No. 20-6419

In the Supreme Court of the United States

ROMELL BROOM,

Petitioner,

v.

TIM SHOOP, Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
KYSER BLAKELY
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Respondent
Tim Shoop, Warden

CAPITAL CASE –EXECUTION SCHEDULED FOR MARCH 16, 2022

QUESTION PRESENTED

In 2009, the State tried and failed to execute Romell Broom. The Supreme Court of Ohio held that the Eighth Amendment did not bar the State from trying again. Broom then sought federal habeas relief, which required him to prove that the Supreme Court of Ohio's decision "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). The only Supreme Court precedent to consider the constitutionality of a second execution attempt held that the second attempt created no constitutional problem. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). Did the Sixth Circuit correctly hold that, in light of this precedent, the Supreme Court of Ohio's decision was neither contrary to nor an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States"?

LIST OF PARTIES

The petitioner is Romell Broom, an inmate at the Chillicothe Correctional Institution.

The respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

Broom's list of directly related proceedings is incomplete. It should include the following proceedings:

1. *State v. Broom*, No. 85-196643-ZA (Ohio Ct. of Common Pleas, Cuyahoga County) (sentence imposed Oct. 16, 1985)

2. *State v. Broom*, No. 512237 (Ohio Ct. of Appeals, 8th Dist.) (judgment entered July 23, 1987)

3. *State v. Broom*, No. 87-1674 (Ohio) (judgment entered Dec. 30, 1988)

4. *Broom v. Ohio*, No. 88-6812 (U.S.) (*certiorari* denied May 15, 1989)

5. *State v. Broom*, No. 72581 (Ohio Ct. of Appeals, 8th Dist.) (judgment entered May 7, 1998)

6. *State v. Broom*, No. 98-1252 (Ohio) (judgment entered Sept. 23, 1998)

7. *Broom v. Mitchell*, No. 99-00030 (N.D. Ohio) (case remains pending)

8. *Broom v. Mitchell*, No. 03-4370 (6th Cir.) (judgment entered March 17, 2006)

9. *Broom v. Mitchell*, No. 06-8548 (U.S.) (*certiorari* denied Feb. 26, 2007)

10. *State v. Broom*, No. 91297 (Ohio Ct. of Appeals, 8th Dist.) (judgment entered July 30, 2009)

11. *State v. Broom*, No. 2009-1567 (Ohio) (judgment entered Sept. 11, 2009)

12. *Broom v. Mitchell*, No. 09-4125 (6th Cir.) (judgment entered Sept. 14, 2009)

13. *Broom v. Ohio*, No. 09-6401 (09A253) (U.S.) (stay request and *certiorari* denied Sept. 14, 2009)

14. *In re Broom*, No. 2010-1609 (Ohio) (judgment entered Dec. 2, 2010)

15. *Broom v. Mitchell*, No. 11-4300 (6th Cir.) (judgment entered June 26, 2012)

16. *Broom v. Mitchell*, No. 13-3739 (6th Cir.) (judgment entered Oct. 2, 2013)

Broom's list misstates the relevant date of the following entry:

1. *Broom v. Ohio*, No. 16-5580 (U.S.) (*certiorari* denied December 12, 2016, and petition for rehearing denied February 21, 2017).

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INTRODUCTION

Romell Broom, who raped and murdered a child, was scheduled to be executed in 2009. The State had to abort the execution attempt when it could not maintain access to a vein. As a result, Broom has now been alive for eleven years longer than he would have been had his sentence been properly carried out.

Broom has spent many of those years arguing that the State's failure to execute him in 2009 prohibits it from ever trying again. Specifically, he has argued that the Eighth Amendment prohibits second execution attempts after a first attempt fails. After the Supreme Court of Ohio rejected that argument, *see* Pet.App.6–7, Broom shifted his focus to federal court. There, he argued that he was entitled to a writ of habeas corpus under 28 U.S.C. §2254(d)(1). To win relief under that statute, he had to show that the Supreme Court of Ohio's decision "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). The District Court denied his request for relief. The Sixth Circuit unanimously affirmed. Broom now asks this Court to grant *certiorari* and reverse.

