

Memorandum for the Conference

No. 142 - Louisiana v. Resweber

January 11, 1947

In order that there be an opinion of the Court, I had hoped to join brother Reed's opinion in addition to expressing my own views. The reason I cannot do so ^{inter alia} is that I do not think we should decide the case even on the assumption that the Fifth Amendment as to double jeopardy is the measure of due process in the Fourteenth Amendment. I do not see why we should make an assumption which is contrary to the whole tenor of Palko v. Connecticut, 302 U. S. 319. It makes for nothing but confusion in the consideration of constitutional cases under the Due Process Clause to cite cases that construed the scope of the double jeopardy provision of the Fifth Amendment. Presumably cases are cited because of their relevance to the problem under discussion. And so, to cite Ex parte Lange, 18 Wall. 163, and In re Bradley, 318 U. S. 50, in support of the statement that "our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense" is to make the authority of those cases, in applying the double jeopardy clause of the Fifth Amendment, the basis of claims of restraints against the States under the Due Process Clause. One has only to read the dissents in Ex parte Lange and In re Bradley, to see how needlessly we are borrowing trouble in using such cases for this case.

This will give some indication, in addition to what I have written in my opinion, why I regretfully cannot join in Reed's opinion.

F. F.

5/8/49

NO. 1346

Willie Francis,

Petitioner

v.

E. L. Resweber, Sheriff of the Parish
of St. Martin, Louisiana,

Respondent

On Petition for Certiorari

to the Supreme Court of

Louisiana

NO. 140 MISCELLANEOUS

Willie Francis,

Petitioner

v.

E. L. Resweber, Sheriff of the Parish
of St. Martin, Louisiana, et al,

Respondents.

On Motion for leave to

file petition for habeas

corpus

The petition of Willie Francis v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, for leave to file an original petition for habeas corpus is denied for reasons set forth in Ex Parte Hawk, 321 U.S. 114. In view of the grave nature of the new allegation set forth in this petition, the denial is expressly without prejudice to application to proper tribunals.

Mr. Justice Murphy is of opinion that the petition should be granted.

The motion for leave to proceed in forma pauperis is granted.

The petition for writ of certiorari and the application for stay are denied.

Mr. Justice Rutledge is of the opinion that the application in No. 140 should be treated as a petition for rehearing in No. 142 of October Term, 1946; so regarded, the petition should be granted; the judgment in No. 142 should be vacated; and that cause remanded to the Supreme Court of Louisiana for further proceedings to determine the issues of fact presented by the petition.

Mr. Justice Douglas took no part in the consideration or decision of these applications.

January 11, 1947

Mr. Justice Reed

Dear Stanley:

Re: No. 142 - State of La., ex rel
Francis v. Resweber

I agree.

C.J.

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	} On Writ of Certiorari to the Supreme Court of the State of Lou- isiana.
<i>v.</i> E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	

[January —, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and

2 STATE OF LOUISIANA *v.* RESWEBER.

unusual punishment provision of the Eighth Amendment.¹ These federal constitutional protections, petitioner claimed, would be denied because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death. The Supreme Court of Louisiana denied the applications on the ground of a lack of any basis for judicial relief. — La. —. That is, the state court concluded there was no violation of state or national law alleged in the various applications. It spoke of the fact that no "current of sufficient intensity to cause death" passed through petitioner's body. It referred specifically to the fact that the applications of petitioner invoked the provisions of the Louisiana Constitution against cruel and inhuman punishments and putting one in jeopardy of life or liberty twice for the same offense. We granted certiorari on a petition, setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. — U. S. —. For matters of state law, the opinion and order of the Supreme Court of Louisiana are binding on this Court, *Hebert v. Louisiana*, 272 U. S. 312, 317. So far as we are aware, this case is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Four-

¹ Fifth Amendment: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ..."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATE OF LOUISIANA *v.* RESWEBER. 3

teenth Amendment.² As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. We turn to the question as to whether the proposed enforcement of the criminal law of the state is offensive to any constitutional requirements to which reference has been made.

First. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange*, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States v. Lanza*, 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People v. Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko v. Connecticut*, *supra*, 328.³ As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. For we see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the

² See *Twining v. New Jersey*, 211 U. S. 78, 99; *Palko v. Connecticut*, 302 U. S. 319, 324; *In re Kemmler*, 136 U. S. 436, 445; *Collins v. Johnston*, 237 U. S. 502, 510.

³ See *Kepner v. United States*, 195 U. S. 100, 129; cf. *United States v. Ball*, 163 U. S. 662, 666-70.

4 STATE OF LOUISIANA *v.* RESWEBER.

Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution.

Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. See *Weems v. United States*, 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.⁴

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual

⁴ This Court said of a similar clause embodied in the constitution of New York, *In re Kemmler*, 136 U. S. 436, 446:

"... but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added, p. 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution. Louisiana Constitution, Art. 1, § 12. The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

Third. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the Fourteenth Amendment. This suggestion in so far as it differs from the due process argument is based on the idea that execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a non-lethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba v. California*, 314 U. S. 218, 226. Laws cannot prevent accidents

6 STATE OF LOUISIANA *v.* RESWEBER.

nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

Fourth. There is a suggestion in the brief 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. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

The Chief Justice
from

Reed, J.

1/11/47 - 5th. Revis.

Changes marked

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	} On Writ of Certiorari to the Supreme Court of the State of Louisiana.
v.	
E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	

[January —, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and

2 STATE OF LOUISIANA *v.* RESWEBER.

unusual punishment provision of the Eighth Amendment.¹ These federal constitutional protections, petitioner claimed, would be denied because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death. The Supreme Court of Louisiana denied the applications on the ground of a lack of any basis for judicial relief. — La. —. That is, the state court concluded there was no violation of state or national law alleged in the various applications. It spoke of the fact that no "current of sufficient intensity to cause death" passed through petitioner's body. It referred specifically to the fact that the applications of petitioner invoked the provisions of the Louisiana Constitution against cruel and inhuman punishments and putting one in jeopardy of life or liberty twice for the same offense. We granted certiorari on a petition, setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. — U. S. —. For matters of state law, the opinion and order of the Supreme Court of Louisiana are binding on this Court, *Hebert v. Louisiana*, 272 U. S. 312, 317. So far as we are aware, it is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we examine the circumstances in the light of the due process clause of the Fourteenth Amendment.² As nothing has been brought to our attention to suggest

¹ Fifth Amendment: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ..."

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the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. We turn to the question as to whether the proposed enforcement of the criminal law of the state offends the requirements of the due process of law clause of the Fourteenth Amendment.

First. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange*, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States v. Lanza*, 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People v. Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed in jeopardy a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko v. Connecticut*, *supra*, 328.³ As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. We see no difference from the point of view of due process between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no denial of federal due process in the proposed execution.

³ In a prosecution where the Fifth Amendment controls a different rule may be applied. *Kepner v. United States*, 195 U. S. 100, 129; see *United States v. Ball*, 163 U. S. 662, 666-70.

4 STATE OF LOUISIANA *v.* RESWEBER.

Second. We find nothing to violate the due process clause of the Fourteenth Amendment in petitioner's further contention that the proposed execution would be so cruel as to offend due process. The case before us does not call for an examination into any punishments except that of death. See *Weems v. United States*, 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.⁴

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make

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his subsequent execution any more cruel in the constitutional than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

Third. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the Fourteenth Amendment. This suggestion in so far as it differs from the due process argument is based on the idea that execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a non-lethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba v. California*, 314 U. S. 218, 226. Laws cannot prevent accidents nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal

6 STATE OF LOUISIANA *v.* RESWEBER.

protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

Fourth. There is a suggestion in the brief 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. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

The Chief Justice
from

Reed J.

1/7/47 - 4th Revis.

rep. 2-3-4

January 3, 1947.

MEMORANDUM TO THE CONFERENCE.

Re: No. 142, State of Louisiana, ex rel. Willie Francis v. Resweber.

Before the last sentence of the paragraph ending on
page 2 of my opinion, I am adding the following:

"For matters of state law, the opinion and order
of the Supreme Court of Louisiana are binding on
this Court. Hebert v. Louisiana, 272 U. S. 312,
317."

STANLEY REED

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

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To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we examine the circumstances in the light of the due process clause of the Fourteenth Amendment.² As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no

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man is to blame. If an execution by the state, after the accident that interfered with the attempted execution, would be contrary to the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. Louisiana*, 272 U. S. 312, 316, and so would offend national standards of decency in the treatment of criminals, we would hold that such action by the state would violate the due process of law clause of the Fourteenth Amendment. *Malinski v. New York*, 324 U. S. 401.

First. We consider then whether fair standards under the Fourteenth Amendment for the enforcement of the criminal law of the state are threatened by the proposed execution of the death sentence because it would offend this nation's conception of justice to twice put petitioner in danger of life or limb. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange*, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States v. Lanza*, 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People v. Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed in jeopardy a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko v. Connecticut*, *supra*, 328.³ As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. We see no difference between a new trial for error of law at the instance of the state that results in an execution and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation

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4 STATE OF LOUISIANA v. RESWEBER.

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6 STATE OF LOUISIANA v. RESWEBER.

protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba v. California*, 314 U. S. 218, 226. Laws cannot prevent accidents nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

Fourth. There is a suggestion in the brief 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. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

MR. JUSTICE BLACK concurs in the result because he does not believe that the judgment of the Louisiana Supreme Court violates due process of law or amounts to cruel and unusual punishment within the constitutional meaning of those terms.

The Chief Justice
from

Reed J.

1/2/47 - 2nd Recd.

Changes marked

December 13, 1946.

TO THE CONFERENCE

Re: No. 142, State of Louisiana, ex rel. Willie Francis v. Resweber.

I am amending my opinion by inserting the following as the Third subdivision:

"Third. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the Fourteenth Amendment. This suggestion in so far as it differs from the due process argument is based on the idea that execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a non-lethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See Lisenba v. California, 314 U. S. 218, 226. Laws cannot prevent accidents nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal protection are met. Should other condemned prisoners have a similar unfortunate experience as this petitioner, there is no reason to think that the rule of Louisiana law would be any different."

