CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2020 TERM

ROMELL BROOM,

Petitioner,

vs.

TIM SHOOP, Warden,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE IS SCHEDULED MARCH 16, 2022)

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CAPITAL CASE

QUESTION PRESENTED

Is *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) the clearly established United States Supreme Court precedent, for purposes of 28 U.S.C. §2254(d), on whether a second execution attempt on the same inmate is a violation of the Eighth Amendment?

DIRECTLY RELATED CASES

Broom v. Shoop, United States Court of Appeals for the Sixth Circuit, No. 19-3356, June 23, 2020.

Broom v. Jenkins, United States District Court for the Northern District of Ohio, No. 1:10 CV 2058, March 21, 2019.

Broom v. Ohio, United States Supreme Court, No. 16-5580, January 6, 2017, rehearing denied February 17, 2017.

State v. Broom, Supreme Court of Ohio, No. 2012-0852, March 16, 2016.

State v. Broom, Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, No. 96747, February 16, 2012.

Broom v. Bobby, United States Supreme Court, No. 10-9247, May 2, 2011.

State v. Broom, Cuyahoga County, Ohio, Court of Common Pleas, No. CR-196643, April 7, 2011.

In re Broom, Supreme Court of Ohio, No. 2010-1609, December 2, 2010.

Broom v. Bobby, United States District Court for the Northern District of Ohio, No. 1:10 CV 2058, November 18, 2010.

Broom v. Strickland, United States District Court for the Southern District of Ohio, No. 2:03-CV-823, August 27, 2010.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Romell Broom requests the issuance of a writ of certiorari for review of the judgment of the Sixth Circuit Court of Appeals in *Broom v. Shoop*, 963 F.3d 500 (6th Cir. 2020).

OPINIONS BELOW

The Sixth Circuit decision for which Broom seeks a writ of certiorari is reported at *Broom v. Shoop*, 963 F.3d 500 (6th Cir. 2020), and also appears at 2020 U.S. App. LEXIS 19479, 2020 FED App. 0188P (6th Cir.), and 2020 WL 3428074 (June 23, 2020). [Appendix at APPX 0001]

The decision of the United States District Court for the Northern District of Ohio appears at *Broom v. Jenkins*, 2019 U.S. Dist. LEXIS 47128; 2019 WL 1299846 (March 21, 2019). [APPX. 0021]

This court's denial of certiorari for review of the Ohio Supreme Court's decision is reported at *Broom v. Ohio*, 137 S. Ct. 590, 196 L. Ed. 2d 486, 85 U.S.L.W. 3288 (2016), and also appears at 2016 U.S. LEXIS 7482, and 2016 WL 4381115 (December 12, 2016). [APPX 0127] Rehearing was denied at 137 S. Ct. 1138, 197 L. Ed. 2d 238, 85 U.S.L.W. 339, 2017 U.S. LEXIS 948, 2017 WL 670677 (February 21, 2017). [APPX 0128]

The Supreme Court of Ohio's decision is reported at *State v. Broom*, 146 Ohio St. 3d 60, 51 N.E.3d 620, 2016-Ohio-1028, and is also at 2016 Ohio LEXIS 730 (March 16, 2016). [APPX. 0093]

The Court of Appeals of Ohio, Eighth Appellate District, decision is reported at *State v. Broom*, 2012-Ohio-587, and also appears at 2012 Ohio App. LEXIS 511, 2012 WL 504504 (February 16, 2012).

The trial court's decision, *State v. Broom*, Cuyahoga County, Ohio, Court of Common Pleas, No. CR-196643 (April 7, 2011) is unreported.

The decision of the United States District Court for the Northern District of Ohio holding Broom's federal habeas corpus case in abeyance to exhaust state remedies is at *Broom v. Bobby*, 2010 U.S. Dist. LEXIS 126263, 2010 WL 4806820 (November 18, 2010).

This court's denial of certiorari is at *Broom v. Bobby*, 563 U.S. 977, 131 S. Ct. 2878, 179 L. Ed. 2d 1193 (2011).

The Ohio Supreme Court's dismissal of Broom's state habeas proceeding is reported at *In re Broom*, 127 Ohio St. 3d 1450, 2010-Ohio-5836, 937 N.E.2d 1039 (2010).

The decision of the United States District Court for the Southern District of Ohio, holding that Broom's Eighth Amendment claim sounds in habeas rather than as a civil rights action under 42 U.S.C. § 1983, appears at *Broom v. Strickland*, 2010 U.S. Dist. LEXIS 88811, 2010 WL 3447741 (S.D. Ohio Aug. 27, 2010).

JURISDICTION

The Sixth Circuit entered judgment on June 23, 2020. [APPX 0001] The time for filing this petition was extended to 150 days by this court's COVID-19 Order of March 19, 2020 making this petition due no later than November 20, 2020. (Oder List 589 U.S.) This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VIII, which provides:

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

U.S. Const. amend. XIV, § 1, which, in pertinent part, provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 2254. [APPX 0129]

STATEMENT OF THE CASE

Romell Broom is a 64-year-old African American man who was sentenced to death when he was 29 years old. Broom's death sentence arises from 1985 convictions in Cuyahoga County, Ohio, for kidnapping, rape, and murder. *State v. Broom*, 40 Ohio St. 3d 277, 533 N.E.2d 682 (1988). Following direct appeal, state post-conviction, federal habeas corpus, and additional state post-conviction proceedings, Broom's execution was set to take place on September 15, 2009. On that date, the State of Ohio attempted to execute Broom under the State's then extant lethal injection protocol.[1] The execution process required that the State establish access to Broom's veins with IV needles, install IV catheters into the accessed veins, attach receptacles to the IV's to keep the veins "open" so that the fatal drugs could be delivered to the body, and monitor and maintain that IV access until death. Protocol Number 01-COM-11, VI, B. 4. b. (Eff. May 14, 2009).

Ohio had a history of problems with lethal injection executions and particularly with establishing and maintaining IV access. The State acknowledged that the execution protocol in effect at the time of Broom's attempted execution, was "designed to correct a problem that emerged during a prior execution, . . . in which the State also had trouble running an IV line on the inmate." State's Ohio Sp. Ct. Brf. at p. 14. The protocol included training requirements for execution team members. Even so, execution team members failed to attend required trainings and their supervisors excused them. (P. Kerns Depo (Broom First Submission, Exh. 13) at 163-67; Second Biros Injunction Order at 186-87 (Broom First Submission, Exh. 1); *Cooey (Smith) v. Kasich*, 801 F. Supp. 2d 623, 633-35 (S.D. Ohio 2011)).

The protocol required that three vein checks be conducted in the twenty-four hours before

[1] The protocol has been altered several times since. The current protocol was adopted on October 7, 2016. The administrative process used to adopt the execution protocol is currently under review in the Ohio Supreme Court in *O'Neal v. State*, Case Nos. 19 AP 260 and 19 AP 289.

execution was scheduled. The first of these vein checks was conducted and showed that it was uncertain that IV access could be established in Broom's left arm. A second check was conducted with no indication of the results. The third check was omitted. Without regard to these omissions, the execution attempt went forward.