The Court should deny Broom's petition. The case presents neither a circuit split nor any other issue of broad importance. Instead, it presents the question whether the Sixth Circuit properly applied §2254(d)(1) to the unique facts of this case. In other words, Broom seeks pure error correction. And he seeks error correction of a Sixth Circuit decision that contains no error. The only Supreme Court decision addressing the constitutionality of a second execution attempt found no constitutional barrier to the second attempt. *See Louisiana ex rel. Francis v. Resweber*,

329 U.S. 459, 464 (1947) (plurality op.); *id.* at 470 (Frankfurter, J., concurring). Thus, the Sixth Circuit properly held that the Supreme Court of Ohio's decision in Broom's case was neither "contrary to," nor "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1).

STATEMENT

In 1984, Romell Broom kidnapped, raped, and murdered a 14-year-old girl. *State v. Broom*, 40 Ohio St. 3d 277, 278 (Ohio 1988). A jury convicted him and the trial court sentenced him to death. *State v. Broom*, 146 Ohio St. 3d 60, 61 (2016). Two decades later, on September 15, 2009, the State brought Broom to the execution chamber with the goal of carrying out the sentence by lethal injection. *Id.* But the State was never able to establish a viable connection between Broom's veins and the catheter that would deliver the lethal drugs. Pet.App.2. The State thus stopped the execution and returned Broom to his cell. *Id.*

Broom asked Ohio's state courts to hold that a second execution attempt would violate the Eighth Amendment's ban on cruel and unusual punishments and the Fifth Amendment's ban on double jeopardy. Pet.App.5. The state courts rejected those claims. Pet.App.5–7. Relevant here, the Supreme Court of Ohio held, relying on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), that "a second execution attempt would not violate the Eighth Amendment." Pet.App.6. Broom petitioned this Court for a writ of *certiorari* to the Supreme Court of Ohio. The Court denied the petition. Justices Breyer and Kagan would have granted it. *Broom v. Ohio*, 137 S. Ct. 590 (2016).

Broom next turned to federal court, where his petition for habeas relief was already pending. Pet.App.7. He argued that he was entitled to habeas relief under 28 U.S.C. §2254(d)(1). That provision allows federal courts to award habeas relief only if the petitioner's state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The District Court found that Broom was not entitled to habeas relief on either his Eighth Amendment or Fifth Amendment claim. Pet.App.7–8. The Sixth Circuit affirmed. Pet.App.19. Writing for the unanimous panel, Judge Moore explained that *Resweber*, because it was "the only Supreme Court precedent to address … the constitutionality of a second execution attempt after a botched first attempt," was "the only Supreme Court precedent" capable of clearly establishing federal law on that matter. Pet.App.10. In *Resweber*, the Supreme Court determined (in a fractured opinion) "that the Constitution does not prohibit a state from executing a prisoner after having already tried—and failed—to execute that prisoner once," as long as the State:

(1) "did not intentionally, or maliciously, inflict unnecessary pain during the first, failed execution, and"

(2) "will not inflict unnecessary pain during the second execution, beyond that inherent in the method of execution itself."

Pet.App.13 (formatting altered). Because that was "essentially … what the Ohio Supreme Court held" in Broom's case, that court neither contradicted nor unreasonably applied *Resweber*. Pet.App.11–16.

Broom timely filed his petition for a writ of *certiorari* seeking review of the Sixth Circuit's ruling.

