

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

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

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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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

**Freddie Eugene Owens; Brad Keith Sigmon;
Gary Dubose Terry; and Richard Bernard
Moore,**

Plaintiffs,

v.

Bryan P. Stirling, in his official capacity as
Director of the South Carolina Department of
Corrections; **South Carolina Department of
Corrections**; and **Henry McMaster**, in his
official capacity as Governor of South
Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021CP4002306

**ORDER GRANTING DECLARATORY AND
INJUNCTIVE RELIEF**

These matters came before the Court for a non-jury trial, which began on August 1, 2022, and concluded on August 4, 2022. Plaintiffs did not appear for the trial but were represented by their attorneys, J. Christopher Mills, Esquire; Joshua S. Kendrick, Esquire; Lindsey S. Vann, Esquire; and Hannah Freedman, Esquire. Defendants Stirling and South Carolina Department of Corrections were represented by Daniel C. Plyler, Esquire, and Austin Reed, Esquire. Defendant McMaster was represented by Thomas A. Limehouse, Jr., Esquire, and William Grayson Lambert, Esquire.

Having fully considered all of the arguments, testimony, and evidence presented by the parties, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Parties

One of the defendants in this action is the South Carolina Department of Corrections (“SCDC”), the state agency charged with implementing and carrying out the policy of the State of South Carolina with respect to its prison system. *See* S.C. CODE ANN. § 24-1-30 (1976, as amended); *see also* S.C. Const. art. XII, § 2 (“The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates.”). The remaining defendants are Bryan P. Stirling, the Director of SCDC (“Director Stirling”), and Henry McMaster, Governor of the State of South Carolina (“the Governor”), both of whom are sued in their official capacities only.

Each of the plaintiffs is an inmate at SCDC, having been convicted of committing at least one murder and sentenced to death. Gary Dubose Terry (“Terry”) was convicted of murder in Lexington County and has been on death row since 1997. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000). Freddie Eugene Owens (“Owens”) was convicted of murder and sentenced to death in 1999, after he shot and killed a convenience store clerk during the commission of a nighttime robbery. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001), *abrogated by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Like Owens, Richard Bernard Moore (“Moore”) was convicted of a murder that he committed during the commission of a nighttime robbery. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). He was sentenced to death in October 2001. *Id.* Brad Keith Sigmon (“Sigmon”) murdered two people in Greenville County in 2002, and a jury subsequently sentenced him to death. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005).

Between November 2020 and March 2021, the Supreme Court of South Carolina set execution dates for Moore, Sigmon, and Owens after they exhausted their appellate and post-conviction remedies. At that time, South Carolina law provided that any death-sentenced inmate be executed by electrocution or by lethal injection. *See* 1995 S.C. Acts No. 108, § 1 (codified at S.C. CODE ANN. § 24-3-530(A) (2007)). That statutory scheme required that, fourteen days before the scheduled execution, the inmate must choose his method of execution. *Id.* If the inmate made no election, the default method of execution was lethal injection. *Id.*

Before each of Plaintiffs' scheduled execution dates, SCDC informed the Supreme Court that it could not obtain lethal injection drugs to carry out the executions. The Court responded by issuing stays of execution until "[SCDC] advises the Court it has the ability to perform the execution as required by law." *See, e.g.,* Order, *State v. Moore*, No. 2001-021895 (S.C. Nov. 30, 2020).

II. S.C. CODE ANN. § 24-3-530

For many years, SCDC has been unable to obtain or to compound the drugs necessary to carry out lethal injection. This moratorium was due, in part, to the South Carolina legislature declining to pass certain legislation which would facilitate procurement of the drugs. Failures such as these resulted in a *de facto* stay of executions, as inmate after inmate opted for death by lethal injection. *See* S.C. House, Video of Judiciary Subcommittee on Constitutional Laws, 1:45 (Apr. 21, 2021), <https://tinyurl.com/4czcc4yc> (testimony from Director Stirling to a House Judiciary subcommittee that SCDC "cannot carry out an execution by lethal injection because [SCDC] could not obtain the drugs").

In order to address this problem, the South Carolina legislature ("the General Assembly") amended the law regarding executions. Act 43 of 2021 ("the Act") – which was approved by the

General Assembly and ratified by the Governor – amended S.C. CODE ANN. § 24-3-530 to change the default method of execution to electrocution. *See* 2021 S.C. Acts No. 43, § 1 (amending S.C. CODE ANN. § 24-3-530). The Act also added a firing squad as a third option for the method of execution. It provides:

A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election, under the direction of the Director of the Department of Corrections.

S.C. CODE ANN. § 24-3-530(A) (2021). Therefore, if an inmate does not make an election as to his method of execution, or if lethal injection or the firing squad are unavailable, he must die by electrocution. *Id.*

The Act “applies to persons sentenced to death as provided by law prior to and after [its] effective date,” including Plaintiffs. 2021 S.C. Acts No. 43, § 3. In other words, despite Plaintiffs having previously rejected the option death by electrocution, the amended law requires that they die in this manner unless lethal injection or the firing squad is deemed “available” by Director Stirling. With lethal injection remaining unavailable as it has been for many years, Plaintiffs have only two choices: being electrocuted or being shot to death.

III. This Lawsuit

In May 2021, soon after the Act was signed into law, Plaintiffs filed this action. They also filed a Motion for Preliminary Injunction, which was denied by this Court in June 2021. At the same time, Director Stirling advised the Supreme Court that SCDC “has been unable, despite numerous and diligent attempts, to acquire the drugs necessary, in a useable form, to perform lethal injection” and that “SCDC does not currently have the necessary policies and protocols, as required by the statute, for an execution by firing squad.” Letter, Stirling to Shearouse (June 8, 2021), filed in *Sigmon*, No. 2002-024388. The Supreme Court again stayed Plaintiffs’ executions, stating:

According to the Director's response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of the necessary protocols and policies.

Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

Order, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021);

Order, *State v. Owens*, No. 2006-038802 (June 16, 2021).

This prompted SCDC to quickly develop protocols necessary to implement the firing squad as a method of execution. It did so and notified the Supreme Court of its work on March 18, 2022. The Court then set new execution dates for Moore and Sigmon of April 29, 2022 and May 13, 2022, respectively; and Director Stirling submitted an affidavit to the Court certifying that “the only statutorily approved methods of execution available to the Department are electrocution and firing squad.” The Supreme Court stayed those execution notices during the pendency of this action.

After a series of revisions to the original pleadings and the consolidation of related cases into this one, Plaintiffs filed their “Third Amended Complaint for Permanent Injunctive Relief and for a Declaratory Judgment” (“the Complaint”) on April 11, 2022. In it, they assert eight “claims for relief” (labeled as Count I through Count VIII) – (1) that the Act is “retroactive legislation,” which violates their due process rights; (2) that the Act amounts to unconstitutional *ex post facto* legislation; (3) that the execution statute, as amended, is void for vagueness; (4) that the courts must determine the meaning of the word “available” with respect to methods of execution, not

Defendants; (5) that the Act violates the Non-Delegation Doctrine of the South Carolina Constitution; (6) that both electrocution and the firing squad are prohibited by the South Carolina Constitution; (7) that Plaintiffs' right to elect their manner of execution is rendered meaningless by the lack of constitutional choices from which to make that election; and (8) that the statutory methods of execution, as applied to Terry, are unconstitutional.

The trial of this case began on August 1, 2022. At that time, Plaintiffs abandoned and withdrew Count I of the Complaint and consented to sever Count VIII for determination at another time. While six "claims for relief" remain, it appears that the thrust of Plaintiffs' argument is that S.C. CODE ANN. § 24-3-530 (2021) is unconstitutional because both electrocution and the firing squad violate the South Carolina Constitution's prohibition on cruel, unusual, and corporal punishments. The Court heard testimony and received exhibits as to these allegations, culminating in closing arguments on August 4, 2022.

FINDINGS OF FACT

I. Methods of Execution

The parties largely agree on the mechanics of each method of execution.

A. South Carolina's Firing Squad

The protocol for South Carolina's firing squad calls for the inmate to be strapped into a backless metal chair. Once the inmate is restrained in the chair, an "aiming point" is placed over his heart by a physician, and his head is covered by a hood. A three-member team is armed with rifles containing .308 Winchester 110-grain TAP urban ammunition. The team is positioned approximately fifteen feet from the inmate. When instructed to do so, the members of the team focus the sights of their rifles on the aiming point. They then fire their rifles at the inmate's chest.

Following the first volley, if the inmate appears unresponsive, a physician is called to check the inmate's vital signs. Vital signs are checked every sixty seconds until none are present, at which time the physician will certify death. However, if vital signs continue to be present after ten minutes, the firing squad team will fire a second volley at the inmate. Altogether, the protocol provides for contingencies for up to three volleys fired at the inmate if he continues to exhibit signs of life.

B. Electrocution

In 1912, South Carolina became the eighth state to adopt the electric chair as a method of execution. See 1912 S.C. Acts. 702, No. 402 § 1 (“*Be it enacted* by the General Assembly of the State of South Carolina, That after the approval of this Act by the Governor all persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the State Penitentiary, at Columbia, under the direction of the Superintendent of the Penitentiary instead of by hanging.”). Today, SCDC uses the same electric chair that it purchased in 1912, although some of the components have been replaced. It is a wooden chair equipped with leather straps which are used to restrain an inmate's head, legs, arms, and body.

Once the inmate is restrained, one copper electrode is attached to his right leg and another attached to his head using a copper hat. A sponge, soaked in a conductive solution, is placed between the inmate's scalp and the head electrode. An electric current is then applied to the inmate's body as follows: 2000 volts for 4.5 seconds followed by 1000 volts applied for eight seconds (the rounds of high-voltage current), ending with 120 volts of electric current (i.e., low voltage current) applied for two minutes. This process disrupts the inmate's bodily functions such as respiration and circulation, causes electrical burns, and ultimately results in death.

II. Witness Testimony

Plaintiffs presented the testimony from five witnesses, including two expert witnesses. Defendants offered testimony from three expert witnesses.

A. Defendant Bryan Stirling

Director Stirling testified that he became Interim Director of SCDC in 2013. He was then confirmed by the South Carolina Senate as Director in 2014. Since that time, SCDC has not carried out any executions. Director Stirling stated that he offered testimony before the legislative committees which were tasked with evaluating Act 43 but that he never advocated for or against any particular method of execution.

While the Court found Director Stirling to be a credible witness, he is admittedly not a subject matter expert in executions. Rather, he has a general familiarity with SCDC's protocols for its electric chair and firing squad and relies on experts to advise him on needed updates to the electric chair and the design and processes involved in utilizing the firing squad. Therefore, it is apparent that Director Stirling has very limited firsthand knowledge about many of the legal issues raised in this action.

B. Colie Rushton

Rushton currently serves as the Director of Security and Emergency Operations at SCDC. He has been employed by SCDC in various capacities for forty-nine years and has been in his current position since May 2007. Rushton is familiar with both the electric chair and the newly-implemented firing squad.

According to Rushton, SCDC's current protocols for judicial electrocutions were established before May 2007. Therefore, while he is knowledgeable about the electric chair itself and the voltage and timing applied pursuant to the protocols, he does not know why any specific

voltage or time period was chosen. Rushton testified that while the electric chair is old, the electrical system was built in the late 1980's. Further, he was present when the electrical system was tested by a professional engineer in June 2021 and again in April 2022. That testing confirmed that the system was in proper working order.

Unlike electrocution, the protocol for SCDC's firing squad was developed by Rushton. He testified that he did internet research about historical uses of firing squads and the FBI's testing of certain ammunition. Rushton spoke to officials in the State of Utah regarding their use of a firing squad, and he was the person who ultimately chose the ammunition to be used in such executions. However, Rushton admitted that the protocol was developed without consulting with any doctors, firearms experts, ballistics experts, or any professional who could determine the proper positioning of the target on the inmate's body.

C. Witness X

Witness X, another SCDC employee, testified *in camera* pursuant to S.C. CODE ANN. § 24-3-580 (2010). Witness X oversees judicial executions and ensures that security is maintained during those executions. The witness has been present at the capital punishment facility when executions were carried out by SCDC but has never personally observed the body of any inmate after judicial electrocution has occurred. In Witness X's role at SCDC, the witness would be advised if any problems arose during a judicial execution. However, Witness X testified that they are unaware of any problems or anomalies having occurred during any of those executions.

D. John Peter Wikswo, Jr., Ph.D.

Dr. Wikswo is a tenured professor of biomedical engineering, molecular physiology and biophysics, and physics at Vanderbilt University. The Court found, based on his education, training, and experience, that he is qualified as an expert in each of those three subjects. Dr.

Wikswow admitted that although he has been studying the electric chair and electrophysiology since 1992, he has no expertise in consciousness, pain, or forensic pathology. He has never attended medical school and has no training in medicine or forensic pathology, but he has studied how the human body responds to stimuli, including electricity. Therefore, Dr. Wikswow's testimony primarily concerned the mechanics of electrocution and its effect on the body.

Dr. Wikswow also explained that electrocution is meant to cause fibrillation, the process by which the heart rate increases until its electrical circuitry is disrupted and it can no longer pump oxygenated blood through the body, resulting in brain death. The heart, however, is capable of spontaneously regaining function after it enters fibrillation, meaning it can resume pumping oxygenated blood without any medical intervention. This is significant because, as Dr. Wikswow testified, the heart has an "upper threshold of vulnerability" beyond which a current will not induce fibrillation. According to Dr. Wikswow, that upper threshold is approximately 1000 volts. South Carolina's protocols call for the application of an initial current equal to or greater than this upper threshold. Therefore, Dr. Wikswow testified, the first 12.5 seconds of the inmate's electrocution is unlikely to induce fibrillation in most people, meaning that most inmates who are electrocuted in South Carolina's electric chair will not die from loss of oxygen to the brain after the first two shocks.

According to Dr. Wikswow, when judicial electrocutions are performed, the hope is that the electric current is first applied to the inmate's brain, but that this scenario is unlikely to actually occur. He testified that the human skull is not a good conductor of electricity. Thus, when the electric current is applied to the inmate's scalp, it spreads into the facial muscles and thoracic portions of the body, with only a small fraction entering the brain. In other words, the electric current primarily travels around the skull before and down the skin and tissues of the neck and

torso before reaching the electrode on the inmate's leg. However, Dr. Wikswo admitted that he cannot quantify the percentage of electric current that reaches the brain and that there is no evidence of how much of the brain is rendered nonfunctional during the process.

Instead, Dr. Wikswo opined that because the human skull is significantly more resistive than the skin, the muscles, and the connective tissue around the head, when current is applied to the top of the head, the vast majority does not enter the brain. Rather, it flows from the head electrode to the leg electrode. It does not cause immediate loss of consciousness but causes severe pain due to the tetany, or full contraction, of the body's skeletal muscles. Dr. Wikswo testified that tetany caused by a judicial electrocution may be forceful enough to cause broken bones. For this reason, Dr. Wikswo explained, the use of a head-to-hoof or head-to-leg arrangement is not even permitted for animal slaughter.

Dr. Wikswo also testified that when electric current flows through the body, it encounters resistance, which generates heat. In the case of the electric chair, the current generates enough heat to cause burning, charring, and arcing – a phenomenon in which electricity jumps through the air, as with a lightning strike or a spark. Arcing can cause burns to appear to on parts of the body that are not touching electrodes. Dr. Wikswo testified that one of the autopsies he reviewed from South Carolina documented that the fleshy portion of the inmate's nose had been burned off, which Dr. Wikswo explained was likely caused by arcing. He also testified that in the autopsies he reviewed from South Carolina and from other states, he observed damage consistent with severe electrical burns, charring, and arcing. Specifically, he testified that multiple of the South Carolina autopsies documented burns so deep that the underlying fat tissue rendered, causing the skin to slip and fall away from the bone. He did, however, admit that he was unable to determine whether the burns and other damage to the body occurred pre- or post-mortem.

In summary, Dr. Wikswo opined that there is no scientific evidence that electrocution – particularly in the manner applied by SCDC – causes painless, instantaneous death, and that he is unable to find scientific rationale to support for South Carolina’s electrocution protocols. In fact, South Carolina’s use of multiple, prolonged shocks is evidence that the first application of current is insufficient to kill the inmate. Further, there are no measurements to prove that the human brain is rendered insensate from the first electrical shock in judicial electrocutions, and that there is a substantial risk that the inmate remains conscious, sensate, and in pain for some period of time. Thus, while it is impossible to determine the exact moment that death occurs during a judicial electrocution, the process is neither instantaneous nor painless.

E. Dr. Jonathan Arden

Dr. Arden is a board-certified forensic pathologist. He has worked as a medical examiner in many jurisdictions and is currently a parttime forensic pathologist for the State of West Virginia and the City of San Diego, California. He is also a private consultant. Based on his education, training, and experience, the Court admitted Dr. Arden as an expert in the field of forensic pathology. Dr. Arden offered testimony about the kinds of injuries an inmate suffers when subjected to death by firing squad or by electrocution.

1. Firing Squad

According to Dr. Arden, the mechanism that causes death by firing squad is destruction of the heart, causing cessation of circulation. He explained that gunshot wounds to the chest would cause extensive damage, including fractures of the ribs and sternum. This, he testified, would cause excruciating pain as long as the person remained sensate, especially when making any movements such as flinching or breathing. Dr. Arden supported his conclusion that the firing squad would hit and fracture bone by reviewing a report of examination and photographs from a

firing squad execution in Utah. The pathological diagnoses in that execution noted “fragmentation of anterior chest wall,” which Dr. Arden recognized as indicating broken bones in the chest cavity.

Dr. Arden testified that an inmate would remain sensate and able to feel pain for approximately fifteen seconds, assuming the heart was rendered completely unable to circulate blood to the brain. If, however, the heart function was not completely disrupted – either because the bullets were not properly aimed at the heart or because the fragmentation caused the bullet fragments to hit surrounding areas – the inmate would remain sensate for longer. Based on his extensive experience as a pathologist, Dr. Arden testified that it is a scientific fact that a person will not immediately lose consciousness upon disruption of the heart because the remaining blood in the brain will provide sufficient oxygen to maintain consciousness for approximately fifteen seconds even if circulation is completely disrupted.

