CASE NO. 2020-6419

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

REPLY TO BRIEF IN OPPOSITION TO BROOM'S 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?

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REPLY IN SUPPORT OF 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). The Warden has opposed Broom's request. Broom replies as follows.

REASONS FOR GRANTING THE WRIT

The Warden opens his argument with the statement that "This case *does not* present the question whether the Eighth Amendment prohibits executing an inmate after its first attempt at executing him fails." Warden's Brf. Opp., p. 4. Broom never said it did. The question Broom presents is whether *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) "is 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."

Whether a second attempt to execute Broom violates the Eighth Amendment is the question the Ohio Supreme Court decided by applying *Francis v. Resweber*. *See State v. Broom*, 146 Ohio St. 3d 60, 70-71, ¶43-47 (2016). Because the decision in *Francis v. Resweber* is not based on the Eighth Amendment, Broom contends that using *Francis v. Resweber* as the basis for denying his Eighth Amendment claim was an "unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States" that resulted in "an unreasonable determination of the facts in light of the evidence" under 28 U.S.C. 2254(d)(1) and (2). *Francis v. Resweber* may be clearly established for some purposes, but not for resolving Eighth Amendment issues. Even so, in Broom's habeas proceedings, the Sixth Circuit 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. Shoop*, 963 F.3d at 511-512.

The Warden does not deny that there is no Eighth Amendment holding in *Francis v.*

Resweber. Instead, he argues that because *Francis v. Resweber* addressed generally similar facts –– a second execution attempt after a botched first attempt — it was not unreasonable for the Ohio Supreme Court to rely on it to resolve Broom's Eighth Amendment claim. Warden's Brf. Opp., p. 7. The Warden's reasoning ignores the difference between, on the one hand, the general Due Process protection which, under due process standards from the 1940's, was not violated in 1947 for Willie Francis, and, on the other hand, the specific violation of the Eighth Amendment which Romell Broom faces now.

Next, the Warden argues that *Trop v. Dulles,* 356 U.S. 86 (1958), the case Broom has argued throughout his proceedings is the clearly established precedent that should have been applied, is not clearly established precedent for Broom's case on the theory that the determinations made in *Trop v. Dulles* are too general or abstract to be precedent. Warden's Brf. Opp., p. 9. The Warden misjudges the clear precedential value of *Trop v. Dulles*.

1) *Ever-increasing fear and distress.*

Trop v. Dulles held that a punishment with the following consequences violates "cardinal principles" which are protected by the Eighth Amendment:

> It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, . . . It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear . . . on [him]. The threat makes the punishment obnoxious.

356 U.S. at 102. Certainly, it is true that, in describing what makes denaturalization a cruel and unusual punishment, some facts unique to that punishment were discussed; but the "squarely addressed" basis for finding that it violated the Eighth Amendment, that it "subjects the individual to a fate of ever-increasing fear and distress," is the same issue that is the basis of Broom's Eighth Amendment claim. That is, that a second execution attempt subjects Broom to the ever-increasing

fear that he will be subjected to the same treatment in a second execution effort. And *Trop* governs that issue too: "It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear." 365 U.S. 102. The Warden's representation that what happened on September 15, 2009 likely will not happen again is insufficient to protect Broom's Eighth Amendment rights. This Court in *Trop* found that the consequences of denaturalization violate the Eighth Amendment. Those same consequences in the context of an execution cannot be less constitutionally important. *Trop v. Dulles* is the case where this Court clearly established that a punishment that entails ever-increasing fear and distress violates the Eighth Amendment.

2) *Evolving standards of decency.*

Trop v. Dulles also clearly established 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. The Warden suggests *Trop's* principles are too "general" and do not arise in Broom's "specific" factual setting. As cases arise, facts vary from those that were present in the case in which Federal law becomes "clearly established" but that does not make the Federal law less applicable when the settled issue – here that punishments that induce ever-increasing fear and distress are an affront to the dignity of man and violate the Eighth Amendment – is present in the new case. *See, e.g., Robinson v. California*, 370 U.S. 660 (1962), *Brady v. Maryland*, 373 U.S. 83 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966). It is the issue decided that is the clearly established law.

Sometimes what sounds like a general principle is in fact the description of an exact and exacting principle so deeply rooted in concepts of liberty and decency that it applies in all cases that fall within its reach. When that happens, the principle cannot be dismissed as too general for application. Such principles, as this Court has found, even though stated in general terms, are

"fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Broom's case presents just such a permutation. When the ever-increasing fear and distress caused by denaturalization is so cruel that it violates the Eighth Amendment, how then could the ever-increasing fear and distress of facing another execution attempt after what Broom has already suffered not be cruel and unusual?

3) *The AEDPA permits correction of errors that result in or from unreasonable applications of Federal law.*

The Warden argues that "Broom seeks pure error correction" and that this Court usually does not review a case "to correct case-specific errors." Warden's Brf. Opp., p. 4. Broom's petition does not seek mere or unimportant "error correction." The judgment of the Sixth Circuit rests on a faulty foundation—that *Francis v. Resweber* is the applicable clearly established precedent for reviewing Broom's Eight Amendment claim when it is not—and that faulty foundation continues to support a second attempt to execute Broom due in part to the failure of both lower federal habeas courts to properly apply the holdings of an entire line of this Court's AEDPA case law as reflected in *Yarborough* and *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013). Those cases make it clear that *Trop v. Dulles* is the clearly established precedent for Broom's situation. What is more, that faulty foundation is likely dispositive here—the difference between whether Broom gets relief in habeas or he does not—because, if the Sixth Circuit's review had been *de novo* (as it would be if the Ohio Supreme Court's ruling against Broom was wrongly reliant on *Resweber*), at least "some" of the judges on the Sixth Circuit panel may have granted relief. *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").

But *even if* Broom's petition were construed as a request for "pure error correction," his is

a case in which such a request would be appropriate. Broom's case is of legal and systemic importance. Although it is only the second case in some 70 years where the courts have been asked to stop a second execution attempt after the first was botched through no fault of the condemned inmate, it speaks to the ability of the Court to do justice where justice is due, regardless of the infrequency with which a particular situation arises.

And if Broom's petition for certiorari asks for error correction of any sort, it is explicitly the kind of error correction that 28 U.S.C. 2254(d) allows. The Ohio Supreme Court made an unreasonable application of clearly established Federal law when it assessed Broom's Eighth Amendment claim on the basis of *Francis v. Resweber. Francis v. Resweber* is not an Eighth Amendment decision: it sets no standard for assessing Eighth Amendment claims. Broom's request to have the Eighth Amendment applied to his circumstances, where he endures and will continue to endure ever-increasing fear and distress is more than a request for error correction: it is a request that the rule of law be followed, that the correct "Federal law, as determined by the Supreme Court of the United States" – here *Trop v. Dulles* – be applied regarding the more severe punishment that he faces, and that the unreasonable application of the wrong case – here *Francis v. Resweber* – not determine his fate.

The determination of whether the Eighth Amendment proscribes a state from compelling a condemned person to endure the emotional distress, fear, indignity, and pain of a second attempt to take his life, when the state's first attempt failed only after the infliction of immense pain, suffering, and indignity upon that person, is an important constitutional issue. That issue must be resolved by applying Eighth Amendment standards, *those which prevail today*, and not the Fourteenth Amendment analysis of the plurality in *Francis v. Resweber* that was developed before the Eighth Amendment even applied to the states.

CONCLUSION

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

Respectfully Submitted,

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