REASONS FOR DENYING THE WRIT

This case *does not* present the question whether the Eighth Amendment prohibits executing an inmate after its first attempt at executing him fails. Broom's earlier *certiorari* petition challenging the Supreme Court of Ohio's contrary ruling did present that question. But the Court denied review. *Broom v. Ohio*, 137 S. Ct. 590 (2016). At that point, Broom turned his focus to securing federal habeas relief. Relevant here, he argued that the Supreme Court of Ohio's rejection of his Eighth Amendment claim entitled him to relief under 28 U.S.C. §2254(d)(1). Broom's *certiorari* petition argues that the Sixth Circuit misapplied §2254(d)(1) to the facts of his case. He does not argue that its decision created a circuit split. Nor does he argue that the Sixth Circuit's decision changed the rules by which §2254(d)(1) claims must be adjudicated. He simply argues that the Court misapplied those rules in his case. Thus, the only question presented in this case is whether Broom is entitled to relief under §2254(d)(1).

As this description shows, Broom seeks pure error correction. The Court does not generally hear cases to correct case-specific errors. *See* Rule 10. In any event, Broom's petition is doomed by the fact that the Sixth Circuit did not err.

1. Federal habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quotation omit-

ted). As a result, Congress has greatly limited the power of federal courts to award habeas relief. For example, 28 U.S.C. §2254(d)(1) permits courts to award relief when a petitioner shows that he is in custody because of a state-court adjudication that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Very few petitioners can make that showing. The phrase "clearly established Federal law, as determined by the Supreme Court of the United States," includes only *holdings* of the Supreme Court; *dicta* does not count. *White v. Woodall*, 572 U.S. 415, 419 (2014). Nor do "general proposition[s]" and "abstract" constitutional principles. *Lopez v. Smith*, 574 U.S. 1, 5–6 (2014) (*per curiam*). The words "contrary" and "unreasonable" impose limits of their own. A state-court decision will not be deemed "contrary to" or an "unreasonable application of" a Supreme Court holding simply because it is wrong. Instead, a decision is "contrary to" Supreme Court precedent only if it either: (1) rests on "a rule that contradicts the governing law set forth in" Supreme Court "cases"; or (2) "confronts a set of facts that are materially indistinguishable from a decision of" the Supreme Court and "nevertheless arrives at a result different from [its] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An "unreasonable application" of Supreme Court precedent requires an application "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

The Supreme Court of Ohio's determination that "a second execution attempt would not violate the Eighth Amendment" is neither contrary to nor an unreasonable application of any Supreme Court holding. Pet.App.6. Indeed, the only Supreme Court precedent that addressed the legality of second execution attempts *permitted* the second attempt to go forward. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). True, *Resweber* produced no majority: the plurality found that the second attempt was not "cruel and unusual," *id.* at 464 (plurality op.), while Justice Frankfurter concurred on the ground that the Eighth Amendment does not apply to the States, *id.* at 470 (Frankfurter, J., concurring). Yet the fact remains, *Resweber* is the only case in which the Supreme Court has considered whether a government may proceed with a second execution attempt without violating the Constitution. *See* Pet.App.10. Because that case allowed the second attempt, the Supreme Court of Ohio's decision doing the same thing cannot possibly be "contrary to" or an "unreasonable application of" that decision.

2. Broom's arguments for reversal all fail.

He first argues that *Resweber* is not "clearly established" Supreme Court precedent. Pet.11. That argument is a red herring. It does not matter whether *Resweber* qualifies as "clearly established" precedent. The reason is this: the Warden does not have the burden of identifying a "clearly established" Supreme Court holding that the state court properly implemented. *Contra* Pet.13 (suggesting it was error for the Supreme Court of Ohio even to rely on *Resweber*). Instead, *Broom* has the burden of identifying a "clearly established" Supreme Court holding that the

state court contradicted or unreasonably applied. §2254(d)(1); *see also* Pet.App.10–11 (making the same point). He has not done that, especially because the most analogous case, which is undoubtedly *Resweber*, allowed a second execution attempt to go forward in the face of an Eighth Amendment claim.