2. Electrocution

Dr. Arden testified that he has reviewed more than eighty autopsy reports from electric chair executions in various states and that all of those autopsies showed severe injuries. Specifically, he described severe electrical and thermal burns on inmates’ bodies and “effects on parts of the body, including internal organs, that is the equivalent of cooking.” Some of the burns Dr. Arden observed were classified as third-degree burns, and he testified that if a person were conscious during that process, they would feel “horrific pain.” Like Dr. Wikswo, Dr. Arden testified that when a person is electrocuted, their skeletal muscles tetanize, causing them to contract painfully. The muscles around the chest and lungs, which regulate breathing, also tetanize, meaning a person who is electrocuted is unlikely to be able to breathe. He also opined that the experience of electrocution and the passage of high voltage current through the body “in and of itself would be painful and excruciating.”

According to Dr. Arden, although it is not possible to distinguish between all pre- and post-mortem injuries, it is possible for some injuries. For example, he stated that some of the injuries he observed in the autopsy reports could only have occurred post-mortem, such as subdural hematomas. However, he testified that the presence of subdural hematomas in South Carolina electric chair autopsies is an indication that the inmates were exposed to extreme heat, as in cooking. Other injuries, Dr. Arden testified, could only have happened pre-mortem. Those injuries include bruising corresponding to the configuration of the restraints, for example, which Dr. Arden observed in many of the autopsies he reviewed, including those from South Carolina. According to Dr. Arden, bruising occurs when blunt force trauma causes blood to rush to the area of injury, a process that can only happen when the heart is beating. The presence of bruising, Dr. Arden explained, is a clear signal that a person killed in the electric chair did not die immediately.

Finally, Dr. Arden testified that of the eighty autopsies he reviewed, ten revealed that the executions were “botched,” meaning they did not go according to plan. Dr. Arden testified that some of the botches involved inmates surviving and remaining conscious past the first application of current, as indicated by voluntary movement or breathing. He stated that at least one of the South Carolina autopsies indicated a botched electrocution, as the head electrode appeared to have moved and fallen into the inmate’s eyes. Dr. Arden explained that if the inmate were conscious during any of his electrocution, he would have experienced excruciating pain from having an electrical burn in his eyes. In conclusion, Dr. Arden testified that “[t]here is no proof that judicial electrocutions, botched or not, provide instantaneous death.”

F. Dr. Ronald Wright

Dr. Wright – deemed by the Court to be an expert in forensic pathology – testified about the electric chair on behalf of Defendants. He largely disagreed with Plaintiffs’ witnesses.

According to Dr. Wright, when a person is electrocuted with very high voltage current, they are rendered instantaneously unconscious and cannot regain consciousness because their brain cells are subject to immediate poration. Poration, Dr. Wright testified, is a phenomenon in which an electrical current punches sub-microscopic holes into tissue, causing irreparable damage. He also stated that even if the brain does not instantly porate, a person will still die very quickly because the human heart tetanizes instantly. For this reason, Dr. Wright opined that “[i]f I had been sentenced to die, that [the electric chair] would be my choice because it doesn’t hurt.” Dr. Wright could not, however, offer any affirmative proof to support this theory of instant poration and insensibility. To the contrary, Dr. Wright acknowledged that a person whose brain has been subject to instant poration would not be capable of breathing, moving, or screaming; and he was unable to explain electrocutions during which inmates breathed, moved, and screamed after the application of electric current.

Dr. Wright also opined that the second application of electric current in South Carolina’s protocol is not necessary, given his view that the first application of high-voltage current causes instantaneous loss of consciousness. As to the third application of current, he testified that low-voltage current – which he described as current of less than 600 volts – is “very dangerous” and that electrocution with low-voltage current is particularly painful. He acknowledged that if a person survived and remained sensate after the first two applications of current in South Carolina’s electric chair, they would experience considerable pain and suffering. Consistent with this, Dr. Wright also acknowledged that electro-convulsive therapy (ECT), a medical treatment for some severe psychiatric illnesses, always involves the administration of anesthesia to induce sedation, followed by a strong muscle relaxant to prevent damage to the musculoskeletal system that can occur when a person’s skeletal muscles tetanize. ECT never involves a heat-to-leg electrode

system, but instead always requires cross-brain electrical current. These measures, Dr. Wright acknowledged, are designed to reduce pain and suffering. Dr. Wright could not explain how a head-to-leg electrode system – as is used by SCDC – is consistent with the goal of reducing pain and suffering.

Additionally, Dr. Wright acknowledged during his testimony that in reaching his opinions, he relied on a meta-analysis of more than fifty other peer-reviewed articles. *See* Hannah McCann, Giampaolo Pisano, & Leandro Beltrachini, *Variation in Reported Human Head Tissue Electrical Conductivity Values*, 32 BRAIN TOPOGRAPHY 825 (2019). Dr. Wright specifically described this article as “very good.” However, when confronted with the fact that the article explicitly details a consensus view among experts that the human skull is significantly more resistant than the scalp, muscles, fat, blood, and the brain, Dr. Wright discounted it and attributed those findings to the studies having used low voltages. He did not explain why a low voltage would impact the resistance measures.

G. Dr. Jorge Alvarez

Dr. Alvarez is a cardiologist in San Antonio, Texas, is the medical director of the South Texas Heart Valve Center, and is the co-medical director of the Methodist Hospital Chest Pain Center. The Court qualified Dr. Alvarez as an expert in cardiology and heard testimony from him regarding the use of a firing squad to cause death.

Dr. Alvarez agreed with other witnesses that when a firing squad is utilized, death is accomplished by disruption of the heart and surrounding vessels, which would stop blood circulation. He also agreed that the heart is located behind a series of bones, including the ribs and the sternum, with the sternum covering between one-third to one-half of the heart.

Regarding consciousness, Dr. Alvarez testified that the ammunition would cause relatively immediate stoppage of blood flow and a rapid decline in consciousness. Based on his experience as a cardiologist, he testified that the loss of consciousness would be relatively quick: less than ten seconds. On cross examination, Dr. Alvarez agreed that the precise location of where the bullet hits could impact how quickly a person would be exsanguinated, possibly increasing the amount of time a person could remain conscious. Finally, while he disagrees with Dr. Arden about precisely how long it takes for unconsciousness of the inmate to occur, they agree that loss of consciousness is not immediate; that accuracy in the administration of the firing squad is a necessary component of a rapid death; and that broken bones and chest cavitation cause pain.

H. Dr. D'Michelle DuPre

The final testifying witness was Dr. DuPre, a private consultant and forensic pathologist who has previously been employed as a medical examiner in multiple states. This Court qualified Dr. DuPre as an expert in forensic pathology. She offered testimony concerning the use of the firing squad.

Unsurprisingly, Dr. DuPre agreed with Drs. Arden and Alvarez about the mechanism of death and location of the heart behind bone. She also agreed with Rushton's assessment that the ammunition he selected would cause increased cavitation due to its frangibility. According to Dr. DuPre, each bullet fragment would itself create a temporary cavity in the inmate's body, causing more damage.

Dr. DuPre disagreed with other experts about how long an inmate remains conscious after being shot. Unlike the other experts, Dr. DuPre opined that death by firing squad would be very rapid with unconsciousness occurring "almost immediately." She asserted that it would be so quick that the inmate would not experience pain at all. She based this opinion, in part, on the idea

that the blood loss caused by the gunshot wounds would cause nearly instantaneous unconsciousness. However, Dr. DuPre offered no affirmative evidence to support her opinion that the firing squad causes immediate loss of consciousness.

In addition, Dr. DuPre acknowledged that her opinion about the firing squad was premised on an assumption that it would be carried out properly, with well-trained marksmen who would not miss their targets. She admitted, however, that she did not have any information about the marksmanship training received by the firing squad team and that she was not involved in the design of the protocol. Moreover, Dr. DuPre testified that shooting and killing another person is difficult and that a person with inadequate training or insufficient psychological preparation would be more likely to flinch or hesitate at the last moment, increasing the chances of a botched execution. Thus, it is clear that Dr. DuPre's testimony about the firing squad is based on a series of unsupported assumptions.¹

CONCLUSIONS OF LAW

The Uniform Declaratory Judgments Act is an appropriate method to challenge the constitutionality of a statute. See S.C. CODE ANN. § 15-53-20 (1976). It provides that “[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” *Id.* “Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.” S.C. CODE ANN. § 15-53-20 (1976); *see also* Rule 57, SCRCP.

“In an action for declaratory relief, the burden of proof rests with the party seeking the declaration...” *SPUR at Williams Brice Owners Ass’n, Inc. v. Lalla*, 415 S.C. 72, 82, 781 S.E.2d

¹ Here, the Court makes no attempt to discredit Dr. DuPre's testimony. Rather, the Court recognizes that they are premised on assumptions, which are just that – assumptions.

115, 121 (Ct. App. 2015) (citations omitted). Generally, “that party must meet its burden by a greater weight or preponderance of the evidence.” *Id.* (citing *Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994); *Menne v. Keowee Key Prop. Owners’ Ass’n, Inc.*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App.2006)). However, when the action alleges the unconstitutionality of a statute, the same must be proven beyond a reasonable doubt. *See, e.g., Joytime Distribts. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (“A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.”).

The criminal justice “system affords greater protection to the accused [in capital cases] since the imposition of death by public authority is so ‘profoundly different’ from any other sanction.” *State v. Butler*, 277 S.C. 452, 456, 290 S.E.2d 1, 3 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (quoting *State v. Shaw*, 273 S.C. 194, 206-07, 255 S.E.2d 799, 805 (1979), *overruled on other grounds by Torrence*, 305 S.C. 45, 406 S.E.2d 315; *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). However, it remains true that “[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid.” *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). “When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution.” *State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (citations omitted). “This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution.” *Johnson v. Collins Ent. Co.*, 349 S.C. 613, 626, 564 S.E.2d 653, 660 (2002) (citing *Main v. Thomason*, 342 S.C. 79, 535 S.E.2d 918

(2000); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994); *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)).

I. Count VI: Both Electrocution and the Firing Squad are Unconstitutional

Plaintiffs allege that electrocution and the firing squad are unconstitutional methods of execution. Specifically, Plaintiffs contend that both methods of execution are cruel, unusual, and corporal, in violation of Article I, Section 15 of the South Carolina Constitution. The Court agrees.

The Constitution of the State of South Carolina provides, in relevant part,

All persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.

S.C. Const. art. I, § 15. Notably, this language offers greater protections than those found in the Constitution of the United States. See U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). This is because the federal constitution “sets the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643-44, 541 S.E.2d 836, 840 (2001).

The Court rejects Defendants’ argument that the South Carolina Constitution should be analyzed in the same manner as the United States Constitution. South Carolina’s courts have historically reached the same conclusion. See, e.g., *id.* at 644, 541 S.E.2d at 841 (finding that the South Carolina Constitution’s prohibition on “invasions of privacy” provides greater protections than the Fourth Amendment to the United States Constitution); *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) (holding that the state constitutional right to privacy prohibited the state from forcibly medicating a death row inmate in preparation of his execution); *State v. Brown*, 284 S.C.

407, 326 S.E.2d 410 (1985) (finding that despite being permitted under the federal constitution, castration is a form of mutilation, which is prohibited by Article I, Section 15 of the South Carolina Constitution).

Unlike the federal constitution, South Carolina's constitution uses disjunctives to distinguish the categories of prohibited punishment. Therefore, the Court must account for all three prohibitions – cruel, unusual, and corporal – in determining whether a specific method of execution (i.e., the inmates' punishment) is unconstitutional. This is consistent with our state's tradition of "providing [our] citizens with a second layer of constitutional rights," beyond what is guaranteed by the federal constitution. *See State v. Austin*, 306 S.C. 9, 16 & n.6, 409 S.E.2d 811, 815 & n.6 (Ct. App. 1991).

A. The Firing Squad

1. The Firing Squad is Unusual

A review of executions nationally and in South Carolina demonstrates that the firing squad is unusual. The Supreme Court of the United States recognized nearly a century and a half ago that the punishment was used mainly as a military punishment for soldiers, not civilians. *See, e.g., Wilkerson v. Utah*, 99 U.S. 130, 135 (1878), ("Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot."). Later, in ruling the nation's death penalty was unconstitutional in the 1970s, United States Supreme Court Justice Brennan noted that executions by "shooting [had] virtually ceased" following the adoption of supposedly more humane methods of execution including electrocution and lethal gas. *Furman v. Georgia*, 408 U.S. 238, 296-97 (1972) (plurality opinion) (Brennan, J. concurring). Dr. DuPre corroborated this conclusion, testifying that her research confirmed that less than 1% of executions

have been carried out by firing squad, with only thirty-four since 1900, all but one of which were in Utah.

In fact, no one disputes that the State of South Carolina has never before employed a firing squad as a method of execution or non-military punishment and has never carried out such an execution. This is so even though firing squads have existed for many years, meaning that it is not a newly created or recently discovered means of execution. Rather, it is a reversion to a historic method of execution that has never before been used by our State and is not used in the overwhelming majority of other states. Thus, execution by firing squad is unusual punishment both nationally and in South Carolina.

2. The Firing Squad is Cruel

The use of a firing squad to accomplish death is cruel. “Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life.” *In re Kemmler*, 136 U.S. 436, 447 (1890). Here, it is clear that the firing squad causes death by damaging the inmate’s chest, including the heart and surrounding bone and tissue. This is extremely painful unless the inmate is unconscious which, according to Drs. Arden and Alvarez, is unlikely. Rather, the inmate is likely to be conscious for a minimum of ten seconds after impact. Moreover, the length of the inmates’ consciousness – and, therefore, his ability to sense pain – could even be extended if the ammunition does not fully incapacitate the heart. During this time, he will feel excruciating pain resulting from the gunshot wounds and broken bones. This pain will be exacerbated by any movement he makes, such as flinching or breathing.

This constitutes torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of death, making the punishment cruel.²

² Not only do South Carolina courts acknowledge that such conscious pain and suffering exist prior to death, but our system of justice routinely compensates a person’s heirs for that discomfort. *See, e.g., Welch v. Epstein*, 342 S.C. 279,

3. The Firing Squad is Corporal

The firing squad constitutes corporal punishment. “Corporal” is defined as “pertaining or relating to the body.” Merriam-Webster Dictionary (2022), <https://www.merriam-webster.com/dictionary/corporal>. For purposes of interpreting the South Carolina Constitution, “corporal” also refers to mutilation of the human body. *See, Brown, supra*. Thus, a method of punishment which mutilates the human body, such as the firing squad, is violative of the South Carolina Constitution.

The firing squad clearly causes destruction to the human body. Rushton testified that in developing South Carolina’s protocols, he chose frangible ammunition because it would break apart upon impact and inflict maximal damage to the inmate’s body. Rushton opted for specific ammunition which he understood would cause cavitation (a hole in the inmate’s chest) up to six inches in diameter, at a depth of 45 inches into the body. He expects that the ammunition will first hit the bone in front of the inmate’s heart causing it to fragment, as opposed to if it hit only soft tissue and possibly not fragmenting immediately. An inmate is to be struck by three such rounds of ammunition, compounding the damage to his body.

The expected damage is confirmed by the Court’s review of the autopsy photos of the last person executed by firing squad in Utah, which was introduced as an exhibit at trial. Those photos depict multiple entrance wounds in the inmate’s chest and large volumes of blood poured out over his body and clothing. The inmate’s body has been, by any objective measure, mutilated. SCDC certainly anticipates similar carnage, as it created a firing squad chamber that includes a slanted trough below the firing squad chair to collect the inmate’s blood and covered the walls of the

536 S.E.2d 408 (Ct. App. 2000); *Smalls v. S.C. Dep’t of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); *Edwards v. SCAPA Waycross, Inc.*, 2022 WL 3050834 (Aug. 3, 2022).

chamber with a black fabric to obscure any bodily fluid or tissues that emanate from the inmate's body.

B. Electrocuting is Cruel, Unusual and Corporal

Only three states have ever addressed the constitutionality of death in the electric chair: the Supreme Court of Florida in 1999, the Supreme Court of Georgia in 2001, and the Supreme Court of Nebraska in 2008. *See Provenzano v. Moore*, 744 So.2d 413 (Fla. 1999) (per curiam); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001); *State v. Mata*, 745 N.W.2d 229 (Neb. 2008). The Georgia and Nebraska courts held that the electric chair violates those states' constitutions, while the Florida court held the opposite in *Provenzano*. However, after *Provenzano* was decided, the Supreme Court of the United States granted certiorari review. In response, the Florida legislature amended the state's method of execution statute to make lethal injection the default method and the Supreme Court dismissed the petition "[i]n light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection.'" *See Bryan v. Moore*, 528 U.S. 1133 (2000) (describing "recent amendments to Section 922.10 of the Florida Statutes"). Thus, the decision of the Florida Supreme Court was effectively abrogated when the Florida legislature amended that state's methods of execution statute to remove the possibility of an involuntary execution by electrocution.

In *Dawson*, the Supreme Court of Georgia held that the electric chair violates the Georgia Constitution for three independent reasons. First, the court noted that "the evidence establishes that it is not possible to determine whether unnecessary pain is inflicted in the execution of the death sentence." 554 S.E.2d 142-43. In essence, the court held that the inmate had not satisfied his burden of proof on the question of "unnecessary conscious pain suffered by the condemned inmate." *Id.* at 143. Second, however, the court held that the electric chair violates the Georgia

Constitution because it “unnecessarily mutilate[s] or disfigure[s] the condemned inmate’s body,” regardless of “whether or not the electrocution protocols are correctly followed and the electrocution equipment functions properly.” *Id.* The court noted that the electric chair leaves inmates’ bodies “burned and blistered with frequent skin slippage from the process” and “the brains of condemned inmates are destroyed in a process that cooks them.” *Id.* Third, the court held that the electric chair is cruel and unusual “in light of viable alternatives which minimize or eliminate the pain and/or mutilation.” *Id.* Thus, the court concluded, “death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition on cruel and unusual punishment” in the Georgia Constitution. *Id.* at 144.

