

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Jocelyn Newman, Circuit Court Judge

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Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

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FREDDIE EUGENE OWENS, BRAD KEITH SIGMON, GARY DUBOSE  
TERRY, and RICHARD BERNARD MOORE,..... Respondents-Appellants,

v.

BRYAN P. STIRLING, in his official capacity as the Director  
of the South Carolina Department of Corrections; SOUTH  
CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY  
MCMASTER, in his official capacity as Governor of the State  
of South Carolina, ..... Appellants-Respondents.

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CONSENT MOTION TO SEAL PORTIONS OF CIRCUIT COURT RECORD

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Under Rule 240, SCACR, and *In re Revised Order Concerning Personal Identifying Information & Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 757 S.E.2d 421 (2014), Appellants-Respondents move, with the consent of Respondents-Appellants, to seal portions of the trial transcript and certain exhibits in this appeal. In support of this Motion, Appellants-Respondents submit as follows:

1. Although judicial proceedings are presumptively open, *see* S.C. Const. art. I, § 9, this Court has recognized that, in certain circumstances, parts of proceedings may be sealed, *Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006). One such circumstance is when a statute precludes the public disclosure of certain information. *Id.*

2. At trial here, the circuit court heard certain arguments and took certain testimony in a closed courtroom, and the circuit court admitted certain exhibits under seal. All of those decisions were in accord with South Carolina law, and all of that evidence should be sealed in this Court.

3. As for portions of the transcript, section 24-3-580 prohibits anyone from “knowingly disclos[ing] the identity of a current or former member of an execution team or disclos[ing] a record that would identify a person as being a current or former member of an execution team.” S.C. Code Ann. § 24-3-580. Such “information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation.” *Id.* Here, two sections of the transcript involve information and testimony protected by this statute. The first section, from pages 80 to 112 of the transcript, involves pretrial argument over whether the circuit court should hear testimony from a member of an execution team. The circuit court closed the courtroom for this portion of the argument. The second section, from pages 284 to 290 of the transcript, is the testimony of that witness. The circuit court closed the courtroom for this testimony. In addition to

these sections, a public version of the remaining pages of the transcript requires redactions on pages 2, 78, 112, 284, and 290 to ensure nothing that would disclose the witness's identity is inadvertently revealed.

The Court should seal these parts of the transcript. The General Assembly has made the determination that this information is worthy of special protection (indeed, even if it is disclosed to a litigant, it can be only "under seal"). This information has not yet been disclosed, and disclosing it potentially puts the witness at grave risk from condemned inmates or others who may want to harm or intimidate a person involved with carrying out a death sentence. Sealing this testimony serves the public record by ensuring that SCDC is able to carry out executions and that SCDC employees are able to serve on the execution team with the confidence that their identities will be protected in the manner provided by law. Moreover, sealing this information sealed will not harm the public. The overwhelming majority of the trial was conducted in public, and anyone interested in these proceedings may fully understand them without accessing the limited portions of the transcript pertaining to testimony provided under seal.

4. As for exhibits, the circuit court admitted under seal Plaintiffs' Exhibits 1, 2, 3, 4, 5, 7, 14, 15, 17, and 18. These exhibits fall into two categories: (1) SCDC's execution protocols (Exhibit 7), and (2) autopsy records and photographs (all other exhibits).

A. SCDC's execution protocols include the detailed steps taken and when they are taken to carry out an execution by each of the three methods (electrocution, firing squad, and lethal injection) authorized by section 24-3-530. For security reasons, SCDC had designated this document confidential. And courts have held that it is not subject to disclosure. *See, e.g., Just. 360 v. Stirling*, 42 F.4th 450 (4th Cir. 2022) (holding that counsel for Respondents-Appellants in this case lacked standing to assert a First Amendment right to obtain a copy of SCDC's execution

protocols); Order, *Just. 360 v. S.C. Dep't of Corrections*, No. 2020-CP-40-05306 (S.C. Ct. Comm. Pls. Nov. 25, 2020) (denying a demand by counsel for Respondents-Appellants in this case for a copy of the SCDC's execution protocols pursuant to FOIA).