The Ohio Supreme Court found the following facts regarding the events that took place once the execution process began:

> **{¶ 4}** At 1:59 p.m. on September 15, the warden finished reading the death warrant to Broom. One minute later, Team Members 9 (a female) and 21 (a male) entered the holding cell to prepare the catheter sites.
> **{¶ 5}** Team Member 9 made three attempts to insert a catheter into Broom's left arm but was unable to access a vein. At the same time, Team Member 21 made three unsuccessful stabs into Broom's right arm. After a short break, Member 9 made two more insertions, the second of which caused Broom to scream aloud from the pain.
> **{¶ 6}** Member 21 managed to insert the IV catheter into a vein, but then he lost the vein and blood began running down Broom's arm. When that occurred, Member 9 rushed out of the room, saying "no" when a security officer asked if she was okay.
> **{¶ 7}** Director Voorhies testified that he could tell there was a problem in the first 10 to 15 minutes. Warden Phillip Kerns saw the team make six or seven attempts on Broom's veins during the same 10- to-15-minute period. According to Kerns, the team members did hit veins, but as soon as they started the saline drip, the vein would bulge, making it unusable.
> **{¶ 8}** About 15 minutes into the process, Kerns and Voorhies saw Member 9 leave the holding cell. Voorhies described her as sweating "profusely" and heard her say that she and Member 21 had both accessed veins, but the veins "blew." Member 17 then entered the holding cell and made "several attempts" to access a vein in Broom's left arm. Simultaneously, Member 21 continued his attempts on Broom's right arm.
> **{¶ 9}** Terry Collins, who was then the director of the ODRC, called a break about 45 minutes into the process to consult with the medical team. The break lasted 20 to 25 minutes. The medical team reported that they were gaining IV access but could not sustain it when they tried to run saline through the line. They expressed "clear concern" about whether they would get usable veins. But because they said that there was a reasonable chance of establishing venous access, the decision was made to continue.
> **{¶ 10}** By this time, Broom was in a great deal of pain from the puncture wounds, which made it difficult for him to move or stretch his arms. The second session commenced with three medical team members—9, 17, and 21—examining Broom's arms and hands for possible injection sites. For the first time, they also began examining areas around and above his elbow as well as his legs. They also reused previous insertion sites, and as they continued inserting catheter needles into

> already swollen and bruised sites, Broom covered his eyes and began to cry from the pain. Director Voorhies remarked that he had never before seen an inmate cry during the process of venous access.
>
> **{¶ 11}** After another ten minutes or so, Warden Kerns asked a nurse to contact the Lucasville physician to see if she would assess Broom's veins and offer advice about finding a suitable vein. Broom later stated that he saw "an Asian woman," whom he erroneously identified as "the head nurse," enter the chamber. Someone handed her a needle, and when she inserted it, she struck bone, and Broom screamed from the pain. At the same time, another team member was attempting to access a vein in Broom's right ankle.
>
> **{¶ 12}** The Lucasville physician confirmed that she came to Broom's cell, examined his foot, and made one unsuccessful attempt to insert a needle but quickly concluded that the effort would not work. By doing so, she disobeyed the warden's express instructions to observe only and not get involved. The physician examined Broom's foot but could see no other vein.
>
> **{¶ 13}** After the physician departed, the medical team continued trying to establish an IV line for another five to ten minutes. In all, the second session lasted approximately 35 to 40 minutes.
>
> **{¶ 14}** During the second break, the medical team advised that even if they successfully accessed a vein, they were not confident that the site would remain viable throughout the execution process. The governor's office had signaled its willingness to grant a reprieve, and so the decision was made to halt the execution for the day.
>
> **{¶ 15}** Dr. Jonathan Groner examined and photographed Broom three or four days afterward. The photographs show 18 injection sites: one on each bicep, four on his left antecubital (forearm), three on his right antecubital, three on his left wrist, one on the back of his left hand, three on the back of his right hand, and one on each ankle. Prison officials later confirmed that he was stuck at least 18 times.
>
> **{¶ 16}** Dr. Mark Heath met with Broom one week after the event. Dr. Heath observed "considerable bruising" and a lot of "deep and superficial" tissue damage consistent with multiple probing. Dr. Heath also posited that the actual number of catheter insertions was much higher than the number of needle marks, because according to what Broom told him, the medical team would withdraw the catheter partway and then reinsert it at a different angle, a procedure known as "fishing."

State v. Broom, 146 Ohio St. 3d at 63. [APPX at 0094-0096]

During the execution attempt, team members were allowed to leave the room at will (as did Team Member 9) and took two group "breaks" but Boom got no "break." Even when the execution team stopped the needle jabs for their breaks, Broom was left in the cell, under guard, in pain, and knowing the team would return. Broom never got a break from the relentless reality that he was confined in a room where every person with whom he could have contact was there for the

specific purpose of killing him and the expectation that by the end of the day he would be dead.

During the second staff break, Ohio Department of Rehabilitation and Correction Director Collins contacted Ohio Governor Ted Strickland and recommended that the Governor grant a reprieve to stop Broom's execution. A one-week reprieve was granted. Counsel Shank met with Broom and delivered a copy of the reprieve. Broom was still in pain. Facing, a new execution date, Broom was traumatized and in anguish from concern about the next execution attempt. (Broom Execution Timeline, Broom First Submission, Exh. 20.)

Broom filed a civil rights action under 42 U.S.C. §1983 in the federal district court for the Southern District of Ohio on September 18, 2009. That court granted a preliminary injunction staying Broom's second execution then scheduled for September 22, 2009. On August 27, 2010, the federal district court dismissed without prejudice Broom's Eighth and Fourteenth Amendment claim that the State could not attempt to execute him a second time, holding that the claim was more properly raised in a habeas corpus action. *Broom v. Strickland*, 2010 U.S. Dist. LEXIS 88811, *9-12 (S.D. Ohio Aug. 27, 2010). The district court retained jurisdiction of Broom's claims based on the unconstitutionality of Ohio's lethal injection protocol in his §1983 action and those claims are still pending. *In Re: Ohio Execution Protocol Lit.*, No. 2011-cv-1016 (S.D. Ohio)

The appropriate vehicle for seeking relief in the Ohio courts was unclear and Broom therefore pursued several different remedies in different courts. Broom filed a petition for state habeas corpus relief in the Ohio Supreme Court. The case was voluntarily dismissed without prejudice. *In the Matter of: Romell Broom*, Ohio Supreme Ct., No. 2009-1686 (Nov. 4, 2009)

Broom also filed a habeas corpus petition in the Federal District Court for the Northern District of Ohio raising his Eighth Amendment claim. That case was held in abeyance pending resolution of state proceedings. *Broom v. Bobby*, 2010 U.S. Dist. LEXIS 126263; 2010 WL 4806820 (Nov. 18, 2010).

Broom again sought state habeas review in the Ohio Supreme Court, but his petition was dismissed *sua sponte* by the court. *In re Broom*, 127 Ohio St. 3d 1450 (2011). This Court denied review. *Broom v. Bobby*, 563 U.S. 977 (2011).