Mata, decided less than a decade later, reached largely the same conclusions, but did so on the basis of a more developed record with the benefit of additional scientific and medical testimony. Unlike *Dawson*, the *Mata* court explicitly held that “death and loss of consciousness is not instantaneous for many condemned inmates” and that the condemned inmate had met his burden of proving that “electrocution inflicts intense pain and agonizing suffering.” 745 N.W.2d at 277-78. The electric chair, *Mata* held, has a “proven history of burning and charring bodies” that is “inconsistent with both the concepts of evolving standards of decency and the dignity of man.” *Id.* at 278. “Examined under modern scientific knowledge, ‘electrocution has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of state prisons.’” *Id.* (quoting *Jones v. State*, 701 So.2d 76, 87 (Fla. 1999)). The Court finds *Mata* to be a relevant and persuasive opinion, given that two of the experts who testified in that case Drs. Wright and Wikswo – also testified in this case and offered essentially the same opinions. See *Mata*, 745 N.W.2d at 273-75 (describing Dr. Wikswo’s and Dr. Wright’s competing theories of how the electric chair accomplishes death).

According to the testimony adduced at trial, there is no evidence to support the idea that electrocution produces an instantaneous or painless death. If the inmate is not rendered immediately insensate in the electric chair, they will experience intolerable pain and suffering from electrical burns, thermal heating, oxygen deprivation, muscle tetany, and the experience of high-voltage electrocution.

South Carolina's electric chair also causes severe damage to an inmate's body, some of which occurs pre-mortem. Because the human skull is significantly more resistant than other parts of the head and upper body, not all of the electrical current applied in the first two rounds of current will enter an inmate's brain. This increases the likelihood that a person will survive the initial shocks in the electric chair, even if the lower voltage third round of current does eventually kill them by fibrillating their heart, cooking their organs, or preventing them from breathing.

There is evidence that inmates executed by electrocution continue to move, breathe, and even scream after the shock is administered. The inmate may also regain heart function and spontaneously resume breathing during the process. These are indications that a substantial percentage of individuals survive and remain sensate long enough to experience excruciating pain and suffering. In fact, the head-to-leg electrode protocol is not designed to reduce pain and suffering. According to expert testimony, there is no scientific or medical justification for the way South Carolina carries out judicial electrocutions. The South Carolina electric chair causes grave damage to the body, but it is unlikely to immediately cause grievous harm to the two organs most important to maintaining consciousness: the brain and the heart. This creates a risk that an inmate will remain conscious and sensate while he is burned, bruised, and suffocated. The human body is largely unpredictable and it is not possible to know with certainty, in advance, how any given person will respond to an electrocution in the electric chair on any given day. As a result of the

inherently unpredictable nature of electrocution and the occurrence of human error, an intolerably high percentage of judicial electrocutions do not go according to plan and cause extreme pain and suffering.

Based on the foregoing findings of fact, the Court holds that the electric chair violates the South Carolina Constitution because it is cruel, it is unusual, and it is corporal. Since 1976, the state has killed just seven men in the electric chair. In multiple of those executions, there is objective evidence, documented in the autopsy reports as bruising, that the condemned likely experienced severe pain and suffering. The punishment is, at a minimum, no longer viewed as a reliable method of administering a painless death, and the underlying assumptions upon which the electric chair is based, dating back to the 1800s, have since been disproven.

As other courts have observed, although “it is not possible to determine conclusively whether unnecessary pain is inflicted [in a judicial electrocution],” the affirmative evidence that does exist strongly indicates that in an intolerably large number of cases, judicial electrocution amounts to torture. *Dawson*, 554 S.E.2d at 142-43; *see also Mata*, 745 N.W.2d at 278. Moreover, the law does not require certainty; even under the most demanding methods-of-execution analysis, “[t]he standard is whether the punishment creates a substantial risk that a prisoner will suffer unnecessary and wanton pain in an execution,” and the electric chair carries that risk. *Id.*

Even if an inmate survived only fifteen or thirty seconds, he would suffer the experience of being burned alive – a punishment that has “long been recognized as ‘manifestly cruel and unusual.’” *Dawson*, 554 S.E.2d at 143 (quoting *In re Kemmler*, 136 U.S. 436, 446 (1890)). Or, in the words of the Supreme Court of Nebraska, the argument that fifteen to thirty seconds “is a permissible length of time to inflict gruesome pain . . . is akin to arguing that burning a prisoner at the stake would be acceptable if we could be assured that smoke inhalation would render him

unconscious within 15 to 30 seconds.” *Mata*, 745 N.W.2d at 278. These risks are even more intolerable in light of the fact that South Carolina authorizes execution by lethal injection, a method that is known to be more humane and less painful when it is properly administered. Simply put, “[e]lectrocution’s proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Other states have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty.” *Id.* After more than a century of use, it is time to retire the South Carolina electric chair as a violation of the Article I, section 15 of the South Carolina Constitution.

II. Count II: The Statute Violates the Ex Post Facto Clauses of the United States and South Carolina Constitutions

Plaintiffs allege the amended execution statute operates in violation of the Ex Post Facto Clause because the prior statute provided an inmate would be executed by lethal injection unless he affirmatively chose electrocution, but the new statute sets the default method as electrocution unless firing squad and/or lethal injection are certified as available and the inmate chooses it. Because SCDC has indicated it cannot obtain the drugs to carry out lethal injection, Plaintiffs assert they now face the greater punishment of death by electrocution or firing squad versus lethal injection in violation of the Ex Post Facto Clause. The Court agrees.

Both the Constitutions of the United States and of South Carolina forbid ex post facto legislation. See U.S. Const. art. I, § 10 (“No State shall ... pass any ... ex post facto law”); see also S.C. Const. art. I, § 4 (“No ... ex post facto law ... shall be passed”). These provisions prohibit legislatures from enacting any “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). Put differently, a law is ex post facto when it “produces a sufficient risk of increasing the measure of

punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or “alters the situation of the party to his disadvantage,” *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). *See also Jernigan v. State*, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000). Thus, although “a change in law that merely affects a mode of procedure but does not alter substantial personal rights is not ex post facto,” a law that “poses a sufficient risk of increasing the measure of punishment” affects an inmate’s substantial personal rights and is not merely procedural. *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 413, 745 S.E.2d 110, 114, 120 (2013).

Lethal injection is the least severe of the three statutorily authorized punishments, and the amended statute effectively revokes that lesser punishment. When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the Supreme Court of the United States is “believed to be the most humane [execution method] available.” *Baze*, 553 U.S. at 62. When carried out properly, it can largely eliminate the risk of pain that comes with other methods of execution. *Id.* at 49 (noting that the first drug of the three-drug protocol “eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections”); *see also Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (observing that a single-drug protocol is “widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols” (internal quotations omitted)). As a result, there is a “consensus among the States and the Federal Government that lethal injection is the most humane method of execution.” *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

The Supreme Court’s decision in *Malloy v. South Carolina (Malloy II)*, 237 U.S. 180 (1915), finding a change in the execution method from hanging to electrocution did not create an

ex post facto violation, does not undermine this Court's findings. *Malloy*, decided over a century ago, relied on the then- "well grounded belief that electrocution is less painful and more humane than hanging." *Id.* at 180; *see also Kemmler*, 136 U.S. at 443-44 (approving electrocution as a method of execution based on the assumption that "application of electricity to the vital parts of the human body . . . must result in instantaneous, and consequently in painless, death"). As Drs. Wikswo and Arden testified, based on review of electrocution procedures and outcomes over the one hundred years since *Malloy II* and *Kemmler*, the assumption that electrocution causes an instantaneous and painless death is a fallacy unsupported by scientific evidence or simulations. Accordingly, the statute's effect of changing the default method of execution from lethal injection to electrocution constitutes an ex post facto violation.

Defendants assert a change in execution methods cannot violate the Ex Post Facto Clause because it does not change the punishment itself (i.e., death) but is merely a change in the method of carrying out that punishment. They also assert that even if it could, there is no ex post facto violation unless the new punishments also violate the Eighth Amendment. Neither assertion comports with the proper standards for reviewing a statute for ex post facto purposes.

Defendants rely on a concluding sentencing in *Malloy II* stating "[t]he statute under consideration did not change the penalty – death – for murder" for the proposition that a change in the method of execution cannot create an ex post facto violation. *Malloy II*, 237 U.S. at 180. This reliance ignores the next sentence of the opinion: "The punishment was not increased [by adoption of electrocution], and some of the odious features incident to the old method [hanging] were abated." *Id.* This demonstrates the ex post facto standard requires comparison between the methods of execution to determine if the punishment is increased. Even if the United States Supreme Court did not require such a comparative review, our state's Supreme Court clearly does.

In reviewing the same change from hanging to electrocution, the Supreme Court of South Carolina conducted a comparative analysis of the two methods, describing “the manner in which an execution by hanging is conducted,” including the adjustments made to ensure “when [the inmate] drops from the scaffold his neck will be broken, thus destroying the structural formation of the body” and instances “where the head is completely severed from the body” and “numerous instances where the neck is not broken, and the convict died of strangulation” and reviewing the *Kemmler* decision to find that the Supreme Court of the United States “clearly . . . regarded electrocution as a more humane method of punishment than that by hanging.” *State v. Malloy* (*Malloy I*), 95 S.C. 441, 441, 78 S.E. 995, 998 (1913). Accordingly, comparative review of the methods of execution is appropriate under the state and federal ex post facto clauses and demonstrates that the amended statute subjects Plaintiffs to a greater punishment.

Finally, Defendants’ assertion that there can be no ex post facto violation unless the newly adopted method of execution is itself a violation of the Eighth Amendment to the United States Constitution is incorrect. State and federal courts have reviewed changes in punishment where both the old and new punishments are clearly constitutional under the Eighth Amendment and found the change nevertheless violates the Ex Post Facto Clause by increasing the punishment. See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000) (holding the change from annual to biannual parole review could not be applied retroactively without violating South Carolina’s prohibition on ex post facto punishment). Thus, regardless of whether electrocution and firing squad violate the Eighth Amendment (a question not before this Court), subjecting Plaintiffs to them instead of lethal injection constitutes an ex post facto violation.

Because the amendments to the execution statute are retroactive, S.C. CODE ANN. § 24-3-530(3) (2021), the only question is whether the law “increases the punishment” or whether “its consequences alter[] the situation of a party, to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted). As discussed in great detail above, electrocution and firing squad both cause excruciating pain and damage to the body of the condemned inmate. In comparison to lethal injection, these methods of execution “inflict a greater punishment” than lethal injection. *See Calder*, 3 U.S. at 390.

III. Counts III, IV, and V: The Use of the Term “Available” Voids the Statute

Plaintiffs raise three arguments that center on the use of the term “available” in the amended execution methods statute – that it is impermissibly vague; that it must be defined by the courts, not by Defendants; and that its use violates the Non-Delegation Doctrine of the South Carolina Constitution.

A. Count III: Due Process Violation

First, Plaintiffs assert that the amended execution statute is unconstitutionally vague because it does not define the term “available.” According to Plaintiffs, this renders the term subject to multiple definitions depending on the context and, as such, the statute violates procedural due process. The Court agrees.³

Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). “[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies.” *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006). Specifically, a statute is unconstitutionally vague “if it

³ Plaintiffs also argue that the statute’s failure to address the sequence of events (such as certification and election) renders it invalid. Because the Court finds vagueness as to the meaning of “available,” it need not address these issues.

forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

The amended execution methods statute is unconstitutionally vague because a person of average intelligence must guess as to its meaning. The words “available” and “unavailable” do not have meanings independent of their statutory context. Defendants have asserted that “available” plainly means “present or ready for immediate use,” but the word could also mean “accessible, obtainable,” or “capable of being gotten; obtainable.” MERRIAM-WEBSTER DICTIONARY (2022), <https://www.merriam-webster.com/dictionary/available>; *see also* AMERICAN HERITAGE DICTIONARY (2022), <https://ahdictionary.com/word/search.html?q=available>. The various definitions of “available” demonstrate that the meaning of the word depends on the context in which it originates. Therefore, this is not a case in which “the statute’s language is plain, unambiguous, and conveys a clear, definite meaning,” leaving no room for judicial interpretation.⁴ *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm’n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010).

Defendants would have this Court interpret the meaning of “available” in the context of the Legislature amending the statute to allow executions resume despite SCDC’s assertion that it cannot obtain drugs necessary to carry out executions by lethal injection. However, “context,” as

⁴ The Supreme Court’s Orders staying Plaintiffs’ execution dates in June 2021 are persuasive in rejecting the idea that “available” has a plain meaning of “present and ready for immediate use.” As described above, following enactment of the amended execution methods statute, Director Stirling, interpreting the statute, certified that neither lethal injection nor firing squad were “available” and SCDC planned to carry out executions by electrocution. However, after he provided an explanation for why, in his view, the firing squad was “unavailable,” the Supreme Court vacated the execution notices it had previously issued and stayed all executions because “firing squad [was] currently unavailable due to [SCDC’s failure to implement it].” Order, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). The Supreme Court’s rejection of Director Stirling’s interpretation—at least in that instance—indicates that the meaning of “available” is vague and leaves “a person of common intelligence” to guess as to the meaning of the term in the statute.

a matter of statutory interpretation, is not a broad reference to legislative debate or public opinion. Instead, “context” requires the interpreting court to consider not only “the particular clause being construed, but the undefined word and its meaning with the purpose of the whole statute and the policy of the law.” *S.C. Energy Users Comm.*, 388 S.C. at 492, 697 S.E.2d at 590.

First, the Court notes this is not a case in which the General Assembly “announced a purpose of the Act.” *Contra id.* at 202-03 & n.2, 733 S.E.2d at 906 (noting that the General Assembly expressed its intent in the title of the newly enacted legislation); *S.C. Energy Users Comm.*, 388 S.C. at 494-95, 697 S.E.2d at 592 (relying, in part, on the General Assembly’s own explanation of the challenged law’s purpose). Therefore, the Court looks at the purpose based on the whole statute. Inclusion of the term “if available” to make the election of execution method conditional provides some support for the idea that the intent of the General Assembly was to restart executions despite SCDC asserting it could not obtain lethal injection drugs. However, the choice to retain an election between execution methods (including lethal injection) and adding firing squad as an authorized method of execution indicates that the General Assembly intended to do more than merely restart executions by a method other than lethal injection. What these dual purposes fail to do is provide the Court, Director Stirling, or Plaintiffs with a definition for the term “available” because the General Assembly failed to provide a definition or standards for determining availability and the statute’s purpose leaves the term open to multiple definitions. The statute is, therefore, unconstitutionally vague.

B. Count IV: Statutory Violation Based on the Meaning of “Available”

Plaintiffs also contend that “[w]hatever their obligations to make methods of execution available under the statute, Defendants have failed to meet those obligations.” This claim is necessarily dependent on the definition of the term “available” and what obligations that definition

imposes on Defendants. Because this Court has found the statute unconstitutionally vague as to the term “available,” this claim cannot and need not be decided at this time.

C. Count V: Violation of the Non-Delegation Doctrine

As a correlate to their claim that the amended execution methods statute is unconstitutionally vague, Plaintiffs allege that by failing to provide standards for the determination of availability, the General Assembly vested unbridled discretion in Director Stirling to decide the methods of execution in violation of the non-delegation doctrine of the South Carolina Constitution. *See* S.C. Const. art. I, § 8. The Court agrees.

Article I, Section 8 of the South Carolina Constitution provides that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other.” Specifically, although the General Assembly “may authorize an administrative agency or board ‘to fill in the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose,” it may not vest “unbridled, uncontrolled, or arbitrary power” in another branch of government. *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 232-33, 246 S.E.2d 869, 876 (1978) (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)).

Although “there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated,” the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876-77. Accordingly, “a statutory delegation is constitutional as long as [the General Assembly] ‘lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.’” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989)); *see also West Virginia v. Env’tl Protection Agency*, 142 S.Ct. 2587, 2617

(2022) (“[T]he framers believed that a republic – a thing of the people – would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’ . . . [B]y vesting the lawmaking power in the people’s elected representatives, the Constitution sought to ensure ‘not only that all power would be derived from the people,’ but also ‘that those entrusted with it should be kept in dependence on the people.’” (quoting *The Federalist* No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton) & *id.*, No. 37, at 227 (J. Madison))).

Without defining “available” or delineating standards for making the determination, Director Stirling’s determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where “the courts, when presented with a challenge of the agency’s actions, would, there being no limitations on the agency’s authority, be unable to judicially review its actions”). For example, if Director Stirling certifies that lethal injection is unavailable, the statute provides no mechanism or standards by which the condemned person can challenge that assessment. Because the statute is silent as to the meaning of “available,” “there is an absence of standards for guidance of the [Director’s] action,” making it “impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed.” *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the General Assembly effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority “to suspend or revoke a license for any cause which it deems satisfactory”). Under the statute as written, Director Stirling might determine that a specific method is not “available” for any reason or for no reason at all.

Defendants’ assertion that the director of SCDC can be presumed to act in good faith does not remedy the non-delegation issue. “The presumption that an officer will not act arbitrarily but

will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.” *Harbin*, 226 S.C. at 596, 86 S.E.2d at 471. In this case, Director Stirling testified credibly and in good faith. The constitutional problem, however, is that because the statute leaves it to his sole discretion to decide what “available” means, he can always certify in “good faith” that a given method is or is not “available,” based on his own definition. The intentions of Director Stirling are not in question; the reviewability of his decisions, as an unelected official of the executive, is the issue. The statute’s lack of standards and failure to define the term “available” renders it an unconstitutional delegation of authority.

IV. Count VII: Violation of the Methods-of-Execution Statute

Finally, the Court notes that even if its legal analysis of the statutory amendments is incorrect, and the statute passes constitutional muster with respect to vagueness and delegation, the statute is still rendered invalid by this Court’s findings on the firing squad and electrocution. Because both methods are unconstitutional, the statute’s creation of an inmate’s right “to elect the manner of their execution” is violated by the fact that an inmate does not have a choice between two constitutional methods of execution. *See* Order, *Sigmon*, No. 2002-024388; *see also* Order, *Owens*, No. 2006-038802. Accordingly, even Plaintiffs are not entitled to relief on Counts III, IV, and V, Plaintiffs are entitled to a declaration that the statute is invalid.