The present Third will become the Fourth subdivision.

STANLEY REED.

December 17, 1946

Mr. Justice Reed

Dear Stanley:

Re: No. 142 - State of La., ex rel
Willie Francis v.
Resweber.

I agree with the draft of your
opinion in the above case circulated
December 17th.

C.J.

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	On Writ of Certiorari to the Supreme Court of the State of Lou- isiana.
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[December —, 1946.]

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and

2 STATE OF LOUISIANA *v.* RESWEBER.

unusual punishment provision of the Eighth Amendment.¹ These federal constitutional protections, petitioner claimed, would be denied because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death. The Supreme Court of Louisiana denied the applications on the ground of a lack of any basis for judicial relief. — La. —. We granted certiorari on a petition, setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. — U. S. —. So far as we are aware, it is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we examine the circumstances in the light of the due process clause of the Fourteenth Amendment.² As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. If an execution by the state, after the accident that interfered with the attempted execution, would be contrary to the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. Louisiana*, 272 U. S. 312, 316, and so would offend national standards of decency in the treatment of criminals, we would hold that such action by the state would violate the due process of law clause of

¹ Fifth Amendment: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ..."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

² *Twining v. New Jersey*, 211 U. S. 78, 99; *Palko v. Connecticut*, 302 U. S. 319, 324; *In re Kemmler*, 136 U. S. 436, 445; *Collins v. Johnston*, 237 U. S. 502, 510.

STATE OF LOUISIANA *v.* RESWEBER. 3

the Fourteenth Amendment. *Malinski v. New York*, 324 U. S. 401.

First. We consider then whether fair standards under the Fourteenth Amendment for the enforcement of the criminal law of the state are threatened by the proposed execution of the death sentence because it would offend this nation's conception of justice to twice put petitioner in danger of life or limb. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense. *Ex parte Lange*, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States v. Lanza*, 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People v. Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed in jeopardy a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko v. Connecticut*, *supra*, 328.³ As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. We see no difference between a new trial for error of law at the instance of the state that results in an execution and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no denial of federal due process in the proposed execution.

Second. We find nothing to violate the due process clause of the Fourteenth Amendment in petitioner's fur-

³ In a prosecution where the Fifth Amendment applies, a different rule may apply. *Kepner v. United States*, 195 U. S. 100, 129; see *United States v. Ball*, 163 U. S. 662, 666-70.

4 STATE OF LOUISIANA *v.* RESWEBER.

ther contention that the proposed execution would be so cruel as to offend due process. The case before us does not call for and examination into any punishments except that of death. See *Weems v. United States*, 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in such a cruel manner as to offend against this country's ideals of humanity.⁴

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

⁴ This Court said of a similar clause embodied in the constitution of New York, *In re Kemmler*, 136 U. S. 436, 446:

"... but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added, p. 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution. Louisiana Constitution, Art. 1, § 12. The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

STATE OF LOUISIANA *v.* RESWEBER. 5

Third. The Supreme Court of Louisiana also rejected petitioner's contention that death inflicted after his prior sufferings would deny him the equal protection of the laws, guaranteed by the Fourteenth Amendment. This suggestion in so far as it differs from the due process argument is based on the idea that execution, after an attempt at execution has failed, would be a more severe punishment than is imposed upon others guilty of a like offense. That is, since others do not go through the strain of preparation for execution a second time or have not experienced a non-lethal current in a prior attempt at execution, as petitioner did, to compel petitioner to submit to execution after these prior experiences denies to him equal protection. Equal protection does not protect a prisoner against even illegal acts of officers in charge of him, much less against accidents during his detention for execution. See *Lisenba v. California*, 314 U. S. 218, 226. Laws cannot prevent accidents nor can a law equally protect all against them. So long as the law applies to all alike, the requirements of equal protection are met. We have no right to assume that Louisiana singled out Francis for a treatment other than that which has been or would generally be applied.

Fourth. There is a suggestion in the brief 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. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to

6 STATE OF LOUISIANA *v.* RESWEBER.

electrocute him. Nothing is before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

The Chief Justice
from
Reed, J.

12/17/46 - Peris

Pp. 2 + 5

December 13, 1946

Mr. Justice Reed

Dear Stanley:

Re: No. 142 - State of La., ex rel
Willie Francis v.
Resweber

I agree.

C.J.

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	} On Writ of Certiorari to the Supreme Court of the State of Louisiana.
v.	
E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	

[December —, 1946.]

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the Due Process Clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and

2 STATE OF LOUISIANA *v.* RESWEBER.

unusual punishment provision of the Eighth Amendment.¹ The Supreme Court of Louisiana denied the applications. — La. —. We granted certiorari on a petition, setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. — U. S. —. So far as we are aware, it is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we examine the circumstances in the light of the due process clause of the Fourteenth Amendment.² If an execution by the state, after the accident that interfered with the attempted execution, would be contrary to the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. Louisiana*, 272 U. S. 312, 316, and so would offend our standards of decency in the treatment of criminals, we would hold that such action by the state would violate the due process of law clause of the Fourteenth Amendment. *Malinski v. New York*, 324 U. S. 401, 404-410.

Petitioner contends that fair standards for the enforcement of the criminal law of the state are threatened by the proposed execution of the death sentence because it would offend this nation's conception of justice to twice put petitioner in jeopardy of life or limb. Our minds rebel against twice subjecting an accused to punishment by the same sovereignty for the same offense. *Ex parte*

¹ Fifth Amendment: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

² *Twining v. New Jersey*, 211 U. S. 78, 99; *Palko v. Connecticut*, 302 U. S. 319, 324; *In re Kemmler*, 136 U. S. 436, 445; *Collins v. Johnston*, 237 U. S. 502, 510.

STATE OF LOUISIANA v. RESWEBER. 3

Lange, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States v. Lanza*, 260 U. S. 377, 382. Where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People v. Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial of the same prosecution because of errors, while an accused may be placed in jeopardy a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko v. Connecticut*, *supra*, 328.³ As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. As a matter of double jeopardy, we see no difference between a new trial for error of law at the instance of the state that results in an execution and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no denial of federal due process in the so-called jeopardy of the proposed execution.

We find nothing to violate the due process clause of the Fourteenth Amendment in petitioner's further contention that the proposed execution would be a cruel and unusual punishment. The case before us does not call for any examination into any punishments except that of death. See *Weems v. United States*, 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come to us from the Bill of Rights of 1688

³ In a prosecution where the Fifth Amendment applies a different rule may apply. *Kepner v. United States*, 195 U. S. 100, 129; see *United States v. Ball*, 163 U. S. 662, 666-70.

4 STATE OF LOUISIANA *v.* RESWEBER.

in words identical to those of the clause of the Eighth Amendment now under consideration.

This Court said of a similar clause embodied in the constitution of New York: ⁴

"... but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added: ⁵

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution.⁶ The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. We cannot agree that the hardship imposed upon the petitioner rises to that ~~degree~~ ^{cruel} of hardship denounced as denial of due process because of cruelty.

⁴ *In re Kemmler*, 136 U. S. 436, 446.

⁵ *Id.*, 447.

⁶ Louisiana Constitution, Art. 1, § 12.

There is a suggestion in the brief 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. This suggestion is in these words:

"The trial of Willie Francis was a farce and a travesty on justice. Counsel was appointed by the court to represent this Negro who was charged with killing one of the white citizens of the town of St. Martinsville. No attack on indictment was filed by petitioner's counsel. No motion for change of venue was introduced at the trial in behalf of the defendant; no evidence was introduced in his behalf at the trial; and no appeal whatever was taken from the judgment of conviction—not even a motion for a new trial. Within eight days after the indictment was returned against him the petitioner was tried, convicted and sentenced to death.

"This court can never know the full story of the trial of Willie Francis because *no stenographic record was taken at the trial*. Obviously no appeal was contemplated and there was none. It is submitted that the abysmal darkness which shrouds the trial of Willie Francis speaks no less eloquently than the efforts made in his behalf both before and after that trial by the counsel appointed by the court to represent him."

The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. No explanation is given as to why any improper action cannot be made to appear of record. Certainly the absence of a stenographic transcript is not a sufficient reason for the failure to make a record in accordance with proper procedure in Louisiana of any violation of federal constitu-

6 STATE OF LOUISIANA v. RESWEBER.

tional rights.⁷ Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. If there were errors in the trial that denied federal constitutional rights to petitioner, those alleged errors should be presented for redress to the state courts in Louisiana. We assume that it would be necessary to present them of record in this new proceeding and that the state would afford means to do so. Compare *Mooney v. Holohan*, 294 U. S. 103, 113. Such a record would afford the basis for review here. Otherwise there is nothing before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

⁷ Dart, *Crim. Code of La.* (2d Ed.), Art. 499:

"On the trial of all criminal cases, whenever a bill of exceptions shall be reserved to the ruling on any objection, the court shall at the time and without delay order the clerk or the stenographer to take down the facts upon which the objection and the ruling are based, together with the objection, the ruling and the reasons of the ruling, which statement, objection, ruling and reasons, so taken down, shall be preserved among the records of the trial, and shall, when signed, by the judge, constitute the bill of exceptions; provided that whenever a bill has been reserved the judge may be coerced by mandamus to sign the same."

Id., Art. 504:

"Whenever necessary the trial judge shall append to the bill of exceptions a *per curiam* in order that the appellate court may be fully informed as to all of the circumstances pertaining to the questions raised by the bill. If the bill of exceptions requires no *per curiam* comment, the judge shall so certify at the foot of the bill at the time he signs the same."

The Chief Justice
from
Reed, J.

12/11/46

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	On Writ of Certiorari to the Supreme Court of the State of Louisiana.
v.	
E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	

[December —, 1946.]

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings before this Court a unique situation. The petitioner, Willie Francis, is a colored citizen of Louisiana. He was duly convicted of murder and in September, 1945, sentenced to be electrocuted for the crime. Upon a proper death warrant, Francis was prepared for execution and on May 3, 1946, pursuant to the warrant, was placed in the official electric chair of the State of Louisiana in the presence of the authorized witnesses. The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. He was thereupon removed from the chair and returned to prison where he now is. A new death warrant was issued by the Governor of Louisiana, fixing the execution for May 9, 1946.