Broom filed a petition for state post-conviction relief and declaratory judgment in the Cuyahoga County, Ohio, Court of Common Pleas arguing that he had been subjected to a cruel and unusual punishment on September 15, 2009, and that as a result the State could not try again to execute him and that regardless of whether the first execution attempt was cruel and unusual, a second attempt would be. The trial court denied relief on April 7, 2011. The Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, affirmed on February 16, 2012, in a two to one decision. *State v. Broom*, 2012 Ohio 587 (2012). The Ohio Supreme Court granted discretionary review, and in a four to three decision, denied relief on March 16, 2016. *State v. Broom*, 146 Ohio St. 3d 60 (2016).

The Ohio Supreme Court majority found that nothing that happened in the September 2009 execution attempt had any impact on whether a second execution attempt would be cruel and unusual. It held that "the pain and emotional trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment," and that "[b]ased on *Resweber*, . . . there is no per se prohibition against a second execution attempt based on the Cruel and Unusual Punishments Clause of the Eighth Amendment." 146 Ohio St. 3d at 71. The court went on to decide, not whether the trauma already inflicted on Broom would cause a second execution attempt to superadd to Broom's punishment the "ever increasing fear and distress" found in *Trop v. Dulles*, 356 U.S. 86, 102 (1958) to violate the Eighth Amendment, but instead conducted an analysis under *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross,* 576 U.S. 863 (2015) to determine whether "the state in carrying out a second attempt is likely to violate its protocol and

cause severe pain." *Id*. at 73. The court found, based on evidence outside the record, that it would not. *Id*.

But Broom had not presented a method-of-execution claim to the state court. *State v. Broom*, 146 Ohio St.3d at 70. Broom had instead urged that a second execution attempt would be cruel and unusual under *Trop v. Dulles* because, having endured the process on September 15, 2009, Broom could not face a second execution attempt as if it were the first. He could not ignore what he had already endured. Causing him to face another execution attempt imposes on Broom a unique and uncalled for psychological terror because of what he has already suffered in the first attempt and imposes ever increasing fear and distress beyond what any other condemned prisoner faces as another execution attempt approaches. Broom Ohio Sp. Ct. Brief, at pp. 13-14, 26-28.

Dissenting Ohio Supreme Court Justice O'Neill, found that "Any fair reading of the record of the first execution attempt shows that Broom was actually tortured the first time." *State v. Broom*, 146 Ohio St. 3d at 82. He rejected the majority's reliance on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), saying that, "Despite the quirk of constitutional theory that the judgment of the *Francis* court rests on, five of the justices were able to recognize the second execution attempt for what it was: torture." *State v. Broom*, 146 Ohio St. 3d at 84. Justice O'Neill saw a second execution attempt as "precisely the sort of 'lingering death' that the United States Supreme Court recognized as cruel and unusual within the meaning of the Eighth Amendment 125 years ago." *State v. Broom*, 146 Ohio St. 3d at 84.

Dissenting Justices French and Pfeifer, rejected the majority's conclusion that under *Baze* and *Glossip* Broom had failed to establish that there is substantial risk that a second execution attempt presents an "objectively intolerable risk of harm," and said the record evidence shows that "the state has repeatedly and predictably had problems establishing and maintaining access to inmates' veins, that these problems are the result of medical incompetence on the part of the

execution team members . . . and that the incompetence of the execution staff makes it more likely that these problems will recur in future executions." *State v. Broom*, 146 Ohio St. 3d at 76. Judges French and Pfeifer criticized the majority's reliance on information from outside the record, found the outside evidence unpersuasive, said "The majority is effectively shifting the burden of proof by faulting Broom for not rebutting evidence that the state did not even introduce into the record," and would have ordered a remand for an evidentiary hearing. *State v. Broom*, 146 Ohio St. 3d at 80.

Following exhaustion of his state court remedies, Broom returned to federal court to litigate the habeas case that had been held in abeyance. The federal district court had jurisdiction under 28 U.S.C § 2254. In denying relief, the district court found that though "*Resweber* was decided more than seventy years ago, it still 'squarely addresses' the issue in this case: whether a second execution attempt is a cruel and unusual punishment under the Eighth Amendment." *Broom v. Jenkins*, 2019 U.S. Dist. LEXIS 47128, *56 (March 21, 2019). [APPX at 0062]

On appeal, the Sixth Circuit rejected *Trop v. Dulles,* 356 U.S. 86 (1958) as the clearly established Supreme Court precedent that determines whether a second execution attempt on Broom will violate the Eighth Amendment. *Broom v. Shoop*, 963 F.3d 500, 509 (6th Cir. 2020). It found instead that *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) is the controlling Eighth Amendment precedent. *Id*. at 510. The Sixth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court applied the incorrect case when it relied on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) as the federal precedent governing Petitioner Broom's claim that the Eighth Amendment's prohibition against cruel and unusual punishments bars Ohio's second attempt to execute him. There is no Eighth Amendment decision in *Francis v. Resweber*.

The Ohio Supreme Court also failed to apply the correct Eighth Amendment precedent established by this court in *Trop v. Dulles*, 356 U.S. 86 (1958). In *Trop*, the court held that the Eighth Amendment bars punishments that subject prisoners to ever-increasing fear and distress. The Ohio Supreme Court addressed Broom's claim solely on the basis of whether a second execution attempt would cause severe pain, ignoring in doing so the pain and trauma Broom suffered in the first attempt and the way in which it exacerbates the fear and distress of a second execution attempt. The Ohio Supreme Court thus was unreasonable in its application of the firmly established federal law. 28 U.S.C. 2254(d). By disregarding the psychological cruelty of forcing Broom to face a second execution attempt, the Ohio Supreme Court's decision on Broom's Eighth Amendment claim was an unreasonable determination of fact.

The Sixth Circuit was wrong in its analysis of *Francis v. Resweber* and *Trop v. Dulles.* It was also wrong in affording AEDPA deference to the Ohio Supreme Court. Broom's claim should have been reviewed *de novo*. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). On *de novo* review, and applying the correct Supreme Court precedent, Broom is entitled to relief on the merits of his Eighth Amendment claim, a point some of the three judges on the Sixth Circuit panel appeared willing to accept. *Broom v. Shoop*, 963 F.3d at 511 ("Broom makes a compelling case on the merits, one that some members of the panel might be tempted to accept were this case before us on direct review").

Louisiana ex rel. Francis v. Resweber Is Not The Clearly Established Supreme Court Precedent On Whether a Second Execution Attempt on Broom Will Be Cruel And Unusual Under the Eighth Amendment.

Broom is entitled to habeas relief on his Eighth Amendment claim under *Trop v. Dulles*, 356 U.S. 86 (1958). By relying on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (hereinafter *Francis v. Resweber*) the Ohio Supreme Court reached a decision that was contrary to the applicable United States Supreme Court precedent in *Trop v. Dulles*.

A. *Francis v. Resweber* is not the clearly established law for determining when a second execution attempt will be a cruel and unusual punishment in violation of the Eighth Amendment.

