocent misadventure. The State has known **for many years** that it would one day seek to execute Broom by lethal injection utilizing a protocol necessitating successful IV access to Broom's peripheral veins. The State thus had a duty to identify and prepare for whatever unique physical or other characteristics Broom possessed that might make peripheral IV access on Broom difficult to achieve and/or maintain. The State failed in its duty to identify any unique issues Broom possessed, failed to make any preparations to address them, failed to conduct required venous assessments on the day of the execution designed to identify them, failed to heed the lessons of the Clark and Newton executions, and failed to have any back-up plan in place to allow for prompt and humane completion of the sentence in the event peripheral IV access could not be achieved and/or maintained, all as alleged in the petition and detailed in the exhibits Broom submitted in support.

Finally, the State's hypotheticals and analogies are off the mark. Broom's position isn't that he would have to be "set free" in a situation like that suggested by the State's prison-transfer hypothetical. (State's Brief, p.35.) But, in the event of a transfer in such a hypothetical case, Broom **would** have to be given credit for all or part of the sentence he already served at the first

prison, and his sentence may not be increased or augmented upon transfer. The State's retrial analogy also falls flat. A defendant subjected to retrial, and convicted again, may not be required to serve again any part of the sentence he has already served. See, e.g., Pearce, 395 U.S. at 717.

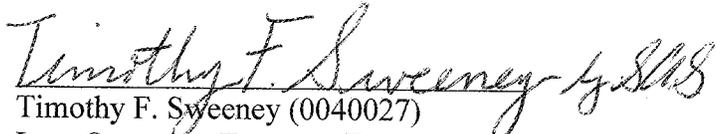
Conclusion

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

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF OF APPELLANT ROMELL BROOM was served by regular U.S. Mail, first-class postage pre-paid on Timothy J. McGinty, Katherine Mullin, and Allan Regas, all of the Cuyahoga County Prosecuting Attorney's Office, 1200 Ontario Street, 8th Floor, Cleveland, OH 44113, this 20th day of October, 2014.


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