Applications to the Supreme Court of the state were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state. Execution of the sentence was stayed. By the applications petitioner claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and

2 STATE OF LOUISIANA *v.* RESWEBER.

unusual punishment provision of the Eighth Amendment.¹ The Supreme Court of Louisiana denied the applications. — La. —. We granted certiorari on a petition, setting forth the aforementioned contentions, to consider the alleged violations of rights under the Federal Constitution in the unusual circumstances of this case. — U. S. —. So far as we are aware, it is without precedent in any court.

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we examine the circumstances in the light of the due process clause of the Fourteenth Amendment.² If an execution by the state, after the accident that interfered with the attempted execution, would be contrary to the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. Louisiana*, 272 U. S. 312, 316, and so would offend national standards of decency in the treatment of criminals, we would hold that such action by the state would violate the due process of law clause of the Fourteenth Amendment. *Malinski v. New York*, 324 U. S. 401, 404-410.

First. We consider then whether fair standards under the Fourteenth Amendment for the enforcement of the criminal law of the state are threatened by the proposed execution of the death sentence because it would offend this nation's conception of justice to twice put petitioner in danger of life or limb. Our minds rebel against permitting the same sovereignty to punish an accused twice.

¹ Fifth Amendment: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ..."

² Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

³ *Twining v. New Jersey*, 211 U. S. 78, 99; *Palko v. Connecticut*, 302 U. S. 319, 324; *In re Kemmler*, 136 U. S. 436, 445; *Collins v. Johnston*, 237 U. S. 502, 510.

STATE OF LOUISIANA v. RESWEBER. 3

for the same offense. *Ex parte Lange*, 18 Wall. 163, 168, 175; *In re Bradley*, 318 U. S. 50. Compare *United States v. Lanza*, 260 U. S. 377, 382. But where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *United States v. Ball*, 163 U. S. 662, 672. See *People v. Trezza*, 128 N. Y. 529, 535. Even where a state obtains a new trial after conviction because of errors, while an accused may be placed in jeopardy a second time, it is not the sort of hardship to the accused that is forbidden by the Fourteenth Amendment. *Palko v. Connecticut*, *supra*, 328.³ As this is a prosecution under state law, so far as double jeopardy is concerned, the *Palko* case is decisive. We see no difference between a new trial for error of law at the instance of the state that results in an execution and an execution that follows a failure of equipment. When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no denial of federal due process in the proposed execution.

Second. We find nothing to violate the due process clause of the Fourteenth Amendment in petitioner's further contention that the proposed execution would be so cruel as to offend due process. The case before us does not call for and examination into any punishments except that of death. See *Weems v. United States*, 217 U. S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth

³ In a prosecution where the Fifth Amendment applies, a different rule may apply. *Kepner v. United States*, 195 U. S. 100, 129; see *United States v. Ball*, 163 U. S. 662, 666-70.

4 STATE OF LOUISIANA *v.* RESWEBER.

Amendment. The Fourteenth would prohibit by its due process clause execution by a state in such a cruel manner as to offend against this country's ideals of humanity.⁴

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

Third. There is a suggestion in the brief 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. The record of the original trial presented to us shows the warrant for arrest, the indictment, the appointment of counsel and the minute entries of trial, selection of jury, verdict and sentence. There is

⁴ This Court said of a similar clause embodied in the constitution of New York, *In re Kemmler*, 136 U. S. 436, 446:

"... but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

It added, p. 447:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Louisiana has the same humane provision in its constitution. Louisiana Constitution, Art. 1, § 12. The *Kemmler* case denied that electrocution infringed the federal constitutional rights of a convicted criminal sentenced to execution.

STATE OF LOUISIANA v. RESWEBER. 5

nothing in any of these papers to show any violation of petitioner's constitutional rights. See *Carter v. People of State of Illinois*, No. 36, October Term, 1946, decided December 9, 1946. Review is sought here because of a denial of due process of law that would be brought about by execution of petitioner after failure of the first effort to electrocute him. Nothing is before us upon which a ruling can be predicated as to alleged denial of federal constitutional rights during petitioner's trial. On this record, we see nothing upon which we could conclude that the constitutional rights of petitioner were infringed.

Affirmed.

The Chief Justice
~~to~~

Reed J.

12/12 - Rees

changes marked

SUPREME COURT OF THE UNITED STATES.

No. 142.-October Term, 1946.

State of Louisiana, ex rel. Willie	)	On Writ of Certiorari to
Francis, Petitioner	)	the Supreme Court of
	)	the State of Louisiana.
v.	)	
E. L. Resweber, Sheriff of the	)	
Prish of St. Martin, Louisiana, et al.	)	

[January , 1947]

Mr. Justice BLACK concurring.

I agree with Mr. Justice Reed that this Court cannot under the Constitution hold that Louisiana authorities are barred from electrocuting the petitioner after a prior unsuccessful attempt to electrocute him failed because of a mechanical accident. But because I cannot accept all the constitutional criteria set out as the basis for this conclusion, I find it necessary separately to express my views.

Since there is no contention in this case that petitioner has been denied procedural due process, Chambers v. Florida, 309 U.S. 227, it is my view, for reasons hereinafter discussed, that the only basis for decision should be consideration of whether the Eighth Amendment's prohibition against cruel and unusual punishment, and the Fifth Amendment's ban against double jeopardy, have been made applicable to the States by the Fourteenth, and if so, whether Louisiana's execution of petitioner would violate either of them. The failure of the electrocution apparatus was purely accidental and not because of any desire of the State or any of its agents to prolong or aggravate the painful agonies which nearly always are associated with anticipation of imminent death. In view of these admitted facts, I do not believe that the electrocution of petitioner after failure of the first attempt constitutes double jeopardy or "cruel and unusual punishment" within the meaning of those terms as used in the Fifth and Eighth Amendments. Historically, the double jeopardy provision was intended to prevent two punishments for the same offense. No support can be found for an argument that its purpose was to prevent execution of a single sentence because a first effort to carry it out had been accidentally frustrated. And I agree with what I understand to be the conclusion of

Justice Reed that the circumstances here fall short of showing that "wanton infliction of pain" which would amount to "cruel and unusual punishment." The cases he cites support these interpretations of provisions of the Fifth and Eighth Amendments which are involved. Therefore I agree that the judgment of the Louisiana court should be affirmed.

I think there is ample support for holding that the Fourteenth Amendment was intended to and does prohibit states from legalizing double jeopardy and cruel and unusual punishment to the same extent as the Fifth and Eighth Amendments prohibit federal laws of that kind. But I do not reach that conclusion by reference to a mystic natural law which is above and beyond the Constitution, and which is read into the due process clause so as to authorize us to strike down every state law which we think is "indecent," "contrary to civilized standards," or offensive to our notions of "fundamental justice." While the Bill of Rights was held inapplicable to the States prior to the Fourteenth Amendment,^{1/} since its adoption this Court has held that it made certain selected Bill of Rights safeguards applicable to the States,^{2/} although declining to apply other Bill of Rights safeguards.^{3/} The First Amendment, safeguarding freedom of speech, press and religion, has been literally and emphatically applied to the States in its very terms.

Board of Education v. Barnette, 319 U.S. 227. History not only supports the conclusion that a purpose of the Fourteenth Amendment was to protect the people's freedom to speak or write their own views and to practice their own religion, but it shows pretty conclusively, I think, that the Amendment was clearly intended to prohibit states from subjecting people to cruel and unusual punishments or double jeopardy. When the proposed Fourteenth Amendment was submitted to the Senate by the spokesman of the committee that considered and helped to frame it, he not only declared that it would protect the people against infractions of the Bill of Rights specified safeguards; he also enumerated them, expressly designating "cruel and unusual punishments." Cong. Globe, 39th Cong., 1st Sess. 2765-2766. And in advocating adoption of the Amendment to the House as it then read, the very man who framed important parts of the Amendment, who steered it through the committee and the House, declared

that its purpose was to curb state violations of the Bill of Rights, saying among other things that, "Contrary to the express letter of the Constitution 'cruel and unusual punishments' have been inflicted under state laws within the Union upon citizens not only for crimes committed but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." Id. 2542-2543. The foregoing are but some of many such expressions spread through the congressional debates on the Fourteenth Amendment which evidence a purpose to protect all persons from state invasions of the freedoms guaranteed by the Bill of Rights. Agreement that the Amendment would accomplish this purpose seems to have been recognized by all. See Flack, The Adoption of the Fourteenth Amendment, (1908) Chap. II. And that this was its purpose was the common understanding of the times. Ibid. Chaps. III, IV, V. There is no good reason that I can perceive, nor is there any good reason suggested in any of the opinions in this case, why the process, heretofore followed, of selecting the provisions of the Bill of Rights to be applied to the States, should discriminate against the constitutional protections against cruel and unusual punishment and double jeopardy. I therefore consider these Bill of Rights provisions applicable to the States, but not for the reasons given in other opinions announced today in this case.

I cannot agree that the due process clause of the Fourteenth Amendment, or that Amendment itself, empowers this Court to strike down every state law, or state executive action, or state court judgment under state law, which may "offend ^(national) ~~our~~ standard of decency in the treatment of criminals." If the due process clause means that, we must measure the validity of every state and federal criminal law by ^(conception of national) ~~our own~~ "standards of decency." ^{without the guidance of constitutional language} Conduct believed "decent" by millions of people may be believed "indecent" by millions of others. Adoption of one or the other conflicting views as to what is "decent," what is right, and what is best for the people, is generally recognized as a legislative function. Our courts move, I think, in a forbidden territory, when they prescribe their "standards of decency" as the supreme rule of the people. If the Constitution had declared that the Supreme Court of the United States should ordain "standards of decency," I should, of course, be forced to undertake that monumental task. But it has not. I cannot expand "due process" so as to make it include that.