The Ohio Supreme Court held, regarding Broom's Eighth Amendment claim, that, "Based on *Resweber*, . . . there is no per se prohibition against a second execution attempt based on the Cruel and Unusual Punishments Clause of the Eighth Amendment." *State v. Broom*, 146 Ohio St. 3d 60, 71 (2016). In Broom's habeas proceedings, the federal district court and Sixth Circuit agreed and thus found that the Ohio Supreme Court's use of *Francis v. Resweber* to decide Broom's Eighth Amendment claim was not an unreasonable application of clearly established law under 28 U.S.C. 2254(d)(1). *Broom v. Jenkins*, 2019 U.S. Dist. LEXIS 47128, *55-56 (N.D. Ohio March 21, 2019); *Broom v. Shoop*, 963 F.3d at 511-512.

1. There was no single Eighth Amendment rationale adopted by a majority of the justices in *Francis v. Resweber*.

Francis v. Resweber "is a plurality decision in which there were not five justices who found that a second execution attempt did not offend the Eighth Amendment." *Broom v. Bobby*, 2010 U.S. Dist. LEXIS 126263, *8-9 (N.D. Ohio November 18, 2010) citing *Broom v. Strickland,* 2010 U.S. Dist. LEXIS 88811, 2010 WL 3447741, at *2 (S.D. Ohio Aug. 27, 2010). *Francis v. Resweber* is a 4-1-4 decision in which four justices assumed but did not decide that the Eighth Amendment applied to the states but found that even if it did, a second execution attempt on

Willie Francis would not be cruel and unusual, 329 U.S. 459, 462, 464 (plurality); one justice said the Eighth Amendment did not apply to the states but that a second attempt to kill Willie Francis did not offend Fourteenth Amendment notions of due process, *id*. at 469, 471-472 (Frankfurter J., concurring); and four justices, dissenting, would have remanded the case for additional fact finding in order to determine whether a second execution attempt would violate Fourteenth Amendment due process protections. *Id*. at 472 (Burton, J., joined by Douglas, Murphy, and Rutledge, JJ., dissenting).

Justice Frankfurter cast the single deciding vote in *Francis v. Resweber* based on his belief that the Eighth Amendment was not applicable to the states saying, "the penological policy of a State is not to be tested by the scope of the Eighth Amendment." 329 U.S. at 470. (Since then, this court has held that the Eighth Amendment does apply to the states. *Robinson v. California*, 370 U.S. 660 (1962)). That left, in Justice Frankfurter's analysis, only the protection of Fourteenth Amendment due process as a possible bar to another attempt to execute Willie Francis. Justice Frankfurter found that the Fourteenth Amendment did not reach "the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless . . . 'in doing so, it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 469. He concluded that a second attempt to kill Willie Francis did not offend the "Due Process Clause" and allowed the execution to go forward. *Id*. at 471-472.

The *Francis v. Resweber* plurality agreed that the Eighth Amendment did not apply but assumed that an Eighth Amendment violation would also violate "the due process clause of the Fourteenth Amendment." *Id*. at 462. It then determined that, "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment . . . 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" and was not a "denial of due process because of cruelty." *Id*. at 464.

The plurality and Justice Frankfurter agreed that the Eighth Amendment did not apply to the states and that a second execution attempt on Willie Francis did not violate the Due Process Clause of the Fourteenth Amendment. The Ohio Supreme Court's application of *Francis v. Resweber* as a precedent for whether the Eighth Amendment barred a second execution attempt on Broom was unreasonable because *Francis v. Resweber* makes no Eighth Amendment decision on the use of a second execution attempt.

2. Justice Frankfurter's concurrence limits the reach of *Francis v. Resweber* to the Fourteenth Amendment issues raised by Willie Francis. The concurrence does not apply the Eighth Amendment.

Justice Frankfurter's concurrence does not address whether a second execution attempt violates the Eighth Amendment. His concurrence is based only on whether the Fourteenth Amendment's Due Process Clause prohibited a second execution attempt on Willie Francis. Even if the plurality's assumption that an Eighth Amendment violation would also violate due process is viewed as an Eighth Amendment ruling, Justice Frankfurter did not concur in that view. Justice Frankfurter stated plainly that he did not view the provisions of the first eight amendments as equivalent to or subsumed within the Fourteenth Amendment. 329 U.S. at 467-469. Thus, the holding in *Francis v. Resweber* is limited to Justice Frankfurter's conclusion that a second execution attempt would not violate the Due Process Clause of the Fourteenth Amendment.

This court explained in *Marks v. United States*, 430 U.S. 188 (1977), how a plurality decision is to be applied.

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ..."

Id. at 193. The points of agreement between the four-member plurality and Justice Frankfurter are that the Eighth Amendment was not applicable to the states and that the Due Process Clause of the Fourteenth Amendment did not bar a second execution attempt under the circumstances faced by Willie Francis. The Ohio Supreme Court did not apply *Francis v. Resweber* on the basis of its narrowest ground but instead treated *Francis v. Resweber* as if it were a majority decision that held that a second execution attempt does not violate the Eighth Amendment. Thus, the Ohio Supreme Court's application of *Francis v. Resweber* to decide Broom's Eighth Amendment claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Moreover, though Broom relied on *Marks*, Ohio Sp. Ct. Brief, p. 26, the Ohio Supreme Court ignored its holding and treated the four vote plurality opinion in *Francis v. Resweber* as if it were a majority opinion, thus also failing to follow the clearly established Supreme Court precedent of *Marks*.

B. *Trop v. Dulles* is the firmly established United States Supreme Court precedent applicable to Broom's Eighth Amendment claim.

In *Trop v. Dulles*, 356 U.S. 86 (1958), the United States Supreme Court held that "denationalization as a punishment" violated the Eighth Amendment even though it involved "no physical mistreatment" because "[i]t subjects the individual to a fate of ever-increasing fear and distress." *Id*. at 101-02. Thus, the constitutional law firmly established in *Trop* is that a punishment that "subjects the individual to a fate of ever-increasing fear and distress" violates the Eighth Amendment. 356 U.S. at 100. Also, firmly established in *Trop* are the principles that "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man" and "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

Broom's claim in the Ohio Supreme Court was that the first attempt to execute him was

excruciatingly painful, terrifying, and the result of deliberate state actions and indifference and that, regardless of whether the first attempt was cruel and unusual, a second attempt would be due to the pain and trauma he had already endured and its impact on any future execution attempt. Broom's Ohio Sp. Ct. Brief, p. 14. He relied on *Trop v. Dulles* for the proposition that the psychological and emotional trauma he suffered, and that he suffers and will suffer awaiting and enduring a next attempt, makes that second attempt cruel and unusual. The Ohio Supreme Court relied on *Francis v. Resweber* for the proposition that "there is no per se prohibition against a second execution attempt based on the *Cruel and Unusual Punishments Clause of the Eighth Amendment*." *State v. Broom*, ¶ 46. The court then made Broom's claim into a stand-alone method of execution claim under *Baze v. Rees*, 553 U.S. 35 (2008) and *Glossip v. Gross,* 576 U.S. 863 (2015). *Id*. at ¶ 47. The Ohio Supreme Court determined, based on evidence from outside the record, that Broom had failed to show "that the state in carrying out a second attempt is likely to violate its protocol and cause severe pain." *Id*. at ¶ 53. It did not address Broom's claim that the pain and trauma from the first execution attempt would make any future execution attempt cruel and unusual and thus never applied *Trop v. Dulles* to determine whether the ever increasing fear and distress, entailed in a second execution attempt, violated the Eighth Amendment.