Keeping the protocols sealed will ensure SCDC can fulfill its statutory duty to carry out death sentences, but it will not harm the public. Multiple witnesses testified at trial about the process of electrocution and the firing squad, so anyone who is interested in this case may review the transcript and the briefing and easily discern how both methods generally work and the mechanism of death. The specifics of SCDC's protocols are not needed for the public to understand this case.

B. Turning to the autopsies, South Carolina law specifically restricts who may view “[p]hotographs, videos, or other visual images and audio recordings of or related to the performance of an autopsy.” S.C. Code Ann. § 17-5-535(A). Violating this statute is a crime. *Id.* § 17-5-535(C). Moreover, this restriction does not include an exemption for unrelated or third-party litigation (or, for that matter, public disclosure more generally, *see id.* § 30-4-40(a)(18) (FOIA exemption); *Perry v. Bullock*, 409 S.C. 137, 144, 761 S.E.2d 251, 254 (2014)). Additionally, the Attorney General has consistently opined that autopsy records are confidential because of the volume of detailed information those records contain. *See, e.g.*, S.C. Att’y Gen. Op., 2011 WL 782314, at \*5 (S.C.A.G. Feb. 23, 2011); S.C. Att’y Gen. Op., 2001 WL 957742, at \*1 (S.C.A.G. Aug. 8, 2001).

Keeping these autopsy records sealed respects the policy determination the General Assembly has made. It protects the “extensive medical information” in an autopsy, including “vivid medical allusions to parts of the human body” that are “not available for public consumption.” *Perry*, 409 S.C. at 142–43, 761 S.E.2d at 253–54. That is particularly true in this

case, when many autopsy reports included photographs of the condemned inmates after their executions were carried out. At the same time, the public testimony from the witnesses generally described the conditions of the bodies and the perceived or purported effects of the particular method of execution. So once again, any person interested in this issue may, from the public testimony, know everything necessary to understand the issues being litigated here.

5. Appellants-Respondents therefore move the Court to seal the parts of the trial transcript identified in Paragraph 3 and the exhibits identified in Paragraph 4. For the reasons outlined above, the factors outlined by the Court in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 470, support sealing these records on appeal, which will also maintain consistency with the circuit court's orders addressing the testimony and exhibits addressed in this Motion.

6. To be able to compile the Record on Appeal, Appellants-Respondents seek one piece of relief from this Court. Three weeks ago on September 19, 2022, Appellants-Respondents moved the circuit court for relief related to sealing the transcript and the sealed exhibits. First, Appellants-Respondents asked the circuit court to formally seal the parts of the transcript for which the courtroom was closed, with the goal of streamlining the process of moving this Court to seal these parts of the record. Second, Appellants-Respondents asked the circuit court to order the Clerk of Court in Richland County give Appellants-Respondents official copies of the sealed exhibits from trial, which that Clerk has refused to do without a court order. Respondents-Appellants consented to this requested relief.

The circuit court has not yet ruled on this motion. Appellants-Respondents therefore ask this Court to direct the Clerk of Court in Richland County to provide all counsel of record in this case copies of all exhibits, including the sealed exhibits, from trial, so that they may compile the

Record on Appeal. Additionally, this Court should direct the Clerk of Court in Richland County not to make public the parts of the transcript that this Court has sealed or redacted.

7. If the Court grants this Motion, Appellants-Respondents will include a Sealed Volume of the Record on Appeal that contains these, and only these (and only if they are designated by any party to be part of the Record on Appeal), parts of the circuit court record.

8. Appellants-Respondents request the Court expedite consideration of this Motion so that Appellants-Respondents are able to assemble and file the Record on Appeal by the deadline in the Court's October 5 Order.

Respectfully submitted,

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