The other meaning of due process here suggested, while in different words, when analyzed, turns out to vest a similar unbounded grant of legislative power to the Court by the Court. It is said, and it has been said before, that we as a Court can, under the due process clause, strike down any law which is "contrary to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." If this be construed to mean that we are to abide by those "fundamental principles of liberty and justice" expressed in the specific grants and limitations of state and federal power enumerated in the Constitution, I agree. For since Marbury v. Madison, 1 Cranch 137, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which are in conflict with these provisions of the Constitution. But when this vast power of courts to invalidate statutes is so enormously expanded by any formula which makes this Court's policy views the supreme law, I cannot go along.

Both "our standards of decency" and the "fundamental principles" criteria formulas, as here used, rest on the unarticulated assumption that the due process clause adopted the natural law concept that there is a higher law than the Constitution, a law which as I understand the concept, courts alone can make, interpret and cause to be enforced. While I can accept the long-established Marbury v. Madison doctrine that courts can strike down statutes which conflict with specific constitutional mandates, I am not willing to read into such procedural words as due process of law a meaning which has in the past and will inevitably in the future result in leaving courts free to substitute their ideas of natural justice for the considered policies of state and federal legislatures. To pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law," deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly ~~marked~~ marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies,

a responsibility which the Constitution entrusts to the legislative representatives of the people." Power Commission v. Pipeline Co., 315 U.S. 575, 601-602, note 4. In a number of cases cited below, ^{4/} I have rejected the view that the due process clause opened the way for judicial invalidation of statutes by invocation of this Court's natural law views, stated in terms such as "reasonable," "decent," "arbitrary and ~~x~~ capricious," "fair play," "fundamental principles of liberty," "common and fundamental ideas of fairness and right," "the concept of ordered liberty," "the universal sense of justice." I cannot now hold Louisiana's law unconstitutional for possible conflict with those concepts.

I share most of the sentiments of those members of the Court who have so feelingly argued that a defendant who has been once compelled to suffer the imminence of death by electrocution should not be put through them again. But I cannot agree with them that any provision of the Federal Constitution authorizes us to rule that an accidental failure fairly to carry out a valid sentence of death on the first attempt bars execution of that sentence.

NOTES

1/ See Barron v. Baltimore, 7 Pet. 243; Ex parte Watkins, 7 Pet.

560, 574.

2/ See Board of Education v. Barnette, 319 U.S. 227.

3/ Collins v. Johnston, 237 U.S. 502, 511; Brantley v. Georgia,

217 U.S. 284.

4/ See Chambers v. Florida, 309 U.S. 227; Polk v. Glover, 305 U.S.

12-19; McCart v. Indianapolis Water Co., 302 U.S. 419, 423, 428;

Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287, 301; Betts v. Brady,

315 U.S. 455, 474; International Shoe Co. v. Washington, 326 U.S. 310, 322,

324-326; Feldman v. United States, 322 U.S. 487, 494, 495; Williams v.

North Carolina, 325 U.S. 226, 261, 271-272; Southern Pacific R.R. v. Arizona,

325 U.S. 784, 788.

Recirculated:
Circulated:
From: Black, J.
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JAN 9 1947

F. W. V.

January 4, 1947

Memorandum for the Conference

No. 142 - State of Louisiana, ex rel. Willie Francis v.
Sheriff of the Parish of St. Martin, La., et al.

I am adding the following as footnote 1 to my concurring opinion
after the fourth ~~sentence~~ *line* from the bottom of page 1.

1/

The Fifth Amendment provision against double jeopardy was also intended to foreclose a second trial by a jurisdiction which had once put a defendant in jeopardy for the same offense, whether the prior trial had resulted in acquittal or conviction. Helvering v. Mitchell, 303 U.S. 391; Kepner v. United States, 195 U.S. 100, 128. Palko v. United States, 302 U.S. 319, held that a new trial where the state supreme court had reversed on acquittal for trial errors of law did not violate the double jeopardy provisions of the Fifth Amendment insofar as it might have been made applicable to the States by the Fourteenth. In the Palko decision, the Court said, however, that there was no "general rule" that "Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." But in the Palko decision this Court seems to have reversed the question of whether it would hold a new trial in a federal case involving only the Fifth Amendment to be barred by a previous acquittal, reversed on appeal for trial errors.

H.L.B.

W. V. L.

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SUPREME COURT OF THE UNITED STATES

JAN 10 1947

No. 142 - October Term, 1946

C. W. V.

State of Louisiana, ex rel. Willie)
Francis, Petitioner,)

v.)

On Writ of Certiorari to
the Supreme Court of
the State of Louisiana.

E. L. Resweber, Sheriff of the Parish)
of St. Martin, Louisiana, et al.)

[January 1947]

Mr. Justice FRANKFURTER concurring.

When four members of the Court find that a State has denied to a person the due process which the Fourteenth Amendment safeguards, it seems to me important to be explicit regarding the criteria by which the State's duty of obedience to the Constitution must be judged. Particularly is this so when life is at stake.

Until July 28, 1968, when the Fourteenth Amendment was ratified, the Constitution of the United States left the States free to carry out their own notions of criminal justice, except insofar as they were limited by Article I, §10 of the Constitution which declares: "No State *** shall pass any Bill of Attainder [or] ex post facto Law ***". The Fourteenth Amendment placed no specific restraints upon the States in the making or the administration of their criminal law. It restricted the freedom of the States generally, so that States thereafter could not "abridge the privileges or immunities of citizens of the United States," or deprive any person of life, liberty or property, without due process of law", or "deny to any person within its jurisdiction the equal protection of the laws".

These are broad, inexplicit clauses of the Constitution, unlike the specific provisions of the first eight amendments formulated by the Founders to guard against recurrence of well-defined historic grievances. But broad as these clauses are, they are not generalities of empty vagueness. They are circumscribed partly by history and partly by the problems of government, large and dynamic though they be, with which they are concerned. The "privileges or immunities of citizens of the United States" concern the two aspects of citizenship in our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society. See the classic language of Mr. Justice Matthews in Hurtado v. California, 110 U. S. 516, 530-³¹~~32~~.

When, shortly after its adoption, the Fourteenth Amendment came before this Court for construction, it was urged that the "privileges or immunities of citizens of the United States" which were not to be "abridged by any State" were the privileges and immunities which citizens theretofore enjoyed under the Constitution. If that view had prevailed, the Privileges or Immunities Clause of the Fourteenth

Amendment would have placed upon the States the limitations which the specific articles of the first eight amendments had theretofore placed upon the agencies of the national government. After the fullest consideration that view was rejected. The rejection has the authority that comes from contemporaneous knowledge of the purpose of the Fourteenth Amendment. See Slaughterhouse cases, 16 Wall. 36, 67-68, Davidson v. New Orleans, 96 U. S. 97. The notion that the Privileges and Immunities Clause of the Fourteenth Amendment absorbed, as it called, the provisions of the Bill of Rights that limit the federal government has never been given countenance by this Court.

Not until recently was it suggested that the Due Process Clause of the Fourteenth Amendment was merely a compendious statement of the Bill of Rights whereby the States were now restricted in devising and enforcing their penal code precisely as is the federal government by the first eight amendments. On this view, the States would be confined in the enforcement of their criminal codes by those views for safeguarding the rights of the individual which were deemed necessary in the eighteenth century. Some of these safeguards have perduring validity. Some grew out of transient experience or formulated remedies which time can easily improve. The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that at all times and in all climes have been found to be offensive to the dignity of man and heedless of his freedom.

These are very broad terms by which to accommodate freedom and authority. They may be too large, as has been suggested from time to time, to serve as the basis of adjudication in that they allow much room for exercising individual notions of policy. That is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court.

In an impressive body of decisions this Court has decided that the Due Process Clause in the Fourteenth Amendment expresses a demand for civilized standards of life which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the specifications of the particularities of the first eight amendments nor are they confined to them. That due process of law has its own independent function, has been illustrated in numerous decisions, and has

been expounded in the opinions of the Court which have canvassed the matter most thoroughly. See Hurtado v. California, *supra*; Twining v. New Jersey, 211 U. S. 308; Snyder v. Massachusetts, 291 U. S. 97; Palke v. Connecticut, 302 U. S. 219. Insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities "that are valid as against the federal government by force of specific pledges of particular amendments" it does so because they "have been found to be implicit in the concept of ordered liberty, and thus through the Fourteenth Amendment, become valid as against the States."

The Federal Bill of Rights requires that prosecutions for federal crimes be initiated by a grand jury and tried by a petty jury; it protects an accused from being a witness against himself. The States are free to consult their own conceptions of policy in dispensing with the grand jury in modifying or abolishing the petty jury, in withholding the privilege against self-crimination. See Maxwell v. Dow, 176 U. S. 581; Twining v. New Jersey, *supra*, Snyder v. Massachusetts, *supra*, Palke v. Connecticut, *supra*, 302 U. S. 319, 323, 324. In short, the Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice unless, as it was put for the Court by Mr. Justice Cardozo, 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". Snyder v. Massachusetts, *supra*, at 105.

A State may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge for which he has been acquitted. Such conduct by a State might be a denial of "due process", but not because the protection against ~~the~~ double jeopardy in a federal prosecution against which the Fifth Amendment safeguards, limits a State. Again, A State may deny a person due process by treating even one guilty of crime in a manner that violate standards of decency more or less ~~and~~ universally accepted and not such about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of "cruel and unusual punishment". See Weems v. United States, 217 U. S. 349, and particularly the dissenting opinion of White and Holmes, JJ.

Once we are explicit in stating the problem before us in terms defined by an unbroken series of decisions, we cannot escape acknowledging that it involves the application of standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone judges, as the repository of Law, are empowered to enforce. When the standards for judicial judgment are not narrower than "immutable principles of justice which inhere in the very idea of government", Holden v. Harding, 169 U. S. 366, 369, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", Hebert v. Louisiana, 272 U. S. 312, 316, "immunities *** implicit in the concept of ordered liberty". Palko v. Connecticut, 302 U. S. 319, 324-325, great tolerance toward a State's conduct is demanded of this Court. Such were recently stated to be the controlling principles". See Mr. Chief Justice Stone in Malinski v. New York, 324 U. S. 401, 438, in connection with the concurring opinion in that case. Ibid, 412, 416, 417.