The federal district court found that *Trop v. Dulles* is not clearly established precedent for 28 U.S.C. 2254(d)(1) purposes and said "*Trop*'s principles, however fundamental to Eighth Amendment jurisprudence, do not address 'the specific question presented by this case' and cannot be used to guide habeas courts in reviewing a state-court decision under § 2254(d)(1)." *Broom v. Jenkins*, 2019 U.S. Dist. LEXIS 47128, * 57 (March 21, 2019).

The Sixth Circuit found that *Trop v. Dulles* does not "squarely address" the issues in this case and that *Francis v. Resweber* does. *Broom v. Shoop*, 963 F.3d at 509-510.

As is addressed above, the *Francis v. Resweber* holding does not touch on Broom's Eighth Amendment claim. *Trop v. Dulles*, on the other hand, specifically addresses the critically important fact that the emotional/psychological impact of a punishment that results in "ever-increasing fear" does violate the Eighth Amendment.

The Sixth Circuit's view that *Trop*'s Eighth Amendment requirements are not specific enough to apply to Broom is in error. "[T]he lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). "Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough*, 541 U.S. at 666. The principle that the Eighth Amendment prohibition against cruel and unusual punishments includes punishments that result in "ever-increasing fear and distress" is one of these fundamental principles. It should not matter what the particular punishment is; if the impact is the same ever-increasing fear and distress then the principle must be applied. The character of the punishment disallowed by the Eighth Amendment is specific and clear in *Trop v. Dulles*. The fact that Broom faces ever-increasing fear and distress is clear in this case. The punishment at issue in *Trop v. Dulles* was denationalization and the psychological trauma at issue was the ever-increasing fear and distress associated with being stateless. *Trop*, 356 U.S. at 102. The punishment at issue in Broom's case is execution after a failed, torturous, and traumatic execution attempt and the ever-increasing fear and distress that comes from awaiting and facing the executioner again. Different punishments but with the same unconstitutional defect must be addressed by applying the same constitutional principle.

C. The state court and the Sixth Circuit misapprehended the clearly established Eighth Amendment law reflected in *Trop v. Dulles,* 356 U.S. 86 (1958), and *Robinson v. California*, 370 U.S. 660 (1962) that is applicable to and determinative of Broom's rare constitutional claim.

This Court's modern Eighth Amendment cases applying the cruel and unusual punishments clause, beginning at least with *Trop v. Dulles*, 356 U.S. 86 (1958) and *Robinson v. California*, 370 U.S.660 (1962), establish the fundamental principles applicable to the rare no-multiple-execution-attempts claim which Broom presents: the Eighth Amendment applies and it prohibits punishments that inflict ever-increasing fear and distress.

The Sixth Circuit found that *Francis v. Resweber* is the "clearly established" Supreme Court precedent for addressing Broom's Eighth Amendment claim. In doing so, the Sixth Circuit found in error that the Ohio Supreme Court had not unreasonably applied Federal law. The Sixth Circuit's decision misapplied this Court's AEDPA precedent on the meaning and scope of "clearly established federal law." As is discussed above, *Francis v. Resweber* does not have an Eighth Amendment holding.

In deciding to apply *Francis v. Resweber*, the Sixth Circuit relied on one line of AEDPA precedent, which holds that "clearly established law" for AEDPA's purposes includes "only the holdings, as opposed to the dicta, of this Court's decisions," when expressed in a decision that "squarely addresses the issue in [the] case," and which disallows "'abstract' constitutional principles, or dicta more broadly," to suffice as "clearly established law" for these purposes. *Broom v. Shoop*, 963 F.3d at 509-10 (citing *Wright v. Van Patten*, 552 U.S. 120, 125 (2008), *Lopez v. Smith*, 574 U.S. 1, 6 (2014), and *White v. Woodall*, 572 U.S. 415, 419 (2014)).

Applying this line of authority, the Sixth Cicuit concluded that *Francis v. Resweber* is the "only Supreme Court precedent to address the issue presented by this case—the constitutionalilty of a second execution attempt after a botched first attempt—[and accordingly] was the only

Supreme Court precedent capable of providing a clear Eighth Amendment holding for the Ohio Supreme Court to follow." *Broom v. Shoop*, 963 F.3d at 10. This reasoning ignores the fact that *Francis v. Resweber* does not "squarely address the issue" in Broom's case: whether the **Eighth Amendment** prohibits a second execution attempt under the facts in Broom's case. *Francis v. Resweber* does not address the Eighth Amendment issue at all. The broad similarity in facts—a first failed execution attempt—does not change the fact that these cases are based on different constitutional provisions. The general similarity in facts led the courts to overlook the different issues underlying Broom's and Francis's claims; the Eighth and Fourteenth Amendments.

In its focus on the fact that Broom's case and *Francis v. Resweber* each involved a failed execution attempt, the Sixth Circuit disregarded another line of this Court's AEDPA authority which requires the application of *Trop v. Dulles* to Broom's case. This line of cases, noted above, recognizes that the absence of a Supreme Court decision on "nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law," *Marshall v. Rodgers*, 569 U.S. at 62, and that some constitutional principles "are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough*, 541 U.S. at 666-67. When two or more relevant Supreme Court decisions set out fundamental principles whose application to the particular factual setting should likewise be without doubt, the AEDPA inquiry, as to what constitutes "clearly established federal law," is not reduced to an *either/or* proposition. Both rules must be applied: Where "two (or more) legal rules considered together would dictate a particular outcome, a state court unreasonably applies the law when it holds otherwise." *White v. Woodall*, 572 U.S. at 432-33 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ) (citing *Harrington v. Richter*, 562 U.S. 86 (2011)).

This second line of authority is more aptly applicable to Broom's Eighth Amendment claim. *Trop* and *Robinson* establish the fundamental principles of clearly established federal law for Broom's rare no-multiple-attempts sentencing claim in the death penalty context. In either event, Broom is entitled to habeas relief because his claim, on *de novo* review, is meritorious under those controlling fundamental principles of clearly established federal law.

D. The combination of the holdings in *Trop* and *Robinson* establish the fundamental principles of clearly established federal law for Broom's rare no-multiple-attempts sentencing claim.

This Court should recognize *Trop* and *Robinson* as the clearly established federal law applicable to Broom's claim. The Sixth Circuit erred in holding otherwise and in deferring to an Ohio state court decision which erroneously relied on *Francis v. Resweber* as the governing federal law for Broom's Eighth Amendment constitutional claim.

1. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) made it clear that the psychological impact of a punishment that imposed ever-increasing fear and distress is cruel under the Eighth Amendment.