CONCLUSION

In 2021, South Carolina turned back the clock and became the only state in the country in which a person may be forced into the electric chair if he refuses to elect how he will die. In doing so, the General Assembly ignored advances in scientific research and evolving standards of humanity and decency.

Based on the foregoing, the Court finds that Plaintiffs are entitled to declaratory judgment that (1) carrying out executions by electrocution and by firing squad violates the Constitution of

the State of South Carolina Constitution and its prohibition on cruel, corporal, or unusual punishments; and (2) S.C. CODE ANN. § 24-3-530, as amended in 2021, is unconstitutional and is, therefore, invalid. Plaintiffs are also entitled to a permanent injunction as requested.

IT IS, THEREFORE, ORDERED that Plaintiffs' request for a declaratory judgment is GRANTED.

IT IS FURTHER ORDERED that Defendants are permanently enjoined from forcing Plaintiffs to be executed by electrocution or by firing squad.

AND IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Freddie Eugene Owens , plaintiff, et al vs Bryan P Stirling , defendant,
et al

Case Number: 2021CP4002306

Type: Order/Other

So Ordered

Jocelyn Newman

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Freddie Eugene Owens and Brad Keith
Sigmon,

Plaintiffs,

v.

Bryan P. Stirling, in his official capacity as
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,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021CP4002306

**ORDER DENYING PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

This matter came before the Court for consideration of Plaintiffs' "Motion for Preliminary Injunction and Expedited Discovery and Hearing," which was filed on May 17, 2021. "Defendants' Joint Response to Motion for a Preliminary Injunction" was filed on June 3, 2021; and Plaintiffs filed a Reply thereto on June 7, 2021.

Oral arguments on the motion were heard at the Richland County Judicial Center on June 7, 2021. Plaintiffs were represented by J. Christopher Mills, Esquire, and Hannah Freedman, Esquire; Defendant Henry McMaster ("the Governor") was represented by W. Grayson Lambert, Esquire; and Defendants Bryan P. Stirling ("Stirling") and the South Carolina Department of Corrections ("SCDC") were represented by Daniel Plyler, Esquire.

Having fully considered the parties arguments, the Court DENIES Plaintiffs' Motion for Preliminary Injunction, as is more fully set forth below.

BACKGROUND

Plaintiffs are inmates at the South Carolina Department of Corrections (“SCDC”), both having been convicted of murder and sentenced to death. They have each been on death row for about two decades now, and they have exhausted their direct and collateral appeals. *See Owens v. Stirling*, 967 F.3d 396 (4th Cir. 2020), *cert. denied*, 141 S. Ct. ___, No. 20-975, 2021 WL 1520801 (U.S. Apr. 19, 2021); *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021). Therefore, the Supreme Court of South Carolina issued notices setting execution dates for Plaintiffs – one on June 18, 2021, and the other on June 25, 2021.

At the time of Plaintiffs’ convictions, South Carolina law provided for execution by both electrocution and lethal injection. *See* 1995 S.C. Acts No. 108, §1 (codified at S.C. CODE ANN. §24-3-530(A) (2007)) (“the 1995 law”). Under that law, an inmate had to elect one of those methods fourteen days before his execution. *Id.* If he made no election, lethal injection was the default method of execution. *Id.*

In its 2021 session, the South Carolina General Assembly revised the 1995 law, changing the default method of execution to electrocution and adding another method of execution, a firing squad. *See* 2021 S.C. Acts No. 43, R-56, S. 200 (codified at S.C. CODE ANN. §24-3-530) (“the 2021 law”). Under the 2021 law, a “person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election.” *Id.* at §1. The 2021 law “applies to persons sentenced to death as provided by law prior to and after [its] effective date.” *Id.* at §3.

Within days of the Governor signing off on the 2021 law, Plaintiffs filed this action to challenge its constitutionality. They contend that the 2021 law violates: (i) the Due Process

Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution; (ii) the prohibitions on *ex post facto* punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution. Thus, Plaintiffs filed their “Motion for Preliminary Injunction and Expedited Discovery and Hearing,” asking this Court to enjoin Stirling, SCDC and the Governor from taking any action pursuant to the 2021 law, thereby staying their scheduled executions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

South Carolina’s courts have been clear that “[t]he remedy of an injunction is a drastic one and ought to be applied with caution.” *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Such a remedy can only be used in very limited circumstances. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). To establish entitlement to injunctive relief, a plaintiff must demonstrate a likelihood of success on the merits, that they will suffer irreparable harm in the absence of an injunction, and that they have no adequate remedy at law. *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

When determining whether an injunction should issue, the circuit court examines the “merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient *prima facie* showing of entitlement to relief.” *Compton v. S.C. Dep’t of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). The plaintiff “need not prove an absolute legal right.” *Levine v. Spartanburg Reg’l Servs. Dist., Inc.*, 626 S.E.2d 38, 42 (Ct. App. 2005). Rather, once a “*prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary

injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826.

Here, there is no dispute that Plaintiffs will suffer irreparable harm in the absence of an injunction. Without court intervention, Plaintiffs will be put to death in a matter of days. However, though the loss of life may be a horrendous consequence – whether for Plaintiffs or their victims – this Court’s analysis cannot be based on sympathy, retribution or any other emotion. Rather, Plaintiffs must next demonstrate a likelihood of success on the merits of their claims. They have failed to do so.

I. *Ex Post Facto* Law

Plaintiffs’ first contention is that the 2021 law amounts to an impermissible *ex post facto* law. In other words, Plaintiffs argue that, by changing the default method of execution from lethal injection to electrocution, the punishment for their crimes has increased. The Court disagrees.

It is clear that both the Constitution of the United States and the Constitution of the State of South Carolina forbid *ex post facto* legislation. U.S. Const. art. I § 10 (“No State shall . . . pass any . . . *ex post facto* law”); S.C. Const. art. I § 4 (“No . . . *ex post facto* law . . . shall be passed”). Therefore, legislative bodies are forbidden from enacting any “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). In other words, a law is *ex post facto* when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995).

At the time of Plaintiffs’ convictions, South Carolina provided, “A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.” S.C. CODE ANN. §16-3-20(A) (2002);

S.C. CODE ANN. §16-3-20(A) (2006). The law – entitled “Punishment for Murder” – remains the same today. S.C. CODE ANN. §16-3-20(A) (2010). The 2021 law, however, is found in Title 24 of the South Carolina Code of Laws, the same title which establishes SCDC and provides the framework for a number of topics, ranging from the wearing of jewelry by prisoners to the disposition of a prisoner’s body once a death sentence is carried out. There is a distinct difference between a punishment itself and the manner in which a sentence is effected.

This principle was discussed in *Malloy v. South Carolina*, 237 U.S. 180 (1915). In that matter, Malloy was scheduled to be executed when the General Assembly changed the law concerning the method of execution. *Id.* Malloy challenged the change in law, calling it *ex post facto* legislation. *Id.* at 183 (“The contention in behalf of plaintiff in error most earnestly relied on is this: Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty.”). In rejecting Malloy’s argument, the Court explained, “The [South Carolina] statute under consideration did not change the penalty – death – for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings.” *Id.* at 185. “The punishment was not increased, and some odious features incident to the old method were abated.” *Id.*

The same can be said of the 2021 law in this case. Plaintiffs have known for many years that they were to be punished for their crimes by the loss of their own lives. Nothing has changed about that; “there was no change in the quantum of punishment attached to the crime.” *See Dobbert v. Florida*, 432 U.S. 282, 294 (1977). While the 2021 law may contain procedural changes to the manner of effecting Plaintiffs’ sentences, procedural changes do not amount to *ex post facto* violations. *See id.*; *see also Montana v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984)

(“Death by lethal injection is not a legislatively created punishment. The punishment is the sentence of death.”); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) (“[T]he sentence was death, and that sentence remains in place. The change in method does not make the sentence more burdensome and so does not violate the *Ex Post Facto* Clause.”). Because this is well-established law, the Court finds that Plaintiffs have made neither a *prima facie* showing of entitlement to relief nor a likelihood of success on the merits of their claim.

II. Due Process Violation

Plaintiffs’ next argument is that they have a vested, statutory right to be executed by lethal injection rather than electrocution or firing squad. They argue (without legal support for their claim) that Defendants are attempting to revoke this vested right without due process, which is unconstitutionally impermissible. The Court disagrees that such a right exists.

One of the founding principles in the law is that no state shall “deprive any person of life, liberty, or property, without due process of law” U.S. Const. Am. XIV; *see also* S.C. Const. art. I, §3 (“The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”). However, “In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006) (citations omitted). He may likewise show the arbitrary deprivation of a cognizable interest in life or liberty.

Plaintiffs have done none of that here. Instead, Plaintiffs – in a somewhat arbitrary and capricious manner on their part – contend that they have a vested statutory right to elect lethal

injection as their manner of execution. According to them, they have relied on the 1995 statute which allowed them to reject electrocution as their manner of death and made decisions consistent with that reliance at the time of trial. Plaintiffs neither offer support for this contention. Plaintiffs also fail to point to any legal precedent which would buttress their argument, perhaps because there is none (at least, none that was located by this Court).

Rather than making a *prima facie* showing of entitlement to relief, it appears that Plaintiffs are attempting to advance a novel, untested legal theory. The Court finds that no *prima facie* showing has been made and, therefore, no likelihood of success on the merits of this claim. For this reason, injunctive relief is not warranted.

III. Remaining Arguments

Plaintiffs' remaining arguments concerning the 2021 law – that it is void for vagueness and that violates the non-delegation doctrine – are also unavailing. The Court finds that these ancillary arguments lack foundation and support. Plaintiffs are unlikely to prevail in an argument that the 2021 law is void because of certain grammatical rules, as the law on its face can be clearly understood. Similarly, the contention that the 2021 law gives Stirling “unfettered discretion” such that it violates the government’s separation of powers is lacking in support. The Court can find no likelihood of success on the merits of either of these claims; therefore, injunctive relief must be denied.

CONCLUSION

Despite Plaintiffs' best efforts, the Court finds that they have failed to make the requisite showing of a likelihood of success on the merits of their claims. Without such a showing, it is wholly inappropriate for this Court to attempt to usurp the authority of the Supreme Court of South

Carolina by effectively nullifying the execution notices which have been served on Plaintiffs after dozens of years of otherwise unsuccessful appeals.

IT IS, THEREFORE, ORDERED that Plaintiffs' "Motion for Preliminary Injunction and Expedited Discovery and Hearing" is DENIED.

AND IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Freddie Eugene Owens , plaintiff, et al vs Bryan P Stirling , defendant,
et al
Case Number: 2021CP4002306
Type: Order/Temporary Injunction

So Ordered

Jocelyn Newman

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH
SIGMON, GARY DUBOSE TERRY, and
RICHARD BERNARD MOORE,

Plaintiffs,

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,

Defendants.

Confidentiality Order

For purposes of facilitating discovery in accordance with the Court's May 19, 2022 Order, and the rulings of the Court following the June 23, 2022 hearing in this matter, the Court enters this Confidentiality Order. All documents to be considered confidential under this order shall be marked CONFIDENTIAL by the party producing the documents, and any testimony, to include transcripts of depositions, to be considered confidential under this order shall be designated confidential at the time the testimony is taken, or within seven (7) days after receipt of the transcript.

Any party may designate documents and/or testimony as confidential, but only after review and consideration of the documents and/or testimony by an attorney who has, in good faith, determined that the documents and/or testimony implicate or contain sensitive personal information, security concerns, information relating to the safety and security of any South Carolina Department of Corrections ("SCDC") facility, employee, inmate, agent, vendor, or other

person, trade secrets, or confidential research, development, or commercial information, or is otherwise traditionally would be considered confidential in the litigation process. Information or documents which are available in the public domain may not be designated as confidential.

The parties shall hold confidential all documents marked CONFIDENTIAL and any such records or information shall be used only for the purposes of conducting the litigation in which the documents were disclosed (including any appeal of that litigation). The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)–(5) below, and then only after the responsible party or counsel has advised the third party of the existence and terms of this Order, and that they are bound by it and counsel has obtained an executed Agreement to be Bound form. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

- (1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;
- (2) parties and employees of a party to this Order but only to the extent that the individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;
- (3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;
- (4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the

preparation and trial of the lawsuit; and

- (5) other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered;

However, under no circumstances will information and/or documentation designated confidential be shared with any current or former inmates of SCDC, unless a court order has been obtained specifically allowing such disclosure or all parties hereto have expressly consented to the disclosure. Furthermore, counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order, and shall produce a copy of such records upon request of the producing party.

No counsel shall in any manner, directly or indirectly, transfer any document taken from the aforesaid otherwise confidential information, or copies of the same, or communicate orally or in writing any of the information or data contained in the same to any person other than for purposes directly related to the litigation of the above-captioned case. Any such person to whom such communication is made shall be bound by the terms of this Confidentiality Order.

Upon the final disposition of the above-captioned action, counsel for Plaintiffs shall return to the counsel for the party producing the records all copies of such records as shall have been provided to them and all copies made by them. Further, Plaintiffs' counsel shall affirmatively state and certify in writing full compliance with this provision. Under this Confidentiality Order, each party is subject to sanctions, including discipline of counsel by this Court, should this Court find any party in breach of the terms herein.

Nothing in this Confidentiality Order shall preclude the parties from objecting to the disclosure or production of certain information or documents, or seeking and obtaining additional protection or modification with respect to the confidentiality of documents or other discovery material or relief from this Confidentiality Order with respect to particular records designated hereunder.

Additionally, any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge:

- a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.
- b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.
- c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:
 - (1) the party who claims that the documents are confidential withdraws such designation in writing;
 - (2) the party who claims that the documents are confidential fails to

move timely for an Order designating the documents as confidential as set forth in paragraph (b) above; or

(3) the court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

In the event a party seeks to file any material that is subject to protection under this Order with the court, that party shall take appropriate action to ensure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the specific, written consent of the party who designated the document as confidential; (2) where appropriate (*e.g.* in relation to discovery and evidentiary motions), submitting the documents solely for *in camera* review; or (3) where the preceding measures are not adequate, seeking permission to file the document under seal.

Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of any duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to the Clerk of Court to allow any document to be filed under seal.

This Order is entered for the purpose of facilitating the adjudication of the pending litigation. Nothing herein shall be construed or presented as a judicial determination that any

specific document or item of information is subject to disclosure or that any specific document or item of information provided or produced by a party and designated as CONFIDENTIAL by counsel is subject to protection under Rule 26(c) of the South Carolina Rules of Civil Procedure or otherwise until such time as a document-specific ruling shall have been made.

This Order shall take effect when entered and shall be binding upon: (1) counsel of record and their respective law firms and/or agencies; and (2) their respective clients.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that documents marked as CONFIDENTIAL and/or testimony designated as CONFIDENTIAL shall remain confidential during the pendency of this litigation and that said documents shall be returned to counsel for the party producing the documents upon the conclusion of the case in accordance with the parameters set forth within this order.

AND IT IS SO ORDERED.

The Honorable Jocelyn Newman
Chief Administrative Judge – Common Pleas
Fifth Judicial Circuit

_____, 2022
Columbia, South Carolina



Richland Common Pleas

Case Caption: Freddie Eugene Owens , plaintiff, et al vs Bryan P Stirling , defendant,
et al
Case Number: 2021CP4002306
Type: Order/Other

So Ordered

Jocelyn Newman

Electronically signed on 2022-07-01 14:43:53 page 7 of 7

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP4002306

Freddie Eugene Owens et al
PLAINTIFF(S)

Bryan P Stirling et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Following a hearing on June 23, 2022,

Defendant's Motion for Protective Order (filed on June 9, 2022) is DENIED as to protocols (which shall be subject to a Confidentiality Order) and GRANTED as to the remaining topics (i.e., lethal injection information, members of the execution team, etc.); and

Defendant SCDC's Motion to Compel (filed on June 10, 2022) is GRANTED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/01/2022 .

Richard Bernard Moore
Gary Dubose Terry

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Freddie Eugene Owens , plaintiff, et al vs Bryan P Stirling , defendant,
et al
Case Number: 2021CP4002306
Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2022-07-01 14:49:13 page 3 of 3

STATE OF SOUTH CAROLINA,)
)
COUNTY OF RICHLAND)
)
FREDDIE EUGENE OWENS)
and)
BRAD KEITH SIGMON)
)
Plaintiff,)
)
vs.)
)
BRYAN P. STIRLING, in his official)
capacity as the Director of the South)
Carolina Department of Corrections)
)
and)
)
SOUTH CAROLINA DEPARTMENT OF)
CORRECTIONS,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina



Plaintiff/Attorney for Plaintiff

Dated: May 17, 2021

Address: Lindsey S. Vann
Justice 360
900 Elmwood Ave, Suite 200
Columbia, SC 29201

SCCA 401 (5/02)

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT**

FREDDIE EUGENE OWENS,

and

BRAD KEITH SIGMON,

Plaintiffs,

v.

BRYAN P. STIRLING, in his official
capacity as the Director of the South
Carolina Department of Corrections,

and,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS,**

Defendants.

Civil Action No. _____

**COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE
RELIEF AND FOR A DECLARATORY JUDGMENT**

Plaintiffs Freddie E. Owens (i.e., Khalil Divine Black Sun Allah)¹ and Brad Keith Sigmon,
by their undersigned counsel, bring this action against Defendants and allege as follows:

I.

NATURE OF ACTION

1. This is a civil action for declaratory and injunctive relief brought by Plaintiffs Owens and Sigmon for violations and threatened violations of their rights pursuant to (i) the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and

¹ In 2015, by order of the Dorchester County Family Court, Mr. Owens's legal name was changed to Khalil Divine Black Sun Allah. However, because all of his prior proceedings before the South Carolina state courts and federal courts have been filed under the name Freddie Owens, this complaint primarily uses the name Owens for purposes of clarity.

Article I, Section 3 of the South Carolina Constitution; (ii) the prohibitions on ex post facto punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and, (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution.