I cannot bring myself to believe that, for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice "rooted in the traditions and conscience of our people". See Snyder v. Massachusetts, 291 U. S. 97, 105. Short of the compulsion of such a principle, this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding personal disapproval rooted in more or less universal condemnation. Strongly drawn as I am to some of the sentiments expressed by my Brother Burton, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of opinion which, for purposes of due process, is enjoined by the Constitution.

The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts, at electrocution or even a single, cruelly willful attempt, would not raise different questions. When

the Fourteenth Amendment first came here for application the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within and without the Due Process Clause must inevitably be left to "a gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson v. New Orleans, 96 U. S. 97, 104. This is another way of saying that these are matters which depend on "differences of degree. The whole law does so as soon as it is civilized" Holmes, J., in LeRoy Fiber Co. v. Chi. Mil. & St. P. Ry., 232 U. S. 340, 354. Especially is this so as to questions arising under the Due Process Clause. A finding that in this case the State of Louisiana had not gone beyond its powers is for me not the starting point for abstractly logical extension. Since I cannot say that it would be "repugnant to the conscience of mankind", Palko v. Connecticut, *supra*, 319 at 323, for Louisiana to exercise the power on which she here stands, I cannot say that the Constitution withholds it.

Memorandum for the Conference

No. 142 - Louisiana v. Resweber

In order to avoid an unintended implication, I am adding the words underlined in the following sentence of my opinion:

"While seritativ opinions are precluded as a regular practice for this Court, it has been true from the beginning that the more difficult and delicate the issues in a case the more numerous have been the opinions elucidating the decision."

F. F.

January 4, 1948

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	} On Writ of Certiorari to the Supreme Court of the State of Louisiana.
v.	
E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	

[January —, 1947.]

MR. JUSTICE FRANKFURTER, concurring.

rather This case serves to illustrate why it has been the tradition of the Court, throughout its history, for more than one opinion to be written even when there is agreement in result. So long as law is not merely the expression of will or desire, but represents the effort of reason to discover justice, just so long will there be occasions when the same destination will be reached by different roads of the mind. Burke has somewhere said that he could not think of English law without English Law Reports. It is still the exception in the highest courts of Great Britain and the Dominion (apart from the Privy Council, for reasons not here relevant), to have a single opinion for the tribunal rather, *seriatim* expressions. From the beginning, it has been true of this Court that the more difficult and delicate the issues in a case, the more numerous have been opinions in elucidating a decision. When one deals with intricate and subtle concepts of law, differences of formulation become highly important. A decision does not exhaust its force in adjudicating the immediate controversy. The words used become part of the judicial process in deciding future cases. Therefore judges must be alert against giving verbal hostages to the future. And so, differences in

2 STATE OF LOUISIANA v. RESWEBER.

phrasing do not merely reflect different literary tastes. They touch the very nerve of a judge's function.

This case is a good illustration why, from time to time, individual concurrences cannot properly be avoided. We are dealing here with a question the answer to which must exclude unintended implications. The problem, to be sure, is an old problem. But its subtleties constantly reappear. The problem is the judicial content of "due process" as guaranteed by the Fourteenth Amendment.

MR. JUSTICE REED and MR. JUSTICE JACKSON agree that, in the situation before us, Louisiana has not transgressed the limitations imposed by the Due Process Clause. Yet MR. JUSTICE JACKSON finds himself unable to subscribe to what MR. JUSTICE REED says about due process. I quite agree with my Brother JACKSON that due process is not the application of a merely personal standard of right and justice, that the "civilized standards" which judges are empowered to enforce are the impersonal standards which law expresses. But I read what MR. JUSTICE REED has written to mean what I understand MR. JUSTICE JACKSON to mean by what he has written. Accordingly, I join MR. JUSTICE REED's opinion by finding in it the gloss of MR. JUSTICE JACKSON's opinion.

The freedom of the States in making and enforcing their criminal laws was only very narrowly restricted by the Due Process Clause of the Fourteenth Amendment. The nature of the restriction has been variously expressed, but always in terms that admonish against confounding the personal views of judges with their representative duty as organs of justice. When the standards for judicial judgment are not narrower than "immutable principles of justice which inhere in the very idea of government", *Holden v. Harding*, 169 U. S. 366, 389, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", *Hebart v. Louisiana*, 372 U. S. 312, 316, "immunities . . . implicit in the concept

of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 324-325, great tolerance toward a State's conduct is demanded of this Court.

"The controlling principles" which guide consideration here of State court decisions challenged under the Due Process Clause were recently stated. See Mr. Chief Justice Stone in *Malinski v. New York*, 324 U. S. 401, 438, in connection with the concurring opinion in that case, *ibid.*, 412, 416-417. They bear repetition. "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment." 324 U. S. 401, 416-417.

I cannot bring myself to believe that, for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice "rooted in the traditions and conscience of our people". See *Snyder v. Massachusetts*, 291 U. S. 97, 105. Short of the compulsion of such a principle, this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding personal disapproval rooted in more or less

4 STATE OF LOUISIANA *v.* RESWEBER.

universal condemnation. Strongly drawn as I am to some of the sentiments expressed by my Brother BURTON. I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of opinion which, for purposes of due process, is enjoined by the Constitution.

The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions. When the Fourteenth Amendment first came here for application the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within and without the Due Process Clause must inevitably be left to "a gradual process of judicial inclusion and exclusion, as the cases presented from decision shall require, with the reasoning on which such decisions may be founded." *Davidson v. New Orleans*, 96 U. S. 97, 104. This is another way of saying that these are matters which depend on "differences of degree. The whole law does so as soon as it is civilized." Holmes, J., in *LeRoy Fibre Co. v. Chi. Mil. & St. P. Ry.*, 232 U. S. 340, 354. Especially is this so as to questions arising under the Due Process Clause. A finding that in this case the State of Louisiana has not gone beyond its powers is for me not the starting point for abstractly logical extension.

No. 142

To: The Chief Justice
From: Frankfurter, J. Concerning
Circulated: Jan - 2 - 1947
Recirculated: _____

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

January 4, 194~~6~~

Honest Injun, Fred, I have thought long and hard about this business of concurring opinions. And I have thought hard about it not only during all the years that I watched the work of this Court as a mother watches a feverish child. I had to think hard about it very soon after I came on the Court. In Graves v. O'Keefe, 306 U. S. 466, Stone wrote an opinion which did not seem ^{to me} to be fully adequate to the situation. Now, while Stone never hesitated to write concurring opinions to what Holmes and Brandeis and Cardozo wrote, he was not crazy to have one write concurring opinions in cases in which he wrote. And it was not pleasant for me to have to start off with such a concurring opinion. But I saw no escape.

I really think that the way to deal with an uninformed lay opinion is to try to inform it in the very limited way that we have, by word but especially by action. When the occasion is appropriate, as it seems to me especially appropriate in the Willie Francis case, it can only do good, I believe, to make people realize that concurring opinions were not invented by the present crowd and will not cease when they leave the scene.

Faithfully yours,

W.F.

The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	}	On Writ of Certiorari to the Supreme Court of the State of Lou- isiana.
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[December —, 1946.]

MR. JUSTICE JACKSON, concurring.

If I am at liberty, in the name of due process, to vote my personal sense of "decency," I not only would refuse to send Willie Francis back to the electric chair, but I would not have sent him there in the first place. If my will were law, it would never permit execution of any death sentence. This is not because I am sentimental about criminals, but I have doubts of the moral right of society to extinguish a human life, and even greater doubts about the wisdom of doing so. Throughout the ages that penalty has been exacted, but it never prevented, and it is doubtful if it ever diminished, the crime it penalized. And as it now exists, it is the unspoken but real cause of more reversals of convictions than any errors of trial judges. A completely civilized society will abandon killing as treatment for crime.

But judges are servants, not masters, of society and it is society's laws that should govern judges. So long as society adheres to its policy of death penalties, it is for us in individual cases to apply the policy of the law, as it is the duty of prosecutors, whatever their personal conviction, to advocate it. If this is our duty as to sentences in federal courts, it is even more imperative that we observe it when, as federal judges, we deal with judgments rendered by courts of several states.

2 STATE OF LOUISIANA *v.* RESWEBER.

Willie Francis was convicted of murder in conformity with the laws of Louisiana. The trial proceedings are not here for review and we must assume validity of the conviction. On that conviction he was lawfully sentenced to death and a death warrant duly issued. Its terms were that a current of electricity should be passed through his body until he was dead. That sentence and warrant admittedly are within the power of the State. When it was attempted to carry out the command of the law, some of the gadgets went wrong and most likely no current reached his body. At all events, the warrant is still unexecuted. Now, it is said that the short circuit not only cut off the electric current but also cut off the power of the State of Louisiana over the matter and turned on the power of the federal Constitution in its stead.

There is a world of difference to me between what a State in decency ought to do and what we as matter of constitutional law may compel it to do. And nothing demonstrates the lack of fixed standards of due process by which we are assuming to direct the conduct of state courts more than the opinions in this case which wage a battle over the catchword "decency."

The writer for the Court, guided by "national standards of decency," arrives at a conclusion which permits what to another is "repugnant to a civilized sense of justice," "inhuman and barbarous" and violates the "first principles of humanitarianism." A third proposes "elementary standards of decency" which brings him to a result exactly opposite the one reached by those who use as guide "national standards of decency." While I should not want to be thought less zealous for decency, either national or elementary, than my colleagues, I doubt if the word or concept affords either an objective or intelligible test of due process. If it is to be useful at all, it must mean that there is a judicial decency as there has long been recognized to be a "judicial discretion," a disciplined and impersonal

decency which expresses society's will and the policy of the law—a quite different thing from personal bias or dislike. We may have become rather licentious about “decency.”¹

I suppose many persons would feel that the Louisiana authorities might decently accept the short circuit or other accident which frustrated the execution as a basis for commutation of the death sentence. The question is whether we have any power to compel the state to do so. If we had the power, I should have no objection to exercising it. But I think we may not say that the states must conform to one uniform “sense of decency” of which we can speak only in four or five inharmonious voices.

But it is said there is an unconstitutional double punishment here. Not, of course, that Willie Francis can die two deaths—but the fear of death, the mental state of anguish induced by its imminence, counts as one, so it seems.