Trop held that "denationalization as a punishment" violated the Eighth Amendment even though it involved "no physical mistreatment" because "[i]t subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 101-02. Broom is undergoing exactly that penalty due to the trauma and pain he suffered in Ohio's first effort to kill him.

Trop also firmly established the principles that "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man" ***and*** "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. These fundamental principles have been affirmed time and again. *See, e.g., Hall v. Florida*, 572 U.S. 701, 708 (2014) ("The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' To enforce the

Constitution's protection of human dignity, this Court looks to the 'evolving standards of decency that mark the progress of a maturing society.'"). There was no dignity in Ohio's first execution attempt where the State purposely disregarded its own rules when supervisors approved execution team members' missed training sessions, required vein checks were skipped, efforts to establish IV lines were so inept that an established line was "accidently" pulled out by an execution team member, Broom's blood was spurting from injured veins, a stranger was called in to assist and stabbed Broom's ankle bone, and the process was so painful that Broom wept and cried out in pain. Subjecting Broom to another attempt cannot dignify the first attempt and does not reflect the human dignity required by the Eighth Amendment.

Instead of applying this clearly established precedent to preclude a second execution attempt on Broom, the Ohio Supreme Court relied on the *Francis v. Resweber* plurality's 4-1-4 rejection of Willie Francis's claim of psychological cruelty to decide that Broom likewise faces no cruel and unusual punishment in being again subjected to execution. *State v. Broom*, 146 Ohio St. 3d at 70-71. But the Ohio Supreme Court failed to consider that Ohio's second attempt will subject Broom to ever-increasing fear and distress, and failed to consider and apply the Eighth Amendment's central protection of human dignity in the context of a second attempt to carry out a death sentence. Understanding of the impact of trauma, and the corresponding standards of decency in dealing with those who have suffered trauma, have changed since the plurality in *Francis v. Resweber* said a second execution attempt, "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." 329 U.S. at 464.

2. *Robinson v. California*, 370 U.S.660 (1962) made *Trop v. Dulles*, 356 U.S. 86 (1958) applicable to the states.

Robinson firmly established that the Eighth Amendment's proscription against cruel and unusual punishments binds the states as well as the federal government. *Robinson v. California*, 370 U.S. at 666 (holding incarceration to be excessive punishment for the crime of "addiction" to a controlled substance). *See also Estelle v. Gamble*, 429 U.S. 97, 101-02 (1976). That historic ruling changed the law in a critical respect from that which existed in 1947 when *Francis v. Resweber* was decided: In 1947, the Eighth Amendment's prohibition of cruel and unusual punishments did not apply to the states; now it does. *O'Neil v. Vermont*, 144 U.S. 323, 331-32 (1892); *Pervear v. Commonwealth*, 5 Wall. 475 (1867).

3. *Francis v. Resweber* is a pre-incorporation case from the 1940's which has long outlived its limited time and place for all purposes relevant to the unique case Broom presents here in the 21st Century.

Francis v. Resweber is a pre-incorporation case from the 1940's. It was decided at a time when no part of the Eighth Amendment—and certainly not the cruel and unusual punishments clause—was recognized as applicable to the states and the plurality decision does not reflect the holding of the court (which is, as addressed above, that the second execution attempt on Willie Francis did not violate the Fourteenth Amendment Due Process Clause). That left the states free to punish convicted criminals largely as they saw fit, under their own law, subject only to whatever minimal federal constitutional protection was afforded against that which offended "the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). *See generally McDonald v. City of Chicago,* 561 U.S. 742, 759-66 (2010).

For all substantive and practical purposes, *that* approach to the federal constitution provided virtually no protection at all. *See, e.g., Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (life sentence for thrice-convicted horse thief). Indeed, during the latter part of the

nineteenth and the first half of the twentieth century, this Court rarely found challenged state criminal decisions to be in violation of the Due Process Clause; none against a challenged punishment or its infliction.[2]

This pre-incorporation status of the cruel and unusual punishments clause was dispositive in *Francis v. Resweber*. The Court's divided decision against Willie Francis hinged on the concurrence of Justice Frankfurter. Justice Frankfurter concluded, in adherence to "an impressive body of decisions [of] this Court," that Louisiana's second attempt to execute Francis did not offend any specific pledge that is "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, [] valid as against the states." *Francis v. Resweber*, 329 U.S. at 468-69 (Frankfurter, J., concurring). The second attempt, in other words, was not so "repugnant to the conscience of mankind" such as would bar Louisiana, under the federal constitution, from "exercise[ing] the power on which she here stands." *Id*. at 471-72.

That Fourteenth Amendment due process standard, dispositive in *Francis v. Resweber*, was long outdated when Broom's case reached the Ohio Supreme Court 70 years later in 2016, having been upended by this Court with *Robinson* in 1962. Had the modern Eighth Amendment principles of *Robinson* prevailed in 1947, Willie Francis would likely have been spared the second execution attempt Louisiana insisted upon making, including because Justice Frankfurter was otherwise supportive of the view of the four dissenting Justices. *Francis v. Resweber*, 329 U.S. at 471 (Frankfurter J., concurring) ("Strongly drawn as I am to some of the sentiments expressed by my

[2]*See, e.g.*, *Rochin v. California*, 342 U.S. 165 (1952) (determining that warrantless use of stomach pump on arrestee to recover two morphine capsules resulted in violation of Fourteenth Amendment Due Process); *Powell v. Alabama*, 287 U.S. 45 (1932) (noting that the state's failure to allow "adequate time" for African-American defendants in a capital case to secure counsel resulted in a violation of Fourteenth Amendment Due Process); *Moore v. Dempsey*, 261 U.S. 86 (1923) (holding that a trial held in a lynch-mob atmosphere violated Fourteenth Amendment Due Process); *Brown v. Mississippi*, 297 U.S. 278 (1932) (excluding confession under Due Process Clause because it was obtained by use of police violence against the accused).

brother Burton, . . . were I to [join the dissenting opinion,] I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution"). *See also* A. Miller and J. Bowman, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS, at pp. 126-27 & n.18 (Greenwood Press 1988) (the Willie Francis case weighed "'so heavily on [Justice Frankfurter's] conscience'" that he convinced a former Harvard law school classmate, a leading member of the Louisiana bar, to seek clemency on Francis's behalf), cited in *State v. Broom*, 146 Ohio St. 3d at 84 (O'Neill, J., dissenting).

4. *Francis v. Resweber* is further inapplicable as the governing federal law in the 21st Century because Willie Francis's conviction arose in Louisiana's racially unjust past – a circumstance the *Francis v. Resweber* plurality declined to address.

Aside from its outdated pre-incorporation status, *Francis v. Resweber* arose in the Deep South and Willie Francis was black. The case was decided in the context of a racially inequitable past which the Court should forever relegate to the dustbin of American history. Would a white 15-year-old have been sentenced to death?[3] Would a white 15-year-old have been subjected to a second execution attempt? Would a white 15-year-old have received the clemency Justice Frankfurter so obviously anticipated being granted?