Broom appears to be under the misimpression that the Sixth Circuit interpreted *Resweber* to clearly establish the constitutionality of a second execution attempt. But that is not what it did; the Sixth Circuit simply determined that, in light of *Resweber*, it could not say that the Supreme Court of Ohio's decision allowing a second execution attempt violated clearly established federal law. In the Sixth Circuit's words: "Because *Resweber* is the only Supreme Court precedent to address the issue presented by this case—the constitutionality of a second execution attempt after a botched first attempt—it was only the Supreme Court precedent *capable of* providing a clear Eighth Amendment holding for the Supreme Court of Ohio to follow." Pet.App.10 (emphasis added). Regardless, *even if* the Sixth Circuit had assumed that *Resweber* "clearly established" some issue of federal law, and *even if* the Court thinks the Sixth Circuit erred in so assuming, the error would not justify reversal. "This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015). Unless Broom can identify a clearly established precedent that the Supreme Court of Ohio contradicted or unreasonably applied, the Sixth Circuit's judgment denying him habeas relief is correct and cannot be reversed.

Perhaps with this in mind, Broom argues that the "clearly established" law governing his claim is *Trop v. Dulles*, 356 U.S. 86 (1958), and that the Supreme Court of Ohio's decision is either contrary to or an unreasonable application of *Trop*. Broom is wrong. As the Sixth Circuit correctly recognized, for "a Supreme Court precedent to be 'clearly established,' the decision's holdings must 'squarely address[] the issue in'" the petitioner's case; "'abstract' constitutional principles, or dicta more broadly, do not suffice." Pet.App.10 (quoting *Wright v. Van Patten*, 552 U.S. 120,125 (2008); *Lopez*, 574 U.S. at 6)). *Trop* does not clearly establish anything relevant to Broom's habeas petition.

First, *Trop* did not address, "even remotely, the specific question presented by this case." *Lopez*, 574 U.S. at 6. It considered whether denationalization as a form of punishment violated the Eighth Amendment, *Trop*, 356 U.S. at 99 (plurality op.), *not* whether the Eighth Amendment forbids executing someone after the first attempt fails.

Second, even if *Trop* had been a death-penalty case, Broom does not identify anything in it that "clearly establishes" a rule governing his case. It is worth noting that *Trop*, like *Resweber*, produced no majority opinion. Broom nevertheless argues that the plurality opinion in *Trop*, but not *Resweber*, created the relevant "clearly established Federal law." §2254(d)(1). *Trop* established the relevant law, Broom says, when it declared that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Pet.14 (quoting *Trop*, 356 U.S. at 101 (plurality op.)), and when it described dena-

tionalization as subjecting individuals to a fate of "ever-increasing fear and distress," Pet.16 (quoting *Trop*, 356 U.S. at 102 (plurality op.)). Setting aside that these statements appear in a plurality opinion, they do not "clearly establish" anything for purposes of §2254(d)(1). The evolving-standards-of-decency language is precisely the sort of "general proposition" or "abstract" constitutional principle that does not constitute a "clearly established" rule for purposes of habeas relief. *Lopez*, 574 U.S. at 5–6. Indeed, this Court has discouraged reading its "precedents at such a high level of generality," because doing so "could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" *Nevada v. Jackson*, 569 U.S. 505, 512 (2013). As for the "ever-increasing fear and distress" language, that is merely the *Trop* plurality's description of the harm denationalization poses. Even if it had appeared in a majority opinion, it would constitute dicta or reasoning at most, not a holding sufficient to qualify as "clearly established Federal law." §2254(d)(1).

Broom concludes his petition by urging this Court to hold that the Eighth Amendment forbids executing an inmate after the first attempted execution fails. Pet.19–31. But this case presents no opportunity to reach that issue. As explained above, this case presents only the question whether the Supreme Court of Ohio contradicted or unreasonably applied a holding of this Court when it concluded that the Eighth Amendment contains no such prohibition. Because the answer to that question is "no," this Court must affirm. It will have no occasion to reach the question

whether the Eighth Amendment *does* in fact prohibit executing an inmate who the State already tried and failed to execute once.

CONCLUSION

The Court should deny Romell Broom's petition for a writ of *certiorari*.

Respectfully submitted,

DAVE YOST
ATTORNEY GENERAL OF OHIO

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
KYSER BLAKELY
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Respondent
Tim Shoop, Warden