We are all under sentence to die. Just how much of terror is added by having the unknown hour of death's call made determinate by a court, I don't know. I suppose it varies with temperament and perhaps with one's

¹ The term was used, but I think in this limited sense, in the *Malinski* case, 324 U. S. 401, 417, in which opinion was so individual that five opinions were required. The length to which the individualism of our standards of due process may carry us has classic illustration in that case. One of the Justices whose support was necessary to override the New York Court of Appeals thought the prosecutor used words “indicative of a desire to appeal to racial and religious bigotry,” the defendant being a Jew. He severely castigated a judicial “attitude of indifference and carelessness in such matters.” 324 U. S. 401, 433, 434. The trial judge was Samuel S. Liebowitz, a Jew distinguished, among other service to civil liberties, for risking his life in defending the Scottsboro negro cases. Cf. *Norris v. Alabama*, 294 U. S. 587; *Patterson v. Alabama*, 302 U. S. 733; 294 U. S. 600. The same theme of racial bias is introduced here, but I find no more basis for it than in the *Malinski* case.

4 STATE OF LOUISIANA *v.* RESWEBER.

confidence as to what he has to answer for, but I am willing to assume without experience that imminent death under such circumstances is as harrowing as my colleagues say it is. Perhaps it is not only cowards who die many times before their deaths.

But if those are right who say that the Constitution forbids repeating the anguish of imminent execution, we may be inviting some unexpected results. Stays or reprieves frequently are given on the very eve of execution. A stay, a reprieve, a grant of a new trial—any delay after execution was so close at hand as to cause anguish—may have an element of prolonging or repeating the ordeal. These, perhaps, are not very great hazards and can be dealt with when reached, but they are quite as substantial as the prospect of four or five attempts at execution or the deliberate adoption of a policy of executing in stages, none of which are very probable or very hard for us to deal with if they should occur.

It is hard to resist the temptation to label anything we do not like as unconstitutional. But I am unable to cite any constitutional backing for my prejudice against executing Francis and, hence, must vote to leave the case to Louisiana's own law and sense of decency. I cannot believe that the founding fathers ever intended to nationalize decency; in fact, the purpose of adopting a federal instead of a unitary form of government was to allow each state to retain some individuality in such matters.

No. 142

To: The Chief Justice

From: JACKSON, J.

Circulated: 12/20/46

Recirculated:

JAN 9 1947

C. M. V.

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	} On Writ of Certiorari to the Supreme Court of the State of Louisiana.
v.	
E. L. Resweber, Sheriff of the Parish of St. Martin, Louisiana, et al.	

[January —, 1947.]

MR. JUSTICE BURTON, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur, dissenting.

Under circumstances unique in judicial history, the relator asks this Court to stay his execution on the ground that it will violate the due process of law guaranteed to him by the Constitution of the United States. We believe that the unusual facts before us require that the judgment of the Supreme Court of Louisiana be vacated and that this cause be remanded for further proceedings not inconsistent with this opinion. Those proceedings should include the determination of certain material facts not previously determined, including the extent, if any, to which electric current was applied to the relator during his attempted electrocution on May 3, 1946. Where life is to be taken, there must be no avoidable error of law or uncertainty of fact.

The relator's execution was ordered by the Governor of Louisiana to take place May 3, 1946. Of the proceedings on that day, the Supreme Court of Louisiana has said:

"... between the Hours of 12:00 o'clock noon and 3:00 o'clock p. m., Willie Francis was strapped in the electric chair and an attempt was made to electrocute him, but, because of some defect in the apparatus devised and used for electrocutions, the contrivance failed to function, and after an unsuccessful attempt to electrocute Francis he was removed from the chair."

2 STATE OF LOUISIANA *v.* RESWEBER.

Of the same proceedings, the State's brief says:

"Through a latent electrical defect, the attempt to electrocute Francis failed, the State contending no current whatsoever reached Francis' body, the relator contending a current of electricity did pass through his body; but in any event, Willie Francis was not put to death."

On May 8, the death warrant was canceled, and the relator's execution has been stayed pending completion of these proceedings. The Governor proposes to issue another death warrant for the relator's electrocution and the relator now asks this Court to prevent it for the reason that, under the present unique circumstances, his electrocution will be so cruel and unusual as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

That Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law;" When this was adopted in 1868, there long had been imbedded deeply in the standards of this nation a revulsion against subjecting guilty persons to torture culminating in death. Preconstitutional American history reeked with cruel punishment to such an extent that, in 1791, the Eighth Amendment to the Constitution of the United States expressly imposed upon federal agencies a mandate that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Louisiana and many other states have adopted like constitutional provisions. See Section 12 of Article I of the Constitution of Louisiana (1921).

The capital case before us presents an instance of the violation of constitutional due process that is more clear than would be presented by many lesser punishments prohibited by the Eighth Amendment or its state counterparts. Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man.

STATE OF LOUISIANA *v.* RESWEBER. 3

It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether. It is unthinkable that any state legislature in modern times would enact a statute expressly authorizing capital punishment by repeated applications of an electric current separated by intervals of days or hours until finally death shall result. The Legislature of Louisiana did not do so. The Supreme Court of Louisiana did not say that it did. The Supreme Court of Louisiana said merely that the pending petitions for relief in this case presented an executive rather than a judicial question and, by that mistake of law, it precluded itself from discussing the constitutional issue before us.

In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments—caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, can be inflicted by a state in conformity with due process of law. *In re Kemmler*, 136 U. S. 436. The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging. *State ex rel. Pierre v. Jones*, 200 La. 807, 9 So. 2d 42, cert. denied, 317 U. S. 633. See also, *Malloy v. South Carolina*, 237 U. S. 180.

The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself. Electrocution has been approved only in a form that eliminates suffering.

The Louisiana statute makes this clear. It provides that:

“Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass

4 STATE OF LOUISIANA *v.* RESWEBER.

through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. . . ." La. Code of Criminal Procedure (1928), Act No. 2, Art. 569, as amended by § 1, Act No. 14, 1940.

It does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death. It prescribes expressly and solely for the application of a current of sufficient intensity to cause death and for the *continuance* of that application until death results. Prescribing capital punishment, it should be construed strictly. There can be no implied provision for a second, third or multiple application of the current. There is no statutory or judicial precedent upholding a delayed process of electrocution.

These considerations were emphasized in *In re Kemmler*, *supra*, when an early New York statute authorizing electrocution was attacked as violative of the due process clause of the Fourteenth Amendment because prescribing a cruel and unusual punishment. In upholding that statute, this Court stressed the fact that the electric current was to cause instantaneous death. Like the Louisiana statute before us, that statute called expressly for the continued application of a sufficient electric current to cause death. It was the resulting "instantaneous" and "painless" death that was referred to as "humane."

After quoting the New York County and Supreme Courts, this Court quoted the New York Court of Appeals, at 119 N. Y. 579, as follows:

"We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, though it is certainly unusual. On the contrary, we agree with the court below that it re-

STATE OF LOUISIANA v. RESWEBER. 5

moves every reasonable doubt that the application of electricity to the vital parts of the human body, *under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.*' " (Italics supplied.) *In re Kemmler, supra*, at 443-444.

Finally, speaking for itself, this Court said:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." (Italics supplied.) *Id.* at 447.

If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment? While five applications would be more cruel and unusual than one, the uniqueness of the present case demonstrates that, today, two separated applications are sufficiently "cruel and unusual" to be prohibited. If five attempts would be "cruel and unusual", it would be difficult to draw the line between two, three, four and five. It is not difficult, however, as we here contend, to draw the line between the one continuous application prescribed by statute and any other application of the current.

Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure. The procedure in this case contrasts with

6 STATE OF LOUISIANA *v.* RESWEBER.

common knowledge of precautions generally taken elsewhere to insure against failure of electrocutions. The high standard of care generally taken evidences the significance properly attached to the unconditional requirement of a single continued application of the current until death results. In remanding this case, we are giving careful recognition to the law of Louisiana. Neither the Legislature nor the Supreme Court of Louisiana has expressed approval of electrocution other than by one continuous application of a lethal current.

Executive clemency provides a common means of avoiding unconstitutional or otherwise questionable executions. When, however, the unconstitutionality of proposed executive procedure is brought before this Court, as in this case, we should apply the constitutional protection. In this case, final recourse is had to the high trusteeship vested in this Court by the people of the United States over the constitutional process by which their own lives may be taken.

In determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must turn upon its particular facts. The record in this case is not limited to an instance where a prisoner was placed in the electric chair and released before being subjected to the electric current. It presents more than a case of mental anguish, however severe such a case might be. The petition to the Supreme Court of Louisiana expressly states that a current of electricity was caused to pass through the body of the relator. This allegation was denied in the answer and no evidence was presented by either side. The Supreme Court of Louisiana thereupon undertook to decide the case on the pleadings. It said:

"Our conclusion is that the complaint made by the relator is a matter over which the courts have no authority. Inasmuch as the proceedings had in the district court, up to and including the pronouncing

STATE OF LOUISIANA v. RESWEBER. 7

of the sentence of death, were entirely regular, we have no authority to set aside the sentence and release the relator from the sheriff's custody."¹

This statement assumed that the relief sought in the Supreme Court of Louisiana was only a review of the judicial proceedings in the lower state courts prior to the passing of sentence upon the relator on September 14, 1945. On the contrary, the issue raised there and here primarily concerns the action of state officials on and after May 3, 1946, in connection with their past and proposed attempts to electrocute the relator. This issue properly presents a federal constitutional question based on the impending deprivation of the life of the relator by executive officials of the State of Louisiana in a manner alleged to be a violation of the due process of law guaranteed by the Fourteenth Amendment. The refusal of the writs necessarily denied the constitutional protection prayed for. In ruling against the relator on the pleadings, in the absence of further evidence, the Supreme Court of Louisiana must be taken to have acted upon the allegations of fact most favorable to the relator. The petition contains the unequivocal allegation that the official electrocutioner "turned on the switch and a current of electricity was caused to pass through the body of relator, all in the

¹ That court, in discussing the pleadings, also said:

"In this latter answer or opposition it is admitted that the attempt was made to electrocute Willie Francis on May 3, 1946, in obedience of the death warrant, but it is averred that through some latent electrical defect in the apparatus, no electric current reached the body of Willie Francis and for that reason the sentence of death was not carried out. We have no other evidence, of course, as to whether an electric current did reach the body of Willie Francis. The important fact, however, is that a current of sufficient intensity to cause death, as required by the statute on the subject, and by the death warrant, did not pass through the body of Willie Francis."