2. Plaintiffs are death-sentenced inmates whose crimes occurred and whose sentences were imposed under a pre-amendment version of the current execution law. *See* App. at 2097, 2385, ECF Nos. 33-3, 33-5, *Sigmon v. Stirling*, No. 8:13-cv-01399-RBH, 2018 WL 4691197 (D.S.C. Sept. 30, 2018) (attached to this Complaint as Exhibit A); App. at 1681–82, ECF No. 16-4, *Owens v. Stirling*, No. 0:16-cv-02512-TLW, 2018 WL 2410641 (D.S.C. May 29, 2018) (attached to this Complaint as Exhibit B). Defendants are the individuals charged by state law with carrying out Plaintiffs’ death sentences.
3. At the time of Plaintiffs’ crimes and sentencing hearings, South Carolina law provided that their death sentences would be carried out by lethal injection, unless Plaintiffs selected electrocution or lethal injection was found by a court to be unconstitutional. *See* S.C. Code Ann. § 24-3-530 (1995).
4. In early 2021, Plaintiffs exhausted the ordinary appeals process and received warrants for their executions pursuant to *In Re Stays*, 521 S.C. 544, 471 S.E. 2d 140 (1996). Neither Plaintiff selected electrocution, and no court has found lethal injection unconstitutional. The South Carolina Supreme Court stayed Plaintiffs’ execution dates, scheduled for February 12, 2021 (Sigmon) and May 14, 2021 (Owens), after the South Carolina Department of Corrections (SCDC) informed the Court that it could not carry out an execution by lethal injection.

5. On May 14, 2021, South Carolina amended the statutory provision that governs executions in an effort to execute Plaintiffs by electrocution or, depending on the circumstances, firing squad, based upon SCDC's mere certification that lethal injection is "unavailable." *See* S.C. Code Ann. § 24-3-530 (2021).
6. As alleged in greater detail below, the amended execution statute violates Plaintiffs' constitutional rights. Plaintiffs therefore seek preliminary and permanent injunctions preventing Defendants from enforcing the 2021 amendments; an order declaring the amended execution law ex post facto legislation; an order declaring that the 2021 amendments violate the South Carolina and/or United States Constitutions; and any other equitable relief as the Court deems just and proper.
7. The amended statute violates due process because it attempts to repeal Plaintiffs' vested right to be executed by lethal injection, unless they choose death by electrocution. Plaintiffs' right to have their sentences carried out pursuant to the pre-amendment statute—and to not be executed by electrocution unless they opt for that method—vested at the time they were sentenced and was relied on when they made their statutory elections pursuant to the pre-amendment statute, and the Legislature cannot now retroactively revoke that right without violating due process. The amended statute also violates due process because it is so vague that the process and consequences of the election decision are unclear to a person of ordinary intelligence.
8. The 2021 amendments are ex post facto legislation, in violation of the State and Federal Constitutions, because they aggravate Plaintiffs' punishment, to their detriment, by seeking to impose a less humane punishment than the one to which they were sentenced.

9. The amended statute impermissibly delegates legislative authority to the Director of the SCDC to decide what method of execution his agency will carry out against death-sentenced prisoners, with no judicial remedy.

II.

PARTIES

10. Plaintiffs Owens and Sigmon are citizens of South Carolina under sentences of death in the custody of Defendants and under the control and supervision of Defendant SCDC, a state agency. Plaintiffs are incarcerated at the Edisto Unit of Broad River Correctional Institution (BRCI) in Columbia, South Carolina.
11. Defendant SCDC is the state agency in South Carolina charged with overseeing the custody and care of people incarcerated in South Carolina.
12. Defendant Bryan P. Stirling is the Director of SCDC and is a citizen and resident of South Carolina. He is charged under Sections 24-3-510, 24-3-530, and 24-3-550 of the South Carolina Code with overseeing and carrying out executions in South Carolina. He is the final executive authority responsible for carrying out sentences of death against South Carolina prisoners. Stirling is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.
13. Defendants are acting, and each of them at all times relevant hereto were acting, in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of the laws of South Carolina. Upon information and belief, unless preliminarily and permanently enjoined, each of the Defendants intends to act in his or her official capacity and under the authority of law in executing Plaintiffs in the electric chair or by firing squad, in violation of Plaintiffs' constitutional and statutory rights.

III. FACTS

Plaintiffs' Death Sentences and Relevant Legal History

14. Plaintiffs were each sentenced to death prior to the 2021 amendments that are the subject of this complaint.
15. Plaintiff Brad Sigmon was sentenced to death in Greenville County in 2002 for a crime that occurred in 2001.
 - a. At Sigmon's sentencing, his jury was instructed that one of the two verdicts they were to consider was "the death penalty, which in the State of South Carolina is by electrocution or by lethal injection." Ex. A. After Sigmon's jury sentenced him to death, the trial judge confirmed that his sentence would be carried out "by electrocution or by lethal injection in the manner provided by law." Ex. A.
 - b. Sigmon completed the ordinary course of his state and federal post-conviction proceedings on January 11, 2021. Ten days later, the Clerk of the South Carolina Supreme Court, pursuant to statute, scheduled Sigmon's execution for February 12, 2021. Two weeks before his execution date, SCDC employees asked Sigmon to select between lethal injection and electrocution per the pre-amendment statute. Because he did not have enough information about SCDC's execution procedures to select a method by which to die, Sigmon declined to make a choice. Pursuant to the statute at the time, when an inmate did not select a method, the default method of execution defaulted to lethal injection. Sigmon's selection papers are attached to this Complaint as Exhibit C.

- c. The State then informed the Court that it did not possess lethal injection drugs and would not be able to obtain them before the execution date. On February 4, the Court issued an order staying Sigmon's execution until the State informs the Court that it "has the ability to carry out an execution by lethal injection, that the petitioner has made an election to be electrocuted, or that there has been some change in law that will allow the execution to take place." Order, *State v. Sigmon*, No. 2002-024388 (Feb. 4, 2021) (attached to this Complaint as Exhibit D).

16. Plaintiff Freddie Owens was sentenced to death in Greenville County in 2006 for a 1997 crime.

- a. Owens completed the ordinary course of his state and federal post-conviction proceedings on April 19, 2021. On April 23, 2021, Owens elected the execution method of lethal injection in writing in accordance with S.C. Code Ann. § 24-3-530 (1995). Owens's selection papers are attached to this Complaint as Exhibit E.
- b. About two weeks later, the Supreme Court of South Carolina stayed his execution because "the South Carolina Department of Corrections (SCDC) lack[ed] the means to conduct an execution by lethal injection at [that] time." Order, *State v. Owens*, No. 2006-038802 (May 4, 2021) (attached to this Complaint as Exhibit F). The Court stayed Owens's execution "until SCDC advises the Court it has the ability to perform the execution as required by the law." *Id.*

17. In the decades since their crimes and convictions, Plaintiffs have prepared for executions by lethal injection, consistent with the law and their sentences.

Amendments to the Execution Law

18. Electrocuting was South Carolina's sole method of execution from 1912, when it was first used, through the 1950s and 1960s. In that time, 241 people died in South Carolina's electric chair.
19. Electrocuting remained the only method of execution for almost two decades after the State enacted a new death penalty law in 1977, following the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that all American capital sentencing schemes violated the Eighth Amendment). Between 1977 and 1995, four people died in South Carolina's electric chair.
20. As is described in greater detail below, there is strong evidence that many of the individuals executed by electrocution in this State died excruciating, painful, torturous deaths.
21. By the 1980s, it had become clear that the electric chair could not accomplish the quick or painless death the Supreme Court of the United States anticipated when approving the first electrocution protocol. *See In re Kemmler*, 136 U.S. 436, 443 (1890). As a result, many states enacted new execution laws replacing electrocution with lethal injection.
22. On June 8, 1995, South Carolina became the twenty-fifth state to adopt lethal injection. *See* S.C. Code Ann. § 24-3-530(B) (1995), 1995 Act No. 108 § 1. The new statute permitted a condemned person to "elect" death by lethal injection but retained electrocution as an option. The law provided that persons sentenced to death after the effective date of the statute were subject to death by lethal injection as the default method of execution, unless they elected electrocution. Accordingly, a person sentenced under this statute could

not be executed by electrocution unless they affirmatively elected that method or a court first declared lethal injection unconstitutional. One of the sponsors of the bill, Representative Harry Hallman, explained the switch from electrocution to lethal injection was necessitated by the reality that “lethal injection is more humane than dying in the electric chair.” *Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B.

23. From 1995 until 2021, lethal injection was the primary means of execution in South Carolina, and during that time, 36 men elected to die by lethal injection. Only three men opted for electrocution. On information and belief, two of the three individuals (Larry Gene Bell and James Reed) were severely mentally ill, and their competence at the time of their executions was in question.
24. No person has been executed in South Carolina’s electric chair since James Earl Reed was voluntarily electrocuted in 2008.
25. Starting around 2010, lethal injection drugs became more difficult to procure across the United States. On information and belief, Defendant SCDC has not possessed usable lethal injection drugs since at least 2013. John Monk, *Controversial bill proposed to get stalled SC executions back on track*, The State, Mar. 6, 2016, <https://www.thestate.com/news/local/article64471007.html>.
26. On information and belief, Defendants did not take the steps taken by other death penalty jurisdictions to procure lethal injection drugs. For example:
 - a. Defendants did not ask the Legislature for funding to construct a compounding pharmacy to create the lethal compounds because, as Defendant Stirling explained, “it just didn’t make a lot of sense to use tax dollars to buy something we could get for a lot less on the open market.” *Id.*

- b. Attempts to enact a law that would have shielded the identity of drug manufacturers and compounding pharmacies repeatedly failed in the Legislature. *E.g.*, S. 553, 121st Session (2015-2016); H. 3853 121st Session (2015-2016); S. 871, 122nd Session (2017-2018); H. 4629, 122nd Session (2017-2018); H. 3354, 123rd Session (2019-2020).
- 27. No person has been executed in South Carolina since Jeffrey Brian Motts waived his remaining appellate relief and died by lethal injection in 2011. Between 2009 and late 2020, no death row inmates in South Carolina exhausted the ordinary course of appellate review proceedings, and during that time the Legislature made no amendments to the execution statute.
- 28. Then, in late 2020 and early 2021, three individuals (including Plaintiffs) completed the ordinary appellate review of their death sentences and received warrants for their executions from the South Carolina Supreme Court. Although Defendants knew they did not have the drugs necessary to carry out these executions as scheduled, they began the process of preparing Plaintiffs for their executions and asked them to choose between lethal injection and electrocution.
 - a. On January 21, 2021, the Clerk of the Supreme Court of South Carolina issued an execution notice for Plaintiff Sigmon. On February 4, 2021, the Court vacated Sigmon's execution notice and directed the Clerk "not to issue another execution notice until the State notifies this Court that the Department of Corrections has the ability to carry out the execution by lethal injection, that [Sigmon] has made an election to be electrocuted, or that there has been some change in the law which will allow the execution to take place." Ex. D.

- b. On April 22, 2021, the Clerk of the Supreme Court of South Carolina issued an execution notice for Plaintiff Owens. Two weeks later, the Supreme Court of South Carolina vacated Owens's execution notice because "the South Carolina Department of Corrections (SCDC) lack[ed] the means to conduct an execution by lethal injection at [that] time." Ex. F. The Court stayed his execution "until SCDC advises the Court it has the ability to perform the execution as required by the law." Ex. F.
29. During its 2021 session, which ran concurrently with the setting and staying of Plaintiffs' execution dates, the South Carolina General Assembly considered identical bills introduced in the House and the Senate—House Bill 3755 and Senate Bill 200. Defendants provided public testimony in support of the bills, asserting that they could not obtain lethal injection drugs and the legislation would allow them to move forward with Plaintiffs' executions by electrocution. Senate Bill 200 eventually passed both chambers with amendments that, *inter alia*, added the firing squad as a third authorized method of execution.
30. On May 14, 2021 Governor Henry McMaster signed into law Senate Bill 200, amending the execution statute to make electrocution the default method and adding the firing squad as a third authorized method of execution—although, as discussed *infra*, the statute is unclear on when a death-sentenced inmate may elect death by firing squad and on the consequences of each election. As amended, Section 1 of the statute now provides, in relevant part:
- (A) A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election, under the direction

of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.

- (B) Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.
- (C) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by firing squad or lethal injection, if it is available, in writing fourteen days before the execution date.
- (D) If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable by the Director of the Department of Corrections or is held to be unconstitutional by an appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.
- (E) The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.
- (F) The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.

S.C. Code Ann. § 24-3-530(1) (2021) (emphasis added to indicate newly enacted language).

31. Section 3 of the new law “applies to persons sentenced to death as provided by law prior to and after the effective date of this act.” *Id.* § 24-3-530(3).
32. During debates over the new amendments, congresspeople in both houses made clear that the changes to the statute were a direct result of the state’s failure to procure lethal injection

drugs. The legislators also recognized that the methods the new law forces upon condemned people—electrocution and firing squad—represent reversions to a previous era and are less humane than lethal injection.

- a. In the Senate, one of the sponsors of the primary amendments to the bill, Richard Harpootlian, characterized electrocution as “not much better” than hanging in light of the risk of disastrous botches: “They are burned to death. There is instance after instance after instance where people are not dead after the first jolt. They’re screaming and on fire. Horrible, horrible thing to do to another human being.” 124th S.C. Gen. Assemb., Senate, Mar. 2, 2021 (statement of Sen. Dick Harpootlian).
- b. During the same debate, another sponsor of the amendments, Senator Greg Hembree, observed that it was “not the government’s place” to “torture anybody needlessly,” and consequently, “[lethal injection] is an option that, in my view, would be more humane than the electric chair.” *Id.* (statement of Sen. Greg Hembree).
- c. In discussing the firing squad, Senator Hembree also acknowledged having “misgivings” about the humanity and viability of the firing squad but explained that his misgivings were ameliorated by a requirement—removed during the House amendments—that Defendant SCDC “promulgate regulations to demonstrate how they would carry [firing squad out].” *Id.* (statement of Sen. Greg Hembree).
- d. In the House, Representative Ivory Thigpen noted the hypocrisy of offering defendants a choice and then removing that choice if an execution option was

not “available.” “[Lethal injection] is not necessarily unavailable, but the state has failed to acquire it. . . . It was nothing done by this inmate, or this person who has been sentenced to death, to not . . . be able to get what they have chosen, so . . . we’re penalizing them for what [the state] did not accomplish.” 124th S.C. Gen. Assemb., H. Comm. on Judiciary, Feb. 23, 2021 (statement of Rep. Ivory Thigpen).

33. The 2021 amendments to the execution statute made South Carolina the first and only jurisdiction in the United States to change its default execution method from what is recognized as a more humane method (lethal injection) to a more barbarous method (electrocution), or to force condemned people to choose between two barbarous methods, electrocution and firing squad.

IV.

CLAIMS FOR RELIEF

Count I: Due Process Violation—Retroactive Legislation

34. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
35. The execution statute, as amended, cannot apply to Plaintiffs because their crimes occurred and sentences were imposed prior to the enactment date, their statutory rights to elect lethal injection have vested, and the statute itself is neither procedural nor remedial.
36. Defendants cannot revoke a vested statutory right without violating due process, and Plaintiffs’ rights under the 1996 method statute vested before enactment of the 2021 statute. A statutory right vests when it creates “legitimate expectations” or establishes legal consequences that invite reliance. *See Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 32, 736 S.E.2d 651, 660 (Beatty, J., concurring in part and dissenting in part) (quoting Barbara

J. Van Arsdale *et al.*, 16B Am. Jur. Constitutional Law § 735 (2d ed. 2009)); *see also* *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (the question of retroactivity “should be informed and guided by ‘familiar considerations of fair notice, reasonable reliance, and settled expectations’” (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994))).

37. The decisions and arguments Plaintiffs and their attorneys made at trial and throughout the initial appeals process were informed by their reliance upon Plaintiffs’ right to select lethal injection as the method of execution. The risk of being subjected against their will to more severe, inhumane methods of execution may have changed the calculus as to some of those decisions or arguments.
38. When Plaintiffs were sentenced to death, the law gave them the option to choose lethal injection and reject electrocution. Since the Legislature authorized lethal injection in 1995, no person has been executed by electrocution against their will in South Carolina.
39. Accordingly, since the time of their crimes and sentencing, Plaintiffs have had a legitimate, reasonable, and settled expectation that they could select lethal injection as their method of execution. The judges and juries who imposed the death sentences similarly expected the sentence imposed would only be carried out by lethal injection or electrocution. Exs. A & B.
40. Because Plaintiffs prefer death by lethal injection to electrocution, they have been preparing for lethal injection for more than two decades.
 - a. Plaintiff Sigmon has prepared for his death by lethal injection by discussing with his attorneys the processes of lethal injection and electrocution, consulting with various religious advisors and mental health professionals about his

impending execution, and informing his loved ones that he will be put to death by lethal injection.

- b. Plaintiff Owens has prepared for his death by lethal injection by explaining to his family members that he will die by lethal injection, discussing the process with his lawyers, and preparing himself mentally and emotionally over the past 22 years with the understanding that he would die by lethal injection.

41. Additionally, the rights of Plaintiffs in particular—as opposed to other condemned people sentenced after 1995—to be executed by lethal injection (as opposed to electrocution) vested when they relied on the 1995 statute to select the method of their executions.

- a. When Defendant SCDC read Plaintiff Sigmon an execution warrant in January 2021 and asked him to select between execution by lethal injection and electrocution, he declined to select because he lacked any information about how Defendants would carry out either method. Ex. C. However, Plaintiff Sigmon made the decision not to elect with the knowledge that he would not be subjected to electrocution because the default method was lethal injection. His statutory right to select lethal injection vested when he relied on the fact that the default method at the time of his sentencing was lethal injection.

When Defendant SCDC read Plaintiff Owens an execution warrant in April 2021 and asked him to select between execution by lethal injection or electrocution, he selected lethal injection. Ex. E. Plaintiff Owens’s statutory right to select lethal injection vested when he relied on the fact that, at the time of his crime, he could not be executed by electrocution without selecting that method.