The decision in *Francis v. Resweber* allowed one of the states of the Deep South—the specific intended targets of the post-Civil War Amendments, including the Fourteenth Amendment—to make a second execution attempt against a dirt-poor, incompetently-defended black teenager, accused of killing a white man, tried before an all-white jury, with the trial

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[3] Willie Francis was fifteen years old when he allegedly committed the subject murder. G. King, THE EXECUTION OF WILLIE FRANCIS: RACE, MURDER, AND THE SEARCH FOR JUSTICE IN THE AMERICAN SOUTH at p. 145 (Basic Civitas 2009) ("Willie Francis, an African American in the Jim Crow South, whose mental abilities were questioned . . . by many residents in St. Martinville as well as his own family, was just fifteen years old at the time of Andrew Thomas's death and only sixteen nine months later when he 'voluntarily' confessed to murder.").

beginning six days after arraignment, where not a single witness was cross-examined by the "defense," with the death penalty mandatory upon conviction. Francis received no appellate review of his conviction and death sentence. And then deputies, reported to be drunk, botched Louisiana's first attempt to execute Francis in the state's portable electric chair, a device that was in vogue in those days so that the spectacle could be widely viewed. *See generally* Miller and Bowman, DEATH BY INSTALLMENTS, *supra* at pp. 6-7, 15-27; G. King, THE EXECUTION OF WILLIE FRANCIS: RACE, MURDER, AND THE SEARCH FOR JUSTICE IN THE AMERICAN SOUTH at pp. 45, 71-73, 79-96, 239, 246 (Basic Civitas 2009).

The lawyers who took Willie Francis's case to the United States Supreme court argued that "the original trial itself was so unfair to the petitioner as to justify a reversal of the judgment of conviction and a new trial. Petitioner's claim in his brief is that he was inadequately represented by counsel." *Francis v. Resweber*, 329 U.S. at 465. The plurality found that "Nothing is before us upon which a ruling can be predicated as to the alleged denial of federal constitutional rights during petitioner's trial." *Id.* at 466. The plurality allowed the execution of Willie Francis to go forward.

One of the dissenting justices in Broom's case in the Ohio Supreme Court accurately summarized the scandalous setting in which *Francis v. Resweber* arose:

> If Willie Francis had been tried for his alleged crime today, he would not have been sent to the electric chair the first time. Francis was a 17-year-old black male in Louisiana on May 3, 1946, the first time the state attempted to put him to death. Miller & Bowman, Death by Installments: The Ordeal of Willie Francis 1, 20 (1988). He had been convicted by an all-white, all-male jury. Id. at 24. Six days after being appointed, his attorneys put up no defense despite a glaring lack of evidence. Id. at 23-26. Let me repeat that—this black teenager's court-appointed attorneys offered no defense in a death-penalty case in the Deep South just after World War II. The state of Louisiana used two probably coerced confessions that were inconsistent with forensic evidence and the story of the only eyewitness to the murder. Id. at 23-26. He received a mandatory death sentence and was not informed of his rights to appeal or to appointed counsel for that purpose. Id. at 26-27. There

> was no appeal of his conviction or sentence. Id. And this is the case the majority relies upon to suggest that due process is alive and well in Ohio.
>
> Since Francis was convicted and executed, our ideas of the Constitution have evolved substantially.

State v. Broom, 146 Ohio St. 3d at 82 (O'Neill, J., dissenting). *See also* Arthur S. Miller, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT at p. 33 (Greenwood Press 1984) (*Francis v. Resweber* allowed "abstract principles of federalism [to] outweigh[] the facts of a bungled execution").

And this rush to execute Willie Francis happened in the very state from which the infamous *Plessy v. Ferguson* was birthed. *See Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896). *Plessy* remained an ever-reliable, clearly established, federal law in Louisiana for seven years after the state was permitted to execute Willie Francis. *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy*). *See, e.g., Garner v. Louisiana*, 368 U.S. 157, 179-80 (1961) (Douglas, J., concurring); Paul Finkelman, The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change, 74 La. L. Rev. 1039, 1083 (2014) ("Like the rest of the Deep South, segregation in Louisiana [before the 1964 Civil Rights Act] was the rule, with all its humiliation and lack of dignity, stifling of economic opportunity, denial of political rights, and ever-present potential for citizen and state-sponsored violence.").

The intolerable racial aspect of what *Francis v. Resweber* facilitated by allowing Willie Francis to be executed, and the time and place from which it arose, cannot be overlooked. *See, e.g.*, Miller and Bowman, DEATH BY INSTALLMENTS, *supra* at pp. 38-39 (discussing pardon proceedings after Francis's botched execution, in which Louisiana officials opposed a pardon because Francis was at risk of being lynched otherwise:

> [District Attorney] Pecot then closed the state's presentation to the Pardons Board with this warning: "There is another side to this case. I don't want to refer to an unpleasant question, but those are facts that happen. We have repeatedly known in

> the past, unfortunately, of lynchings going on after crimes are committed." Pecot's warning was real. From 1882 to 1946, Louisiana had witnessed 390 lynchings—giving Louisiana the fourth highest rate in the United States. Nearly all the victims were black.").

See also Stuart Banner, Traces of Slavery: Race and the Death Penalty in Historical Perspective, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA, 96, 97 (Charles J. Ogletree, Jr., & Austin Sarat, eds., 2006) ("When we think about the death penalty, we think, in part, in race-tinged pictures - of black victims lynched by white mobs, of black defendants condemned by white juries, of slave codes and public hangings."); Stephen Bright, Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty, 35 Santa Clara L. Rev. 439 (1995) ("The death penalty is a direct descendent of lynching and other forms of racial violence and racial oppression in America."); Dorothy E. Roberts, The Supreme Court 2018 Term: Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 41 (2019). "In the mid-twentieth century, the practice of lynching black people was replaced by the practice of subjecting them to the death penalty."); Scott W. Howe, Atoning for Dred Scott and Plessy While Substantially Abolishing the Death Penalty, 95 Wash. L. Rev. 737 (2020).

In light of its historical context, even had it been based on the Eighth Amendment, there is nothing about *Francis v. Resweber*'s outdated plurality decision that should be deemed the relevant clearly established federal law for Broom's Eighth Amendment claim in the 21st Century. The decision in *Ramos v. Louisiana* is instructive in that respect. There the Court finally recognized as "gravely mistaken" one of the Court's earlier precedents that had too-long enabled, in criminal cases in Louisiana (and Oregon too), a practice that was rooted in the same unjust racist past which greatly darkens *Francis v. Resweber*. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

5. The principles of *Trop* (1958) and *Robinson* (1962)—during the more-than-50-years since their announcement—have become the core fundamental principles of this Court's modern Eighth Amendment jurisprudence regarding state criminal punishments such as Broom's.

"Since Francis was convicted and executed, our ideas of the Constitution have evolved substantially." *Broom*, 146 Ohio St. 3d at 82, 51 N.E.3d at 640 (O'Neill, J., dissenting). *Trop* and *Robinson* are the critical Eighth Amendment cases that clearly establish the federal law applicable to Broom's claim. The fundamental principles they announce are core and sacrosanct.