This means that, as long as the relator did not die, the court apparently regarded the carrying out of the death sentence as a purely executive function not subject to judicial review. *addition*

8 STATE OF LOUISIANA *v.* RESWEBER.

presence of official witnesses." This allegation must be read in the light of the Louisiana statute which authorized the electrocutioner to apply to the body of the relator only such an electric current as was of "sufficient intensity to cause death." On that record, denial of relief means that the proposed repeated, and at least second, application to the relator of an electric current sufficient to cause death is not, under present circumstances, a cruel and unusual punishment violative of due process of law. It exceeds any punishment prescribed by law. There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful? [In spite of the constitutional issue thus raised, the Supreme Court of Louisiana treated it as an executive question not subject to judicial review. We believe that if the facts are as alleged by the relator the proposed action is unconstitutional. We believe also that the Supreme Court of Louisiana should provide for the determination of the true facts and then proceed in a manner not inconsistent with this opinion.] *assailant*

That counsel for both sides recognize the materiality of what occurred on May 3, 1946, is demonstrated by the affidavits and the transcript of testimony which they took from available public records and called to the attention of this Court by publication of them in connection with their respective briefs in this Court. Excerpts from those public records, printed in the margin, indicate the conflict of testimony which should be resolved.² *omission*

² The following excerpts are from copies of affidavits printed as appendices to the brief on behalf of the petitioner. The official witnesses named were persons charged by statute with the duty of making a signed report or "proces verbal" reciting the manner and date of the execution to be filed with the clerk of the court in which the sentence was imposed. La. Code of Criminal Procedure (1928), Act No. 2, Art. 571. The statements refer to what happened after the relator had been strapped into the electric chair and a hood placed before his eyes.

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that

STATE OF LOUISIANA v. RESWEBER. 9

The remand of this cause to the Supreme Court of Louisiana in the manner indicated does not mean that the

the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.' Affidavit of official witness Harold Resweber, dated May 23, 1946.

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.' Then they took the hood from his eyes and unstrapped him.

"This boy really got a shock when they turned that machine on." Affidavit of official witness Ignace Doucet, dated May 30, 1946.

"After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: 'Goodby Willie'. At that very moment, Willie Francis' lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: 'Take it off. Let me breath.' Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve." Affidavit of official chaplain Reverend Maurice L. Rousseve, dated May 25, 1946.

Attached to the brief on behalf of the respondents there was submitted a copy of the transcript of testimony taken before the Louisiana Pardon Board on May 31, 1946, in support of the relator's application for executive clemency which was denied June 1, 1946. This transcript includes testimony of those who were in charge of the electrical equipment on May 3, to the effect that no electric current reached the body of the relator and that his flesh did not show electrical burns. It also included a statement by the sheriff of a neighboring parish, who accompanied the relator from the chair, that the relator told him on leaving the chair that the electric current had "tickled him."

These public records were not in existence and therefore not before the Supreme Court of Louisiana when it rendered its decision on May 15, 1946.

10 STATE OF LOUISIANA *v.* RESWEBER.

relator necessarily is entitled to a complete release. It means merely that the courts of Louisiana must examine the facts, both as to the actual nature of the punishment already inflicted and that proposed to be inflicted and, if the proposed punishment amounts to a violation of due process of law under the Constitution of the United States, then the State must find some means of disposing of this case that will not violate that Constitution.

For the reasons stated, we are unable to concur in the judgment of this Court which affirms the judgment below.

no 142

To: The Chief Justice

From: BURTON, J.

Circulated: -----

Recirculated: 1/9/47 -----

see changes on
pk 2, 3, 7 & 8

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner,	}	On Writ of Certiorari to the Supreme Court of the State of Lou- isiana.
<i>v.</i> E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.		

[December —, 1946.]

MR. JUSTICE BURTON, dissenting.

This case is unique. Having failed to find a precedent for it, competent counsel suggest that, in comparable situations, executive clemency may have made judicial action unnecessary. In this case, however, the relator is compelled to seek relief here. The issue is that of a threatened deprivation of his life in violation of his rights under the Constitution of the United States. It calls for the most scrupulous exercise of the trusteeship of this Court over the legal process by which a human life may be taken.

This second attempt to electrocute this man confronts us with at least two serious charges of violations of the Fourteenth Amendment to the Constitution of the United States. *First.* As compared with others who have suffered immediate death under the same law by the expressly prescribed continued application of electric current, this man is to suffer a delayed death caused by at least two noncontinuous and long separated applications of the current for which there is no express statutory provision. His punishment thus becomes both a different and a cruel punishment. If he suffers such a death, it is charged that, thereby, the State will deny him the equal protection of the laws guaranteed to him by the Constitution. *Second.* In contrast to the instantaneous electrocution prescribed by the Louisiana statute, this man is to suffer

2 STATE OF LOUISIANA *v.* RESWEBER.

a unique and severe form of electrocution amounting to a cruel and unusual punishment. If he suffers such a death, it is charged that, thereby, the State will take his life without due process of law and in violation of the Constitution of the United States.*

This man has been convicted of murder and sentenced by a Louisiana County court "to suffer death in the manner provided by law." That manner is prescribed as follows:

"Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the *application and continuance of such current through the body of the person convicted until such person is dead.* Every sentence of death imposed in this State shall be executed at the Parish Prison of the Parish in which the crime was committed for which said person was convicted, or in the Parish to which venue has been changed, or when electricity is not available in the parish prison where an execution is to be performed, the Sheriff, with the consent of the Governor, may change the place of said execution to an adjacent parish, and shall be inflicted within the walls of the Parish jail in a room entirely cut off from view of all except those permitted by law to be in said room. (Italics supplied.) La. Code of Criminal Procedure (1928), Act No. 2, Art. 569, as amended by § 1, Act No. 14, 1940.

*That these violations of the Constitution of the United States were presented to and passed upon by the Supreme Court of Louisiana appears from the following statement in the *per curiam* decision of that court included in the record before us:

"In his petitions to this court, the relator sets forth all of the facts which we have recited, and contends, as he contended in his petitions to the district court, that a refusal to grant him a writ of habeas corpus and to order his execution stayed would be a denial of due process of law and of the equal protection of laws, as guaranteed by the 14th Amendment of the Constitution of the United States and by Section 2 of Article I of the Constitution of this State."

STATE OF LOUISIANA *v.* RESWEBER. 3

It is common knowledge locally, and it was stated by counsel here, that, in this case, there was not available at the parish prison electric current of a voltage sufficient to insure electrocution. Accordingly, the State transported to a place outside of that prison equipment intended to step up the available voltage to the required intensity. On May 3, 1946, the current was turned on with the purpose of applying it to the relator who was strapped to an electric chair in the prison. The failure of this attempt is described in the state's brief as follows:

"Through a latent electrical defect, the attempt to electrocute Francis failed, the State contending no current whatsoever reached Francis' body, the relator contending a current of electricity did pass through his body; but in any event, Willie Francis was not put to death. On the same day, Governor Davis granted a reprieve until May 9, 1946, and stayed the execution of his death warrant."

I

The language of the Louisiana statute is important. It does not provide for electrocution by interrupted and repeated applications of current several days or even several minutes apart. It prescribes the obviously more humane procedure of a single application of a current of sufficient intensity to cause death and it calls for the continuance of such current until death results.

Starting with this statutory provision calling for death by a continuous application of the current, it is our duty to consider the relation of this case to the Fourteenth Amendment. That Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The act of the Governor, on May 3, in staying execution of Francis' original death warrant for six days after the first attempt to carry it out, was a recognition of the need for the lapse of at least that time within which all concerned might recover from

4 STATE OF LOUISIANA v. RESWEBER.

the unusual experience of May 3. To have ordered the reapplication of the current on that day, or even on the next day, would have increased the cruelty of the procedure. The cruelty of such an order, however, differs only in degree from the cruelty that will accompany the now proposed reapplication of the current at a later date.

If an inadequate electric current be applied to a person five times on five different days, or five times at intervals of a few hours on the same day, that experience, although culminating in death, obviously is different from, and more painful to endure than a single application causing instantaneous death. This difference between a punishment including two or more noncontinuous electric shocks of varying intensity finally culminating in death, and a punishment consisting substantially of no more than death itself, is a major difference. There can be no question which punishment a prisoner would select if allowed to choose between them.

This Court appropriately has said:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended . . . that *in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.*" (Italics supplied.) *Barbier v. Connolly*, 113 U. S. 27, 31.

See also, *Yick Wo v. Hopkins*, 118 U. S. 356; *Smith v. Texas*, 311 U. S. 128. I believe, therefore, that the execution of this man by one or more reapplications of the electric current will deny to him the equal protection of the laws guaranteed by the Fourteenth Amendment.

II

The Fourteenth Amendment provides also "nor shall any State deprive any person of life, liberty, or property,

STATE OF LOUISIANA *v.* RESWEBER. 5

without due process of law; . . .". That such due process of law prohibits cruel and unusual punishments is demonstrated by the Eighth Amendment which provides, as to federal agencies, that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Constitution of Louisiana (1921) in Article I, § 12, contains precisely the same wording applicable to Louisiana agencies. Many of the state constitutions contain similar prohibitions.

Torture culminating in death was an abuse of sovereign power keenly resented at the time of the adoption of the Eighth Amendment in 1791. By the time of the adoption of the Fourteenth Amendment in 1868, the prohibition of it was embedded still more deeply in the law of the land and thereby absorbed into the meaning of constitutional due process. It comes well within the following test of the prohibited processes of law described in *Twinning v. New Jersey*, 211 U. S. 78, 106-107:

"Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. . . . We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law."