42. As discussed *infra*, the precise operation of the new law is vague and uncertain, but there is no dispute that it retroactively strips Plaintiffs of their statutory right to be executed by lethal injection, unless they choose otherwise or lethal injection was declared unconstitutional. Indeed, stripping Plaintiffs of that right, and clearing the obstacle it created to Defendants' executing them by less humane methods was the express purpose of the new law and its proponents. The new law thus unsettles the legitimate expectations of Plaintiffs and the judges and juries who sentenced them without the benefit of fair notice. Applying the 2021 amendments to Plaintiffs would bring to bear the precise concern that motivates the presumption against retroactive statutes: the Legislature here has used its "unmatched powers" to "sweep away settled expectations suddenly and without individualized consideration" in response "to political pressures" and in order to get "retribution against [an] unpopular group[s]." *See Landgraf*, 511 U.S. at 266, 270.

Count II: Ex Post Facto Violation

43. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
44. The United States and South Carolina Constitutions forbid ex post facto legislation. U.S. Const. art. I § 10 ("No State shall . . . pass any . . . ex post facto law"); S.C. Const. art. I § 4 ("No . . . ex post facto law . . . shall be passed").
45. The principle that a law has no effect "before it was actually passed" originates in longstanding and "fundamental notions of justice." *Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (quoting 1 J. Kent, *Commentaries on American Law* *455).
46. The Ex Post Facto Clauses of the State and Federal Constitutions forbid the Legislature from enacting any "law that changes the punishment, and inflicts a greater punishment,

than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). Put differently, a law is *ex post facto* when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or “alters the situation of the party to his disadvantage,” *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). *See also Jernigan v. State*, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000).

47. Thus, although “a change in law that merely affects a mode of procedure, but does not alter substantial personal rights is not *ex post facto*,” a law that “poses a sufficient risk of increasing the measure of punishment” affect a prisoner’s substantial personal rights and are not merely procedural. *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 413, 745 S.E.2d 110, 114, 120 (2013).
48. This standard and the United States Supreme Court opinions applying it “set[] the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001). South Carolina, therefore, “is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982). The Supreme Court of South Carolina has read the state Ex Post Facto clause to sweep more broadly than the federal Ex Post Facto clause. *See Jernigan*, 340 S.C. at 263–65.
49. The South Carolina Supreme Court has also recognized that certain methods of execution are more onerous than others, and this qualitative distinction has implications for determining whether a law changing the method of execution is *ex post facto*. For example,

in the course of rejecting an ex post facto challenge, the South Carolina Supreme Court explained that a shift from hanging to electrocution was not ex post facto because the Court was “satisfied that electrocution is a more humane method of execution than hanging.” *Malloy*, 95 S.C. at 441, 78 S.E. at 99.

50. It follows that a retroactive law that changes the method of punishment to one that is less humane is more onerous than the prior law and therefore is impermissibly ex post facto.
51. The 2021 amendments to the execution statute are retroactive. S.C. Code Ann. § 24-3-530(3) (2021). The only question, then, is whether the law “increases the punishment” or whether “its consequences alter[] the situation of a party, to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted).
52. The change from lethal injection as the default method of execution unless Plaintiffs chose otherwise to a default method of execution by electrocution (or firing squad if chosen) alters Plaintiffs’ situation to their disadvantage. Lethal injection is the least severe of all three punishments, and the 2021 amendments effectively revokes that lesser punishment. *See Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory).
53. When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the United States Supreme Court “the most humane [execution method] available.” *Baze*, 553 U.S. at 62. When carried out properly, it can largely eliminate the risk of pain that comes with other methods of execution. *Id.* at 49 (noting that the first drug of the three-drug protocol “eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections”);

Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (observing that a single-drug protocol is “widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols” (internal quotations omitted)). As a result, there is a “consensus among the States and the Federal Government that lethal injection is the most humane method of execution.” *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

54. In contrast to a properly administered execution by lethal injections, electrocution and firing squad are barbaric; carry a heightened risk of painful death; and desecrate the body of the deceased in a way that can only be considered less humane.
55. Even under “ideal” conditions (when the electrocution is not botched), an electrocution can go horribly wrong. John P. Wikswo, Jr. Aff. ¶ 11–12, 14–15 (April 27, 2021), attached as Exhibit G. An electrocuted person will likely experience a slow, painful death by suffocation as his internal organs are slowly cooked. *State v. Mata*, 745 N.W.2d 229, 269–78 (2008); *Dawson v. State*, 554 S.E.2d 137, 142, 143 (2001). Their organs can boil, their head catch fire, their eyes pop out, and their body blister, giving off the nauseating odor of burning flesh. *Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennen, J., dissenting from denial of certiorari); *see also Dawson*, 554 S.E.2d at 144; Jonathan L. Arden Aff. ¶¶ 9–10 (May 14, 2021), attached as Exhibit H.
 - a. Electrocution is considered so torturous and outmoded that the last two state courts to consider it have found that killing a death sentenced inmate in the electric chair violates their state constitutions. *Mata*, 745 N.W.2d at 278 (finding that electrocution violated the Nebraska Constitution’s prohibition against cruel and unusual punishment, which mirrors the Eighth Amendment);

Dawson, 554 S.E.2d at 144 (finding that electrocution violated the Georgia Constitution’s prohibition against cruel and unusual punishment).

- b. There is a consensus among medical and physiology experts that death by judicial electrocution is torturous. *See* Ex. G, Wikswo Aff. ¶ 15; Ex. H, Arden Aff. ¶ 17.
- c. South Carolina lawmakers have affirmatively acknowledged that electrocution is more onerous than lethal injection. *See Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B (Representative Harry Hallman, explaining the switch from electrocution to lethal injection was necessitated by the reality that “lethal injection is more humane than dying in the electric chair”).

56. Death by firing squad is more brutal and inhumane than death by lethal injection.

- a. With the 2021 amendments, South Carolina became the fourth state—along with Mississippi, Oklahoma, and Utah—in which firing squad is available as an execution method, and only three people, all in Utah, have been executed in the United States by firing squad since the 1970s. *See* Richard Fausset & Rick Rojas, *After a Decade Without Executions, South Carolina’s Solution: Bring Out the Firing Squad*, N.Y. Times, May 7, 2021, at A20.
- b. Internationally, only eight countries carry out executions by firing squad, putting South Carolina among the ranks of North Korea, China, Iran, and Somalia. *South Carolina moves closer to allowing death by firing squad*, BBC, May 7, 2021, <https://perma.cc/L94D-U6AD>.

- c. Firing squad, like electrocution, carries a serious risk of error and therefore excruciating pain. *See* James R. Acker & Ryan Champagne, *The Execution of Wallace Wilkerson: Precedent and Portent*, 42 Crim. Justice Rev. 349, 354 (2017) (describing the botched firing squad execution of Wallace Wilkerson).
 - d. Even when an execution by firing squad goes according to plan, the condemned person's heart is "ripped to pieces by bullets" and the person is left to bleed to death. *E.g.*, Ed Pilkington, *Utah firing squad executes death row inmate*, The Guardian, June 18, 2010, <https://www.theguardian.com/world/2010/jun/18/firing-squad-executes-death-row-inmate>. The prisoner's body is left with baseball-sized holes and internal tissues splattered on the outside of the corpse. *See* Exhibit I (photographs of Ronnie Gardner after his execution by firing squad); *Should Firing Squads Replace Lethal Injections?*, VICE News (Mar. 21, 2017), <https://www.youtube.com/watch?v=BOKYCqee2YY>.
57. Electrocution and firing squad violate "[b]asic notions of human dignity [which] command that the State minimize mutilation and distortion of the condemned prisoner's body, irrespective of the pain that such violence might inflight." *Mata*, 745 N.W.2d at 264 (cleaned up).
58. Electrocution and firing squad are less humane punishments than lethal injection. Stripping Plaintiffs of their right to be executed by lethal injection and forcing their execution by either electrocution or firing squad "increases the punishment" and "alters the situation" of a condemned person "to his disadvantage." *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted). The 2021 amendments do not produce "mere

alterations in conditions deemed necessary for the orderly infliction of humane punishment,” such as changes to the location of the execution or the number of witnesses allowed. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Instead, the law as amended violates Plaintiffs’ right to receive the punishment mandated by the law in effect at the time of their crimes and increases the likelihood that they will suffer pain and mutilation during their executions.

59. Enforcing the 2021 statute and electrocuting or shooting Plaintiffs would contravene the explicit purpose of the Ex Post Facto Clause: “to secure substantial personal rights against arbitrary and oppressive legislative action.” *Malloy*, 237 U.S. at 183.

Count III: Due Process Violation—Void for Vagueness

60. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
61. Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007).
62. “[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies.” *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006).
63. Specifically, a statute is unconstitutionally vague “if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).
64. The execution statute, as amended, is unconstitutionally vague because a person of average intelligence must guess as to its meaning. Specifically, the law provides that a condemned

person “shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, *if it is available at the time of election*.” S.C. Code Ann. § 24-3-530(A) (2021) (emphasis added). A similar phrase is repeated in subsection C: a person sentenced to die must be executed by electrocution “unless the person elects death by firing squad or lethal injection, if it is available.” *Id.* § 24-3-530(C). It is unclear what the phrase “if it is available” modifies: both lethal injection *and* firing squad or lethal injection alone.

65. In general, pursuant to the grammatical rule of the last antecedent, “a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Paroline v. United States*, 572 U.S. 434, 447 (2014) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Applying that rule here, the limiting clause—“if it is available at the time of election”—should modify only the noun that immediately precedes it—“lethal injection.” Reading the statute that way, however, is inconsistent with subsection B, which provides that Defendant Stirling or his successor “shall determine and certify . . . whether the methods provided in subsection (A) are available.” Subsection B, in other words, appears to contemplate that it will apply to *both* lethal injection *and* firing squad; otherwise, the statute would specify which method was subject to certification, rather than make certification apply to “the method selected.”
66. On the other hand, subsection (D) clearly makes subsection B’s certification process applicable *only* to lethal injection: “If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable . . . then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.” This specific instance of the certification process renders the overall

statute vague because “[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.” *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). This is because “reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.” *Utility Air Reg. Group v. Env’tl. Prot. Agency*, 573 U.S. 302, 321 (2014) (cleaned up) (quotation marks omitted).

67. Moreover, the last antecedent rule does not apply when a comma separates the modifying phrase from the preceding noun. In those circumstances, “[t]he presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one.” *Comm’rs of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219–20, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) (quoting 82 C.J.S. Statutes § 443 (2009)). Applying that interpretive principle here would lead to the conclusion that the modifying clause—“if it is available at the time of election”—applies to both preceding nouns, meaning lethal injection *and* firing squad. But for the reasons explained above, that reading is inconsistent with the overall statutory construction, which plainly contemplates that subsection (B) applies only to lethal injection.
68. The consequences of this ambiguity are significant. If, for example, a condemned person prefers lethal injection to firing squad but firing squad to electrocution, they cannot know for certain that they will not be subjected to electrocution if they select firing squad. Similarly, if a condemned person prefers firing squad to lethal injection but lethal injection to electrocution, that person does not know the consequences of selecting firing squad.

Simply put, the statute is ambiguous in any situation where a condemned person prefers either firing squad or lethal injection to electrocution.

69. The amended statute is also unconstitutionally vague because it fails to define key terminology so persons governed by the statute may determine they are violating the statute. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2019) (holding that “the lack of any guidelines or standards regarding” the key term of the statute “compell[ed] the conclusion that use of the term in the challenged scheme is unconstitutionally vague”).

- a. The undefined terms “available” and “unavailable,” as used in subsections B and D, are ambiguous on their face because the statute, as amended, offers no guidance for how Defendant Stirling or his successor is to make such an assessment.
- b. The statute as amended fails to define the manner by which Defendant Stirling or his successor must “determine and certify by affidavit” that the “method selected” is “available” in subsection B, nor does it define the manner by which the Director must “determine” that lethal injection is “unavailable” in subsection D. Certification of “availability” versus “unavailability” could very well require separate affirmative tasks; the absence of an affidavit certifying “availability” does not necessarily render a method “unavailable” at that time.
- c. The statute’s silence with respect to when certification must happen means Defendant Stirling could initiate the certification process at any point between the issuance of an execution warrant and the moment of execution. This ambiguity could conceivably prevent an inmate from making an election with

any understanding of the methods from which he may choose (and the consequences of that choice), and prevent him from raising a constitutional challenge to the secondary method of execution.

Count IV: Violation of South Carolina Constitution, art. I,
§ 8—Non-Delegation Doctrine Violation

70. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
71. In *Federalist No. 47*, James Madison insisted that tyranny could be prevented only by separating legislative, executive, and judicial powers. 113 James Madison, *The Federalist No. 47*, in Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 245 (Ian Shapiro ed. 2009). John Locke, a main influence on the Framers’ endorsement of the separation of powers, thought the legislature “cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.” Locke, *Second Treatise* § 141, at 71. Simply put, “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” Madison, *The Federalist No. 47*.
72. Article I, section 8 of the South Carolina Constitution recognizes so much, providing that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other.”
73. Thus, “the Legislature may not delegate its powers to make laws.” *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978). Specifically, although the Legislature “may authorize an administrative agency or board ‘to fill in up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose,” the Legislature may not vest “unbridled, uncontrolled, or

arbitrary power” in another branch of government. *Id.* at 232–33, 246 S.E.2d at 876 (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)).

74. Although “there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated,” the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876–77. Thus, “a statutory delegation is constitutional as long as [the Legislature] ‘lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.’” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (cleaned up) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

75. The 2021 amendments violate the non-delegation principle because they vest Defendant Stirling or his successor with unbridled discretion and unfettered discretion to determine whether a method is “available,” and therefore by which method a condemned person will die. As South Carolina Senator Karl Allen explained, “The director of SCDC gets to sign off on whether [a method is considered unavailable]—what is available and what is not? . . . [T]he South Carolina Department of Corrections indicates as of [March 2, 2021] they have no definition and no policy relating to unavailability.” 124th Gen. Assemb., Senate, Mar. 2, 2021 (statement of Sen. Allen). Because there is absolutely no guidance as to what “available” means, the Electrocutation Law grants unqualified power to Defendant Stirling or his successor to create that definition and policy himself.

76. The purpose of the 2021 amendments is to prescribe methods of execution and to define the process by which a condemned person makes an election between the various

authorized methods. Consistent with this purpose, the statute requires Defendant SCDC to “establish protocols and procedures for carrying out executions pursuant to this section.”

S.C. Code Ann. § 24-3-530(F) (2021).

77. However, subsection (B), the certification provision, is inconsistent with the statutory purpose: it makes the effectiveness of a condemned person’s election, and therefore the method of their execution, hinge on an assessment by Defendant Stirling that the method is “unavailable.” Subsection (B) gives the SCDC Director the power to decide not only how to carry the law out, but to decide what law applies. If Defendant Stirling wanted to carry out Plaintiffs’ executions by electrocution rather than establish a new set of protocols for executions by firing squad, the statute grants him that power; all he need do is certify that firing squad and lethal injection are unavailable and Plaintiffs will be forced to select electrocution or to waive their choice and be subjected to electrocution anyway. “The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if [the Legislature] gave the same power [to determine availability] . . . to members of its staff.” *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting).
78. The practical consequences of the legislative delegation here are substantial. Under the statute as written, the Director’s determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where “the courts, when presented with a challenge of the agency’s actions, would, there being no limitations on the agency’s authority, be unable to judicially review its actions”).

79. For example, if a condemned person elects death by lethal injection and the Director certifies that lethal injection is unavailable, the statute provides no mechanism by which the condemned person can challenge that assessment. Because the statute is silent as to the meaning of “available,” “there is an absence of standards for guidance of the [Director’s] action,” making it “impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed.” *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the Legislature effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority “to suspend or revoke a license for any cause which it deems satisfactory”).
80. Defendant Stirling might determine that a specific method is not “available” for any reason, or for no reason. If Defendant SCDC is unable to obtain the necessary equipment for the selected method in time to meet the date on the execution warrant—e.g., humane lethal injection drugs or appropriate weapons for the firing squad—he could deem it unavailable with no scrutiny or review of what steps he had taken, or foresworn, along the way. A method not being “available” or being “unavailable” could be based on any number of undefined, undisclosed reasons, such as SCDC employees unwillingness to partake in the execution; temporary conditions, such as the COVID-19 pandemic, rendering the method unsafe, expensive, or impractical for SCDC staff; the method’s use exceeding Defendant SCDC’s annual budget for carrying out executions, or simply that SCDC does not desire to present the condemned inmate with that option anymore. If Defendant Stirling made such a determination, Plaintiffs would be powerless under the statute to challenge it.
81. Because the amended statute grants unbridled discretion to Defendant Stirling to determine what the law is, and because it “sets up no standard to guide the Department and contains

no limitations” on what constitutes “available” under the statute, it violates the non-delegation doctrine. *Harbin*, 226 S.C. at 595, 86 S.E.2d at 471.

Count V: Preliminary and Permanent Injunctive Relief
Pursuant to Rule 65 of the South Carolina Rules of Civil
Procedure

82. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.
83. Plaintiffs have a legal right not to be subjected to retroactive or ex post facto legislation; to certainty with respect to the consequences of their election choices under the statute; and to not be subjected to an unconstitutional exercise of executive authority. Plaintiffs will likely succeed on the merits of these claims.
84. Plaintiffs will suffer irreparable harm in the absence of injunctive relief. Without injunctive relief, Defendants will initiate execution proceedings against Plaintiffs pursuant to a statute that violates the Constitution. When Defendants initiate execution proceedings, they will ask Plaintiffs to decide how they will be executed, but the language of the statute as amended creates so much uncertainty that Plaintiffs and their attorneys will be unable to make an informed assessment about the consequences of any given choice. Asking Plaintiffs to make such a choice will subject them to incredible anxiety, not only from the knowledge of an impending execution date, but also because of the uncertainty and resulting risk of death by a surprise method.
85. There is no countervailing risk of harm to Defendants from issuing a preliminary injunction while the courts sort out the meaning of the statute and the constitutionality of applying it retroactively. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 671 (2004).
86. Plaintiffs have no adequate remedy at law. They have exhausted their state and federal post-conviction remedies. As a result, if Defendants are not enjoined from initiating

execution proceedings and from carrying out executions according to the amended statute, Plaintiffs will be executed pursuant to an unconstitutional statute.