Most significant are the holdings that: (1) the Eighth Amendment's protection extends to more than just "physically barbarous punishments," but also to punishments which impose psychological cruelty or "subject[] the individual to a fate of ever-increasing fear and distress," (2) the Constitution's Eighth Amendment prohibition against "cruel and unusual punishments" fully binds the states, (3) the Eighth Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency, because "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man," (4) the gauge of compliance with the Eighth Amendment's protection against a criminal punishment is the "evolving standards of decency that mark the progress of a maturing society." *Robinson*, 370 U.S. at 666; *Trop*, 356 U.S. at 100-02. *See also Estelle*, 429 U.S. at 102.

These are not "dicta" or breezy "general statements," of the type some of the Court's AEDPA precedent might otherwise encourage federal habeas courts to ignore in service of "abstract principles of federalism," like those which drove the unjust Fourteenth Amendment result in *Francis v. Resweber*. On the contrary, they are "elementary principles," *Estelle*, 429 U.S. at 103, "cardinal principles," and clear Eighth Amendment holdings which have been *repeatedly* followed and reaffirmed since then in numerous factual contexts likewise involving a challenged

infliction of criminal punishment, and especially in capital cases. *See, e. g*., *Hall v. Florida*, 572 U.S. at 707-08; *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005).

It is true that the Court uses cases with discrete facts to announce general principles. But it is those general principles which AEDPA instructs state courts to reasonably apply, *Williams v. Taylor*, 529 U.S. 362, 412 (2000), or, more precisely the "fundamental principles established by [its] most relevant precedents." The "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal citations and quotation marks omitted); *see also Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

That rule is reaffirmed in the Court's more recent holdings that clearly-established federal law for AEDPA purposes includes those constitutional principles, albeit expressed in general standards, where the principle is of such fundamental importance that its application will likewise be clear in different factual settings from the one in which the principle was announced. *Yarborough*, 541 U.S. at 666-67; *Marshall*, 569 U.S. at 62. Significantly, that same rule also applies in the analogous context of identifying "clearly established law" in a section 1983 challenge to the infliction of criminal punishment as unconstitutionally cruel, wherein the right is "clearly established," even though encountered under different facts, when its "contours . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (prison guards twice handcuffed prisoner to a hitching post to sanction him for disruptive conduct).

Trop and *Robinson* are squarely within this line of authority, mandating that the fundamental principles they announced are at least part of the clearly established federal law applicable to Broom's Eighth Amendment claim.

Certainly, it was clearly established federal law for AEDPA purposes in 2016 (when the Ohio Supreme Court decided Broom's case) that the cruel and unusual punishments clause applied to the states, *even though* the factual context of *Robinson*, in which that principle was established in 1962, is different than Broom's case. Likewise, too, the fundamental principles of *Trop* were clearly established in 2016—elevating dignity to its core importance, requiring consideration of evolving standards of decency, and prohibiting punishments which subject prisoners to ever-increasing fear and distress—even though Mr. Trop's criminal sentence at issue in 1956 has factual differences from that facing Mr. Broom in 2016. The critical point is that the cases all involve criminal punishments alleged to be unconstitutionally cruel, and, despite the factual differences between the punishments involved, the core principles are all fundamental enough that the necessity to apply them here too is, or should be, beyond legitimate dispute.

At the very least it was wrong for the Sixth Circuit to disregard them entirely as an aspect of the clearly established federal law. The rules from these different cases should have been applied together.

6. Because Broom's case is an Eighth Amendment challenge to a death sentence in precise factual circumstances which rarely if ever arise, this Court must permit broader factual variances, or "permutations," for AEDPA purposes, from those facts encountered when the Court announced the fundamental constitutional principles sought to be applied.

If AEDPA is applied to mandate the quest for a Supreme Court decision on "nearly identical facts," the Court would be facilitating the same "rigid, overreliance on factual similarity" which it condemned in the Eighth Amendment case of *Hope v. Pelzer* in the 1983 context. 536 U.S. at 742. A habeas petitioner is not required to produce a case with such precise factual similarity, and the "clearly established federal law" is not limited to such Supreme Court precedent.

The Court itself has acknowledged that at least some "permutation" from the facts of a prior Supreme Court precedent is permissible without negating that prior case's status as "clearly established federal law" for purposes of AEDPA. But how much variation is permissible? Wherever that line is drawn, the degree of variance should certainly be greater in capital cases involving an alleged unconstitutionally cruel infliction of a death sentence under the Eighth Amendment, and even more so where, if only confined to a narrow focus on specific facts, the precise factual issue is so rare that it virtually never arises.

Broom's case, if confined to narrow focus on specific facts, is one that is so rare that it virtually never arises. Broom and Willie Francis are the only persons, in the past 75 years, to have litigated claims against a second execution attempt after a first had failed. That factual circumstance is so rare that, for Broom, it is pure fortuity that a prior Supreme Court decision with such factual similarity *even exists*, and it is 70 years old and pre-dates the Court's modern Eighth Amendment jurisprudence to such a degree that the Eighth Amendment did not even apply to the states at the time it was decided.

AEDPA does not require that Broom point to a spotted calf like that in order for a Supreme Court precedent to count as "clearly established." A court would not have been free to disregard the fundamental principles of *Robinson* and *Trop*, and fail to apply them to Broom's case, if Broom had in 2016 been the *first*, as opposed to the *second*, person in a century to present a case with the precise factual circumstance of a botched execution. AEDPA does not, when the Eighth Amendment is involved, permit courts to be so over-reliant on factual similarity that they lock in as "clearly established" the decisions of a very distant past in which standards of decency were much different than they are today. That turns the Eighth Amendment on its head by enabling the greatly *devolved*, even racist, standards of a very different America to constitute the controlling federal law in direct disregard of the core modern Eighth Amendment principle that the gauge of

compliance with the cruel and unusual punishments clause is the evolving standards of decency that mark the progress of a maturing society.

The evolving standards as reflected in *Trop* and *Robinson* cannot be frozen out because their narrow facts are different than Broom's, not when the rules they announced are so fundamental and, by 2016, such a core part of the modern Eighth Amendment's protection against cruelty in the criminal sentencing context. Any AEDPA rule of compelled factual similarity, or "permutation," must thus be broad enough to include Broom's rare case within the "permutation" of those facts in *Trop* and *Robinson*. In that respect, it is enough that all three cases involve criminal sentences alleged to be unconstitutionally cruel, and that Trop and Broom premised that allegation at least in part on the sentence inflicting psychological trauma, that it subjects them to ever-increasing fear and distress, and that is does so in disregard of their basic human dignity.

A contrary approach which rigidly over-relies on factual similarity, as employed here by the Sixth Circuit, effectively leaves Broom's rare case to the state courts to decide, with only limited federal review in habeas. AEDPA's purpose is to ensure respect for state court decisions on federal constitutional issues, but it does not permit the disregard of clearly established law by means of defining that law so narrowly that the rare cases evade meaningful federal review altogether. And especially not in capital cases where a federal court's duty to search for constitutional error with painstaking care is never more exacting. *See, e.g., Harmon v. Sharp*, 936 F.3d 1044, 1056-57 (10th Cir. 2019).

CONCLUSION

For all of the reasons set out above, and in the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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