The taking of human life by force of law touches the most fundamental of all rights—the right to live. Here, of all places, a citizen is entitled to "due process." *In extremis*, he depends upon the courts for enforcement of whatever constitutional rights he has to prevent the taking of his life by the tragically unlawful process of a cruel and unusual punishment.

6 STATE OF LOUISIANA *v.* RESWEBER.

If the state officials deliberately and intentionally had placed this man in the electric chair five times and, each time, had applied electric current to his body in a quantity or voltage not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in this case, was unintended, the proposed reapplication of the electric current will be intentional. How many more than one deliberate and intentional application of current does it take to produce a cruel and unusual punishment? While five such applications would be more cruel and unusual than one, the uniqueness of the present case is enough to demonstrate that today a second attempt is sufficiently cruel and unusual to be so recognized and to come within the prohibition of our Constitution.

The lack of intent to produce the first failure is not material to the present issue. It neither lessens the proposed torture nor justifies the original failure. The equipment failed when it was the duty of the State to be sure that the equipment did not fail. The demonstrated inadequacy of that equipment contrasts with the precautions generally taken elsewhere to insure against failures of executions by electricity. The care thus generally taken evidences the significance that is attached to the unconditional specification calling for a continued application of the current until death results.

Executive clemency is a common means of preventing an unconstitutional execution. When, however, the unconstitutionality of an execution properly becomes an issue in this Court, as in this case, we should grant the required relief.

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator [Archbold's Criminal Practice and

STATE OF LOUISIANA *v.* RESWEBER. 7

Pleading (8th Ed.), 584] referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Wilkerson v. Utah*, 99 U. S. 130, 135-136.

Some of the considerations presented here were recognized in the case of *In re Kemmler*, 136 U. S. 436, when a comparatively early New York statute authorizing capital punishment by electrocution was attacked as violative of the due process clause of the Fourteenth Amendment because prescribing a cruel and unusual punishment. In upholding that statute, the several state courts and this Court emphasized the requirement that the electric current was to be applied in such a manner as to cause instantaneous death. Each court treated that requirement as essential to the absence of cruelty. That statute, like the Louisiana one before us, called expressly for the continued application of a sufficient amount of electric current to cause death. It was the resulting strictly "instantaneous" and "painless" death that was referred to as "humane."

After quoting the New York County and Supreme Courts, this Court quoted the New York Court of Appeals, at 119 N. Y. 569, as follows:

"We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, *under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.*" (Italics supplied.) *Id.* at 443-444.

Finally, speaking for itself, this Court said:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in

8 STATE OF LOUISIANA v. RESWEBER.

the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

“Undoubtedly the amendment [Fourteenth] forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, *in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences.*” (Italics supplied.) *Id.* at 447, 448-449.

I believe, therefore, that the execution of this man by one or more reapplications of the electric current will amount to the infliction upon him of a cruel and unusual punishment which will deprive him of his life without due process of law, and that such a punishment should be held invalid as in violation of the Constitution of the United States.

III

The remand of this cause to the Supreme Court of Louisiana, for further proceedings in accordance with an opinion of this Court that the execution of the relator by the reapplication of electric current to him under the present circumstances would be in violation of his constitutional rights, would not mean that he was entitled to a complete release. It would mean merely that the State of Louisiana must find a means of disposing of his case that will be in conformity with the Constitution of the United States.

For the reasons stated, I am unable to concur in the judgment of this Court which affirms the judgment below.

To: The Chief Justice

From: BURTON, J.

Circulated: 12/12/46

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie	} On Writ of Ceritorari to	
Francis, Petitioner,		the Supreme Court
v.		of the State of Lou-
E. L. Resweber, Sheriff of the		isiana.
Parish of St. Martin, Louisi-		
ana, et al.		

[December —, 1946.]

MR. JUSTICE RUTLEDGE, dissenting.

No one would hold, I think, that Louisiana would be free deliberately to place a convicted man in the electric chair, turn on the current, cut it off before death, remove him and later reelectrocute him. That would be sheer torture. Due process outlaws this barbarism in our scheme, whether as contravening the most elementary standards of decency in dealing with persons charged with crime, *Malinski v. New York*, 324 U. S. 401, or as incorporating the commands against cruel and unusual punishments and punishing a man twice for the same offense. See *In re Kemmler*, 136 U. S. 436. Here this trinity comes to the same thing.

I do not think the element of torture is removed because the state acts carelessly rather than deliberately. This is the crucial question. The majority say the failure was due to accident.¹ I find no basis for this view in the rec-

¹ The Court also regards what occurred in this case as equivalent to what happens when the state secures a new trial. *Palko v. Connecticut*, 302 U. S. 319. The analogy is one I neither accept nor understand.

The *Palko* case held "that kind of double jeopardy . . . [which is] so acute and shocking that our polity will not endure it" within the protection of the due process clause of the Fourteenth Amendment. 302 U. S. at 328.

2 STATE OF LOUISIANA *v.* RESWEBER.

ord, except that the failure was not intended or foreseen. Even so, it was not shown to be due to causes over which the state had no control. Its duty is to see that such failures do not occur. It has no right to take chances with faulty or antique equipment, low current or any other risk likely to produce such horror. Torture, for the victim, is not a matter of the executioner's state of mind. It may be inflicted as much by carelessness and bungling or taking a chance as by design. The facts of this electrocution are more consistent with such a cause than any other,² if only by the absence of any showing that the failure was due to factors beyond the state's control. That showing at the least should be compelled in such a case as this, before a second or perchance a third electrocution is attempted.

I do not think the states are free to take chances in any way with such a consequence as took place here. I am unwilling to indulge the presumption on this record that it did not do so. Men's lives should not hang upon a thread so slender. I know of no way to force the states to forego such risks and the horrors both of cruel and of multiple punishments they entail, other than by applying strictly

² The state stated in its answer to the petition for habeas corpus that there was a "latent electrical defect." In its brief submitted to this Court it also has attached a record of the testimony given at a hearing before the Louisiana Pardon Board on May 31, 1946. It appears from the uncontradicted testimony that a portable electric chair was used. The electric chair was installed in the St. Martin Parish Prison by a prison inmate, an assistant to the electrician at the penitentiary where the chair is normally kept and from where it was brought for the purpose of this execution. It was installed about 8:30 a. m. on the day of the execution. The wires ran from a truck outside the prison through a window to the switchboard connected with the electric chair. After the chair was installed it was tested. No further test was made prior to the actual electrocution, which occurred between 12:00 noon and 1:00 p. m. There was also testimony that the cause of the partial or total failure of the electricity was that a wire had come loose. The wire was apparently one between the truck and the switchboard.

142—DISSENTING (B)

STATE OF LOUISIANA *v.* RESWEBER. 3

the constitutional prohibitions against them. Willie Francis cannot be electrocuted again without undergoing a second time the death pangs he already has suffered and which now I think the state has no right to reinflct. Needless to add, I am in substantial agreement with the views expressed by my brothers, MURPHY and BURTON.

142 dis

The Chief Justice
John
Hutledge, Jr.

12/14/46

SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1946.

State of Louisiana, ex rel. Willie	)	
Francis, Petitioner,	)	On Writ of Certiorari to the
v.	)	Supreme Court of the State of
E. L. Resweber, Sheriff of the Parish	)	Louisiana.
of St. Martin, Louisiana, et al.	)	

[December , 1946.]

Mr. Justice RUTLEDGE, dissenting.

No one would hold, I think, that Louisiana would be free deliberately to place a convicted man in the electric chair, turn on the current, cut it off before death, remove him and later reelectrocute him. That would be sheer torture. Due process outlaws this barbarism in our scheme, whether as contravening the most elementary standards of decency in dealing with persons charged with crime, *Malinski v. New York*, 324 U. S. 401, or as incorporating the commands against cruel and unusual punishments and punishing a man twice for the same offense. Here this trinity comes to the same thing.

I do not think the element of torture is removed because the state acts carelessly rather than deliberately. This is the crucial question.

1

The majority say the failure was due to accident. I find no basis for this view in the record, except that the failure was not intended or foreseen. Even so, it was not shown to be due to causes over which the state had no control. Its duty is to see that such failures do not occur. It has no right to take chances with faulty or antique equipment, low current or any other risk likely to produce such horror. Torture, for the victim, is not a matter of the executioner's state of mind. It may be inflicted as much by carelessness and bungling or taking a chance as by design. The facts of

2

this electrocution are more consistent with such a cause than any other,

1. The Court also regards what occurred in this case as equivalent to what happens when ~~one convicted consents to second trial and sentencing by applying for and securing~~ ^{the state} a new trial. The analogy is one I neither accept nor understand.

2. The state stated in its answer to the petition for habeas corpus that there was a "latent electrical defect." In its brief submitted to this Court it also has attached a record of the testimony given at a hearing before

if only by the absence of any showing that the failure was due to factors beyond the state's power to control. That showing at the least should be compelled in such a case as this, before a second or perchance a third electrocution is attempted.

I do not think the states are free to take chances in any way with such a consequence as took place here. I am unwilling to indulge the presumption on this record that it did not do so. Men's lives should not hang upon a thread so slender. I know of no way to force the states to forego such risks, and the horrors both of cruel and of multiple punishments they entail, other than by applying strictly the constitutional prohibitions against them. Willie Francis cannot be electrocuted again without undergoing a second time the death pangs he already has suffered and which now I think the state has no right to reinfllict. Needless to add, I am in substantial agreement with the views expressed by my brothers Murphy and Burton.

(2 cont.) the Louisiana Pardon Board on May 31, 1946. It appears from the uncontradicted testimony that a portable electric chair was used. The electric chair was installed in the St. Martin Parish Prison by a prison inmate, an assistant to the electrician at the penitentiary where the chair is normally kept and from where it was brought for the purpose of this execution. It was installed about 8:30 a.m. on the day of the execution. The wires ran from a truck outside the prison through a window to the switchboard connected with the electric chair. After the chair was installed it was tested. No further test was made prior to the actual electrocution, which occurred between 12:00 noon and 1:00 p.m. There was also testimony that the cause of the partial or total failure of the electricity was that a wire had come loose. The wire was apparently one between the truck and the switchboard.

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The Chief Justice
John R. Rutledge, Jr.

12/14/46

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