- a. Defendant SCDC should be enjoined from informing the Supreme Court that it is capable of carrying out Plaintiffs' executions lawfully and from attempting to carry out any executions pursuant to the 2021 amendments.
- b. Defendant Stirling should be enjoined from initiating the certification process detailed in the 2021 amendments and from attempting to carry out any executions pursuant to it.

87. Plaintiffs are entitled to preliminary and permanent injunctive relief.

**Count VI: Declaratory Judgment Pursuant to S.C. Code
Section 15-53-30**

88. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

89. Pursuant to S.C. Code § 15-53-30, Plaintiffs' legal rights are affected by the amended execution statute and Plaintiffs have a right to the determination of their rights under the law. This Court has the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20.

90. Plaintiffs seek a declaratory judgment pursuant to S.C. Code Ann. § 15-53-30 that enforcement of the Electrocutation Law would violate Plaintiffs' legal rights not to be subjected to retroactive or ex post facto legislation, not to be subjected to an unconstitutional exercise of executive authority, to certainty of the consequences of their election choice under the statute, to be free from cruel and unusual punishment, and to due process under the state and federal constitutions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Grant a preliminary injunction prohibiting Defendants from carrying out, or attempting to carry out, any executions by electrocution unless a condemned inmate selects electrocution as the method of execution.
2. Grant declaratory relief, as requested in this Complaint, to invalidate the portions of the statute that are impermissibly vague.
3. Grant any further relief as the Court deems just and proper.

Respectfully submitted

Dated: May 17, 2021.

By: s/ Lindsey S. Vann

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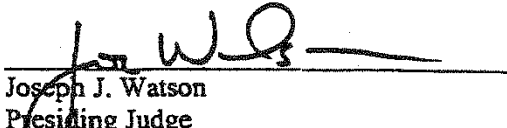
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2385

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
) IN THE COURT OF GENERAL SESSIONS
) THIRTEENTH JUDICIAL CIRCUIT
) STATE OF SOUTH CAROLINA)
) SENTENCE
) CASE NO. 2001-GS-23-7629
VS) 2001-GS-23-7630
) 2001-GS-23-7631
) Brad Keith Sigmon)
) Defendant)

The Defendant, Brad Keith Sigmon, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, be taken to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 30th day of August, 2002. Upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, The Defendant, Brad Keith Sigmon, shall suffer death by electrocution or by lethal injection in the manner provided by law.


Joseph J. Watson
Presiding Judge

Dated: July 21, 2002

Greenville, South Carolina

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P. 2

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE)	THIRTEENTH JUDICIAL CIRCUIT
State of South Carolina)	C.A. No. 1998-GS-23-5220
v.)	
Freddie Eugene Owens)	ORDER

Handwritten:
 Filed May 14, 2006
 by Clerk
 of Court
 Greenville County
 S.C.

Defendant has been found by a jury to be guilty of the offense of murder. This jury has recommended that Defendant should be sentenced to death.

It is, therefore, the judgment and sentence of the court that Defendant, Freddie Eugene Owens, be taken to the Greenville County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the fifteenth day of May, 2007, upon which day between the hours of six o'clock P.M. and six o'clock A.M. on May sixteenth, 2007, or upon a order of Execution issued by the South Carolina Supreme Court, Defendant, Freddie Eugene Owens, shall suffer death in the manner provided by law.

AND IT IS SO ORDERED.

November 11, 2006
 Greenville, South Carolina

Handwritten Signature: Larry B. Patterson
 Larry B. Patterson
 Presiding Judge

ELECTRONICALLY FILED - 2021 Sep 28 11:12 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT**

FREDDIE EUGENE OWENS,
BRAD KEITH SIGMON,
GARY DUBOSE TERRY,
and
RICHARD BERNARD MOORE

Plaintiffs,

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 D. MCMASTER, in his
official capacity as the Governor of South
Carolina,

Defendants.

Civil Action No. 2021-CP-40-02306

**THIRD AMENDED COMPLAINT FOR PERMANENT INJUNCTIVE
RELIEF AND FOR A DECLARATORY JUDGMENT**

Plaintiffs Freddie E. Owens (i.e., Khalil Divine Black Sun Allah)¹, Brad Keith Sigmon, Gary Dubose Terry, and Richard Bernard Moore by their undersigned counsel, bring this action against Defendants and allege as follows:

¹ In 2015, by order of the Dorchester County Family Court, Mr. Owens's legal name was changed to Khalil Divine Black Sun Allah. However, because all of his prior proceedings before the South Carolina state courts and federal courts have been filed under the name Freddie Owens, this complaint primarily uses the name Owens for purposes of clarity.

I.

PARTIES AND NATURE OF ACTION

1. This is a civil action for declaratory and injunctive relief brought by Plaintiffs Owens, Sigmon, Terry, and Moore for violations and threatened violations of their rights pursuant to (i) the Due Process Clauses of Article I, Section 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution; (ii) the prohibitions on ex post facto punishment in Article I, Section 4 of the South Carolina Constitution and Article I, Section 9, Clause 3 of the United States Constitution; (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution; (iv) Article I, Section 15 of the South Carolina Constitution prohibiting cruel, corporal, and unusual punishments; and (v) the statutory right of inmates to elect the manner of their execution under South Carolina Code section 24-3-530 (2021).

2. Plaintiffs Owens, Sigmon, Terry, and Moore are citizens of South Carolina under sentences of death in the custody of Defendants and under the control and supervision of Defendant South Carolina Department of Corrections (SCDC), a state agency. Plaintiffs are incarcerated at the Edisto Unit of Broad River Secure Facility (BRSF) in Columbia, South Carolina.

3. Plaintiffs were sentenced to death prior to the 2021 amendments to South Carolina Code section 24-3-530 (“execution statute”) that are the subject of this complaint.

4. Plaintiff Brad Sigmon was sentenced to death in Greenville County in 2002 for a crime that occurred in 2001. Plaintiff Freddie Owens was sentenced to death in Greenville County in 2006 for a 1997 crime. Plaintiff Gary Terry was sentenced to death in Lexington County in 1997 for a 1994 crime. Plaintiff Moore was sentenced to death in Spartanburg County in 2001 for a crime that occurred in 1999.

5. At the time of Plaintiffs’ crimes and sentencing hearings, South Carolina law provided that their death sentences would be carried out by lethal injection, unless Plaintiffs

selected electrocution or lethal injection was held unconstitutional. *See* S.C. Code Ann. § 24-3-530 (1995). Lethal injection has not been held unconstitutional. *E.g., Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020).

6. Defendants are the individuals charged by state law with carrying out Plaintiffs' death sentences.

7. Defendant SCDC is the state agency in South Carolina charged with overseeing the custody and care of people incarcerated in South Carolina.

8. Defendant Bryan P. Stirling is the Director of SCDC and is a citizen and resident of South Carolina. He is charged under Sections 24-3-510, 24-3-530 and 24-3-550 of the South Carolina Code with overseeing and carrying out executions in South Carolina. He is the final executive authority responsible for carrying out sentences of death against South Carolina prisoners. Stirling is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

9. Defendant Henry McMaster is the Governor of South Carolina and is a citizen and resident of South Carolina. He has the power to approve legislation and duty to ensure laws are faithfully executed. S.C. Const. art. IV, §§ 15, 21. McMaster is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

10. Defendants are acting, and each of them at all times relevant hereto were acting, in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of the laws of South Carolina.

11. On May 14, 2021, South Carolina amended the statutory provision that governs executions in an effort to execute death-sentenced prisoners by electrocution or, depending on the

circumstances, firing squad, if Defendant Stirling avers that lethal injection is “unavailable.” S.C. Code Ann. § 24-3-530 (2021).

12. As alleged in greater detail below, the amended execution statute violates Plaintiffs’ constitutional rights. Plaintiffs therefore seek a permanent injunction preventing Defendants from enforcing the 2021 amendments; an order declaring the amended execution law improperly retroactive, ex post facto, unconstitutionally vague, and an improper delegation of legislative power; an order declaring that the 2021 amendments violate the South Carolina and/or United States Constitutions; an order declaring electrocution and firing squad violate the South Carolina Constitution’s prohibition on cruel, corporal, and unusual punishments; an order declaring the amended execution statute requires inmates be provided a choice between at least two constitutional methods of execution; and any other equitable relief as the Court deems just and proper.

II.

FACTS

Amendments to the Execution Law

13. From 1995 until 2021, lethal injection was the primary means of execution in South Carolina.

14. On May 14, 2021, Governor Henry McMaster signed into law Senate Bill 200, amending the execution statute to make electrocution the default method and adding the firing squad as a third authorized method of execution. As amended, the statute now provides:

- (A) A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election, under the direction of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is

waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.

- (B) Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.
- (C) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by firing squad or lethal injection, if it is available, in writing fourteen days before the execution date.
- (D) If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable by the Director of the Department of Corrections or is held to be unconstitutional by an appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.
- (E) The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.
- (F) The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.

2021 S.C. Acts No. 43, R-56, S. 200, *codified at* S.C. Code Ann. § 24-3-530 (2021) (emphasis added to indicate newly enacted language).

15. S.C. Code Ann. § 24-3-530 does not define the word “available,” nor does it provide any guidance regarding what efforts (if any) the defendants must undertake to make one of the execution methods available.

16. On May 19, 2021, after the amendments were signed into law, counsel for SCDC sent a letter to the South Carolina Supreme Court informing the Court that “due to the recent

amendment to S.C. Code Ann. Section 24-3-530, the Department . . . is now able to carryout [sic] executions by electrocution.” A copy of this letter is attached to this Complaint as Exhibit A. The Clerk of the South Carolina Supreme Court issued execution notices for Plaintiffs Sigmon and Owens, setting their execution dates for June 18 and June 25, 2021, respectively. Execution Notice, *State v. Sigmon*, No. 2002-024388 (May 27, 2021); Execution Notice, *State v. Owens*, No. 2006-038802 (June 1, 2021). Defendant Stirling then informed the South Carolina Supreme Court and Plaintiffs Sigmon and Owens that the only available method of execution at that time was electrocution. See June 3, 2021 letter from Stirling (Exhibit B); Sigmon Notice of Election (Exhibit C); Owens Notice of Election (Exhibit D).

**Defendants Certify that Neither Lethal Injection
nor Firing Squad Is “Available”**

17. On June 4, 2021, the Clerk of the South Carolina Supreme Court sent a letter to Defendant Stirling requesting he “provide an explanation as to why two methods of execution under the statute, lethal injection and firing squad, are currently unavailable.” A copy of the letter is attached to this Complaint as Exhibit E.

18. Defendant Stirling responded by letter on June 8, 2021, that SCDC “has been unable, despite numerous and diligent attempts, to acquire the drugs necessary, in a useable form, to perform lethal injection.” Stirling averred that efforts to purchase compounded lethal injection drugs “have also been unsuccessful.” A copy of Stirling’s response is attached to this Complaint as Exhibit F.

19. As the only evidence of their “diligent attempts” to acquire lethal injection drugs, Stirling attached to his response a letter from Hikma Pharmaceuticals (the Hikma Letter) addressed to him, Defendant McMaster, and South Carolina Attorney General Alan Wilson, “remind[ing]

[them] of [Hikma's] objection" to use of any of their products for lethal injection. A copy of the Hikma Letter is attached to this Complaint as Exhibit G.

20. On information and belief, Defendants have not taken steps necessary to purchase lethal injection drugs, either from pharmaceutical companies or from compounding pharmacies.

- a. The only evidence Defendants have proffered of their purportedly diligent efforts to purchase lethal injection drugs is the Hikma Letter.
- b. On information and belief, the Hikma Letter was sent to Defendants because of Hikma's concern that SCDC might misuse Hikma pharmaceutical products to carry out lethal injections in violation of Hikma's public policy against use of its products in executions—not in response to Defendants' efforts to purchase lethal injection drugs.
- c. On information and belief, Hikma has a practice of sending letters similar to the Hikma Letter to departments of corrections across the country when it suspects that a state may use Hikma drugs to carry out executions. *E.g.*, David Ferrara, *Company Demands Return of Drug Planned for Zane Floyd Execution*, June 25, 2021, <https://perma.cc/F9HK-U25Z>.

21. Defendants likewise did not take steps to make firing squad "available" under the statute. In his June 8 letter to the Supreme Court, Defendant Stirling indicated that "SCDC does not currently have the necessary policies and protocols, as required by the statute, for an execution by firing squad" and that when the protocols are finalized, SCDC will turn to implementation. Ex. F. The timetable for implementation of the firing squad would depend, according to Defendant Stirling, on the finalized policies and procedures. Ex. F.

22. On June 16, 2021, after reviewing Stirling's response and the Hikma letter, the Supreme Court vacated the execution notices for both Sigmon and Owens. The orders in both cases stated:

According to the Director's response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of the necessary protocols and policies.

Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

Order, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). The orders are attached to this Complaint as Exhibit H.

23. On January 10, 2022, after the Supreme Court of the United States denied Plaintiff Terry's petition for writ of certiorari, jurisdiction over his case was remitted to the Supreme Court of South Carolina. Although Terry is now similarly situated to Sigmon and Owens in that he lacks additional avenues for ordinary appellate or collateral relief, the Clerk has not issued an execution warrant in his case. *See* Motion to Stay the Setting of an Execution Date Pursuant to *State v. Sigmon*, No. 2002-024388 (June 16, 2021) and *State v. Owens*, No. 2006-038802 (June 16, 2021), No. 1997-006197 (Jan. 10, 2022). On information and belief, Defendants will eventually inform the Supreme Court that more than one method execution is "available" and will seek an execution date in Terry's case.

24. On March 18, 2022, Defendants notified the Supreme Court of South Carolina that they have finished developing their firing squad protocol. Firing Squad Notification Letter dated March 18, 2022, attached as Exhibit L.

25. On April 6, 2022, the Supreme Court of South Carolina denied Moore's Petition for Writ of Habeas Corpus and denied Moore's request for a stay of execution based on the petition. On April 7, 2022, Supreme Court of South Carolina issued an execution notice in Moore's case setting his execution for Friday April 29, 2022. On April 8, 2022, Defendant Stirling certified that "the only statutorily approved methods of execution available to the Department are electrocution and firing squad." Moore Certification Affidavit dated April 8, 2022, attached as Exhibit M.

Overview of South Carolina's Statutory Methods of Execution

26. With the 2021 amendments, South Carolina became the only jurisdiction in the United States where electrocution is the primary method of execution. Only eight states authorize the use of the electric chair as even an alternative method. With the 2021 amendments, South Carolina became only the fourth jurisdiction in the United States where firing squad is a statutorily authorized method of execution. As the chart on the following page illustrates, among those American jurisdictions that authorize the death penalty, South Carolina's statute is an anomaly in every regard:

Method	Count of jurisdictions—primary method	Count of jurisdictions—alternate method	Jurisdictions
Lethal injection	28	1	<i>Primary method:</i> Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee,

			Texas, Utah, Wyoming, U.S. military, U.S. government <u>Alternate method:</u> South Carolina
Electrocution	1	7	<u>Primary method:</u> South Carolina <u>Alternate method:</u> Alabama, Arkansas, Florida, Kentucky, Mississippi, Oklahoma, Tennessee
Firing squad	0	4	<u>Alternate method:</u> Mississippi, Oklahoma, Utah, South Carolina

27. Since 1976, executions in the United States have been carried out by the following methods:

Method	# of executions	Percent of total
Lethal injection	1,362	88.33%
Electrocution	163	10.58%
Gas chamber	11	0.71%
Hanging	3	0.19%
Firing squad	3	0.19%
<i>Total</i>	<i>1,542</i>	

28. In 2013, Defendants began publicly asserting that they could not obtain drugs to carry out lethal injection executions. Since then, however, thirteen states and the federal government have carried out 222 executions by lethal injection. Additionally, since January 2020, six states and the federal government have carried out 27 executions by lethal injection. Most recently, Donald Anthony Grant was executed by lethal injection in Oklahoma on January 27, 2022. Matthew Reeves was executed by lethal injection in Alabama on the same day. Thirteen additional executions by lethal injection are currently scheduled in 2022 by various states. See <https://deathpenaltyinfo.org/executions/upcoming-executions#year2022> (last visited Feb. 4, 2022).

Details of execution by electrocution

29. South Carolina is now the only jurisdiction in the world where a person could be executed by electrocution even if he did not select that method. Internationally, far fewer

executions have been carried out by electrocution in the past decade than have been carried out by hanging or beheading with a sword.

30. On information and belief, any executions by electrocution in South Carolina will be accomplished in the same electric chair that the State first purchased in 1912, using the same essential process the State has used over the last 100-plus years.

31. The last execution in South Carolina's electric chair took place in 2008, and the inmate selected that method. South Carolina last forced a prisoner to die by electrocution in 1991.

32. Death in the electric chair is torturous. Electrocution produces various physiological reactions: burning and charring of the skin; thermal heating, i.e., cooking of the body and internal organs; direct excitation of sensory, motor, secretory, and autonomic nerves; direct excitation of brain nerves, causing sensations of sound, light, dread, and fear; simultaneous contractions in the flexor and extensor muscles (e.g., the hamstring muscle on the back of the thigh and the quadriceps muscle on the front of the thigh at the same time); contraction of the muscles necessary for breathing, preventing the person from inhaling or exhaling and causing the person to suffocate. All of these reactions cause extreme pain. John P. Wikswo, Jr. Aff. ¶ 12 (attached to this Complaint as Exhibit I); Jonathan L. Arden Aff. ¶¶ 9–11, 14 (attached to this Complaint as Exhibit J).

33. A person executed by electrocution will remain conscious and sensate during an electrocution until he loses consciousness. Electrocution causes loss of consciousness by terminating brain functioning, which occurs through either: “(1) a direct electrical stimulation of the neurons in the brain; or (2) insufficient blood circulation to the brain due to cardiac asystole, shock entrainment, fibrillation, or asphyxia due to either cardiac or respiratory arrest.” John P. Wikswo, Jr. Aff. at ¶ 12(b)(i). Both processes take time. Accordingly, a person subjected to the

electric chair will remain conscious and sensate. *Id.* at ¶¶ 12, 14. Because a person subjected to death in the electric chair can remain alive, conscious, and sensate during the electrocution, there is a significant likelihood of excruciating pain during the event.

34. Death in the electric chair also produces needless and wanton psychological suffering. During the electrocution process, the condemned person's perception of time may become distorted, causing them to experience the electrical trauma as lasting dramatically longer than it appears to a bystander and causing him to perceive each of the sixty cycles of electrical current that will pass through his body every second. When an electrical current directly excites brain nerves, it can trigger sensations of sound, light, dread, and fear. And because Defendants tightly strap condemned people into the electric chair and cover their faces with a leather hood, they are unable to signal when they are experiencing pain or suffering. John P. Wikswo, Jr. Aff. ¶ 12.

35. On information and belief, the procedures Defendants use to carry out executions by electrocution are not precise. The amount of electrical current delivered to an object varies directly with the voltage applied and inversely with the resistance of the object to which the current is applied. Human bodies have varying resistance levels, depending on their size, composition, and the amount of sweat present on the surface of their skin. As a result, the amount of electrical current necessary to stop a condemned person's vital organs from functioning depends on that person's particular characteristics, and the length of a time any given individual will remain alive, conscious, and sensate during an electrocution is unpredictable and variable. *Id.* at ¶ 12(d).

36. There is evidence that at least thirty percent of those prisoners Defendants have executed in the electric chair since 1912 experienced excruciating pain and suffering. *Id.* at ¶ 13. Specifically, in at least thirty percent of electrocutions in South Carolina's history, one or more of

the following occurred: the prisoner's body was subjected to smoke or fire; the electric chair or apparatus emitted sparks; more than one shock was necessary to stop the prisoner's heart; and the prisoner experienced violent involuntary muscle contractions.

37. Of the seven prisoners Defendants have executed in the electric chair since 1985, there is evidence that at least five suffered excruciating pain.²

38. These estimates are almost certainly a significant undercount of the true totals because reliable witness accounts do not exist for most of the executions by electrocution, and a person executed in the electric chair cannot signal when he is experiencing pain or suffering.

39. Evidence from other states confirms that death in the electric chair is torturous. Two states have declared it unconstitutional. The Supreme Court of Nebraska held that "electrocution will unquestionably inflict intolerable pain unnecessary to cause death in enough executions so as to present a substantial risk that any prisoner will suffer unnecessary and wanton pain in a judicial execution by electrocution." *State v. Mata*, 745 N.W.2d 229, 278 (2008). The Supreme Court of Georgia likewise concluded that electrocution, with "its certainty of cooked brains and blistered bodies," is unconstitutional under its state constitution. *Dawson v. State*, 554 S.E.2d 137, 143–44 (Ga. 2001). *See also Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennan, J., dissenting from the denial of certiorari) (describing various problems with the electric chair, including the likelihood that a prisoner will catch fire or otherwise be mutilated by electrocution).

² The five men whose executions went awry were: Pee Wee Gaskins (required three shocks before his heart stopped and witnesses observed him convulsing and his muscles violently contracting), Larry Eugene Bell (required three shocks before his heart stopped), Joseph Carl Shaw (witnesses observed smoke rising from Shaw's pants and saw him violently convulse approximately a dozen times), James Neil Tucker (required three shocks for his heart to stop and witnesses noted that he experienced violent, involuntary muscle contractions), and Ronald Woomer (required three shocks for his heart to stop).

40. Willie Francis, perhaps the only person to live long enough after an attempted electrocution to give a first-hand account, described the feeling of being electrocuted as “a hundred and a thousand needles and pins were pricking in me all over and my left leg felt like somebody was cutting it with a razor blade.” Deborah Denno, *When Willie Francis Died: The “Disturbing” Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk*, in DEATH PENALTY STORIES 43–44 (John H. Blume & Jordan M. Steiker eds., 2009). At one point, Francis could no longer tell whether he was alive or dead. He realized he was alive when the executioners administered another surge of electricity, subjecting him to “the needles and pins” once more.

41. In 1983, it took Alabama fourteen minutes and three attempts to execute John Evans in the electric chair. After prison officials applied the first burst of 1900 volts, smoke and sparks poured from under the hood covering Evans’s face and the room filled with the smell of burning flesh and clothing; prison doctors then determined that Evans was still alive. *Glass*, 471 U.S. at 1091–92 (Brennan, J., dissenting from denial of certiorari). Prison officials applied a second burst of electricity for another thirty seconds, and more smoke filled the room, along with the increasingly sickening smell of burning flesh, but again doctors determined that Evans was not dead. It was only after prison officials had applied a third jolt of electricity that prison doctors declared him dead. *Id.*

42. In 1990, it took Virginia executioners more than five minutes to electrocute Wilbert Lee Evans. During the execution, Evans bled so profusely that his shirt became soaked in blood. Deenan L. Brown, *Execution Probe Sought*, WASH. POST, Oct. 21, 1990, at B1.

43. That same year, Florida officials attempted to electrocute Jesse Tafero for seven minutes. Ellen McGarrah, *TWO TRUTHS AND A LIE: A MURDER, PRIVATE INVESTIGATOR, AND HER SEARCH FOR JUSTICE* xvii (2021). After applying three separate cycles of electricity at 2,000

volts, Tafero appeared to still be alive. Mike Clary, *Flames Erupt in Electric Chair's Death Jolt*, L.A. TIMES, Mar. 26, 1997, at A1. As spectators watched, "the headset bolted onto his bare scalp caught fire. Flames blazed from his head, arching bright orange with tails of dark smoke. A gigantic buzzing sound filled the chamber." McGarrahan, TWO TRUTHS at xvii. Throughout the execution, Tafero's chest heaved, his head nodded, and even after he was engulfed in flames, he continued to sigh. *Id.*

44. Although Virginia prison officials rewired their electric chair in the wake of Wilbert Lee Evans's torturous death, it nevertheless took two attempts for them to kill Derick Peterson in 1991. Karen Haywood, *Convicted Killer Executed in Virginia, But Only on Second Try*, AP NEWS, August 23, 1991, <https://apnews.com/article/77b06f17fdeb31c1c23347adc150a3a5>.

45. In 1998, Florida attempted to execute Pedro Medina in the electric chair. Like Tafero, Medina caught on fire. Medina lurched backwards and balled his hands as blue and orange flames up to a foot long shot from the right side of his head. One witness recalled that the execution was "brutal, terrible. It was a burning alive, literally." Ron Wood, *Flames Erupt from Man's Face Mask During Death Sentence Electrocution*, AP NEWS, March 25, 1997, <https://apnews.com/article/ae9d4a0e21a72803fe299daac7850440>. The smell of burnt flesh lingered as the witnesses left. *Id.*

46. Upon information and belief, there are numerous other examples of botched electrocutions in recent American history.

47. If Defendants are permitted to carry out Plaintiffs' executions in the electric chair, there is a near certainty that they will suffer torturous, terrifying deaths.

Details of execution by firing squad

48. The firing squad has been, and continues to be, rarely used as a method of execution in America. It never gained much traction in any relevant time-period, and it has, until the 2021 amendments, never been a legally authorized method of execution in South Carolina.

49. Internationally, the firing squad is used only in China, North Korea, and other countries in Asia and the Middle East. In recent years, it has fallen out of favor even in those countries and has, for the most part, been replaced by lethal injection. South Carolina is therefore one of the few jurisdictions in the world where a person can be killed by firing squad.

50. Prior to 1789, there were only thirty firing squad executions recorded in the United States. Many were in Louisiana and California, both territories of foreign governments (France and Spain). Although the military long preferred the firing squad as a method of execution, there have been only 144 shooting executions of civilians in the nation's history (out of approximately 16,000 total documented executions). M. Watt Espy & John O. Smykla, *Executions in the United States. 1608-2002* ("The Espy File"), <https://perma.cc/CUT5-RP25>; DEATH PENALTY INFORMATION CENTER, *Execution Database*, <https://perma.cc/6R4K-RZM6> (last visited Feb. 3, 2022). That means that less than one percent of all executions in the United States have been carried out by having citizens shoot and kill other citizens.

51. In the pre-modern and modern eras of capital punishment in this country, the firing squad has virtually disappeared. It has only been used 34 times since 1900, making up less than half of one percent of all American executions in the past 120 years.

52. All but one of those firing squad executions took place in Utah. The sole exception, Andrija Mirkovitch, was shot to death in Nevada in 1920. Christopher Q. Cutler, *Nothing Less*

than the Dignity of Man: Evolving Standards, Botched Executions and the Utah's Controversial Use of the Firing Squad, 50 CLEV. ST. L. REV. 335, 400 (2003).

53. Since the reinstatement of the death penalty in 1976, there have been only three firing squad executions in the United States, all of which took place in Utah.³ Only three other states—Oklahoma, Mississippi, and Utah—currently authorize the use of the firing squad.⁴

54. Consequently, the Supreme Court of the United States has not addressed whether execution by firing squad is a constitutional method of punishment since 1878—nearly 100 years before the Eighth Amendment was incorporated and applied to the states in *Robinson v. California*, 370 US 662 (1962). See *Wilkerson v. Utah*, 99 U.S. 130 (1878). The Supreme Court, reviewing the execution order of a territorial court in Utah, ultimately determined that execution by firing squad was not cruel and unusual punishment, relying primarily on the military's use of the firing squad and its own opinion that firing squad involves less pain and is more dignified than hanging. *Id.* at 133.

55. Execution by firing squad is typically conducted by “multiple people simultaneously firing rifles at a target approximately overlying the heart of the prisoner,” inflicting “multiple, concurrent rifle wounds to the heart and surrounding structures” and causing “severe disruption and destruction of bodily tissues.” Jonathan L. Arden Aff. ¶ 20. The “[m]ultiple rifle wounds to the chest will cause extensive damage to the skin and chest wall soft tissues” and “multiple fractures of the ribs and sternum,” which would be “excruciatingly painful per se, and even more so upon any movement, such as flinching, or trying to breathe.” *Id.* at ¶ 24. The autopsy

³ Most firing squad executions overall throughout our nation's history have taken place in Utah. This is in large part due to the Mormon doctrine of “blood atonement,” i.e., that a murderer must literally shed his blood to obtain divine forgiveness.

⁴ From 1982 to 2009, Idaho had a firing squad alternative to lethal injection if lethal injection was “impractical,” but it was never used.

photographs from the last firing squad execution in the United States—that of Ronnie Lee Gardner in 2010 at Utah State Prison, filed with this complaint as appendices to Exhibit J—reveal that the bullets that struck Gardner created an enormous hole in his chest, soaked his clothing with blood, and destroyed his corpse.

56. “The mechanism of death by firing squad is disruption of the heart, resulting in cessation of circulation of blood to the vital organs.” Jonathan L. Arden Aff. ¶ 21. But even this “[a]brupt cessation of circulation...does not cause immediate unconsciousness.” *Id.* at ¶¶ 22–24. According to Dr. Jonathan Arden, an experienced forensic pathologist, even if all bullets hit the intended target and effectively destroy the heart, there is enough blood left in the brain for the individual to survive for 10 to 15 seconds and be conscious and able to feel pain. *Id.* During that period, the prisoner would suffer “excruciating pain” from the massive trauma to his bones and tissue caused by the executioners’ bullets.

57. Accordingly, execution by firing squad is significantly more painful than execution by lethal injection. As one of the State’s experts in ongoing litigation in Nevada has opined, because the firing squad brings about death “without the use of any medication that would render the individual unconscious, sedate, or in a state of anesthesia, the timeframe between when the individual is shot until death would result in incomparable pain when compared to” death by lethal injection. Complaint, Exhibit K—Declaration of Jeffrey D. Petersohn, M.D., at ¶ 48, *Floyd v. Daniels*, No. 3:21-cv-00176-RFB-CLB (No. 108-6) (D. Nev. June 24, 2021). According to Dr. Petersohn, although the firing squad can result in a quick death if the bullets hit the intended target, “there are many medical case reports detailing bullets passing through the skull without causing loss of consciousness.” *Id.* at ¶ 49.

58. Executions by firing squad have also been botched. For example, on the day of his execution, Wallace Wilkerson reportedly flinched at the “fire” command. The sharpshooters missed, hitting only his arm and torso but not his heart. It took almost half an hour for Wilkerson to bleed to death in front of a group of horrified spectators. All the while, Wilkerson lay on the ground, screaming, “My God! My God! They’ve missed it!” Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 355, 346–47 (2002–2003).

59. Utah botched another execution by firing squad in 1951. The entire squad missed Eliseo Mares’ heart, hitting him instead in the hip and abdomen. Like Wilkerson, Mares slowly bled to death. *Id.*

60. The last firing squad execution in the United States was that of Ronnie Lee Gardner in 2010 at Utah State Prison. Per the Utah protocol, five anonymous executioners fired at Gardner’s chest from approximately 20 feet, aiming at a target pinned over his heart by a physician. One of the rifles contained a blank, however, for the alleged purpose of relieving any single member of the firing squad from experiencing any personal guilt for participating in a homicide.

61. The firing squad also involves more active human participation in the act of killing citizens than lethal injection, or even electrocution. While there is some human involvement in all methods of execution—*i.e.*, the flipping of a switch or the plunging of a syringe—execution by firing squad involves several people volunteering to take aim at another human being’s heart, and on command, shoot that person to death. This is a more brutal method of taking life than execution by lethal injection.

62. On information and belief, the protocol that SCDC is developing for carrying out executions by firing squad is based on the Utah protocol and does not adequately protect Plaintiffs' constitutional rights.

Details of execution by lethal injection

63. Lethal injection is by far the most prevalent method of execution in the United States. American jurisdictions have settled on lethal injection as the most humane method of execution after a 100-plus year history of searching for humane methods of execution. Until South Carolina's recent amendment, every death penalty jurisdiction in the country used lethal injection as its primary method of execution.

64. Of the nation's 1,542 executions since 1976, nearly 90 percent (1,362) of them have been carried out by lethal injection. DEATH PENALTY INFORMATION CENTER, *Execution Database*. In the same period, only 163 executions have been by electrocution, with more than 140 of these occurring in the 70s, 80s, and 90s, and, as noted supra, only three executions by firing squad. *Id.*

65. When carried out properly, lethal injection can largely eliminate the risk of pain that comes with other methods of execution. *See Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). As a result, there is a "consensus among the States and the Federal Government that lethal injection is the most humane method of execution." *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007)

66. Indeed, lethal injection is a "proven alternative method" with a "track record of successful use." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1130 (2019).

67. As of now, the most reliable and humane way to conduct a lethal injection is by a single dose of pentobarbital.

68. Pentobarbital has "been adopted by five of the small number of States that currently implement the death penalty." *Lee*, 140 S. Ct. at 2591. It has been used in "over 100 executions,

without incident,” and it has been “repeatedly invoked by prisoners as a less painful and risky alternative to the lethal injection protocols of other jurisdictions.” *Id.*

69. Capital punishment by a single dose of pentobarbital has been approved twice by the Supreme Court of the United States. *Id.*; *Bucklew*, 139 S. Ct. 1112. It has also repeatedly been upheld by United States Courts of Appeals. *E.g.*, *Whitaker v. Collier*, 862 F. 3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F. 3d 1089 (8th Cir. 2015); *Gissendaner v. Commissioner*, 779 F. 3d 1275 (11th Cir. 2015).

70. Fourteen states (including South Carolina) have used pentobarbital to carry out executions: Alabama, Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. DEATH PENALTY INFORMATION CENTER, *Overview of Lethal Injection Protocols*, <https://perma.cc/H5KE-Q3AL> (last visited Feb. 3, 2022).

71. Since January 2020, five American jurisdictions carried out more than 20 executions using a single dose of pentobarbital. *Id.* Five additional states have plans to use a single dose of pentobarbital: Kentucky, Louisiana, Montana, North Carolina, and Tennessee. *Id.*

72. Also in the last year, Arizona has secured a new batch of pentobarbital. Jacques Billeaud, *Arizona finds death penalty drug after hiatus in executions*, AP NEWS, Mar. 5, 2021, <https://apnews.com/article/arizona-phoenix-executions-6f0ce846e174119635509e0c16b9ac1d>.

IV.

CLAIMS FOR RELIEF⁵

Count I: Due Process Violation—Retroactive Legislation

73. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

74. The execution statute, as amended, cannot apply to Plaintiffs because their crimes occurred and sentences were imposed prior to the enactment date, their statutory rights to elect lethal injection had vested, and the statute itself is neither procedural nor remedial.

75. As the South Carolina Supreme Court has recognized, Plaintiffs have a “statutory right . . . to elect the manner of [their] execution.” Ex. H. Because the pre-amendment statute contained the same language as the post-amendment statute regarding the right to elect, Plaintiffs had a statutory right to choose between lethal injection and electrocution and that right vested when they were sentenced. *See* S.C. Code Ann. § 24-3-530 (1996).

76. Defendants cannot revoke a vested statutory right without violating due process. A statutory right vests when it creates “legitimate expectations” or establishes legal consequences that invite reliance. *See Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 32, 736 S.E.2d 651, 660 (Beatty, J., concurring in part and dissenting in part) (quoting Barbara J. Van Arsdale *et al.*, 16B Am. Jur. Constitutional Law § 735 (2d ed. 2009)); *see also Martin v. Hadix*, 527 U.S. 343, 358 (1999) (the question of retroactivity “should be informed and guided by ‘familiar considerations

⁵ This complaint contains claims previously raised in two separate actions: (1) *Owens v. Stirling* (*Owens I*), No. 2021-CP-40-2306, filed on May 17, 2021, challenging various procedural aspects of S.C. Code Ann. § 24-3-530 (2021); and, (2) *Owens v. Stirling* (*Owens II*), No. 2021-CP-40-04851, filed on September 27, 2021, raising substantive challenges to the proposed methods of punishment. These have been merged into one complaint (along with an additional claim raised by Plaintiff Terry [Count VIII]) by agreement of the parties in an effort to streamline resolution of the issues.

of fair notice, reasonable reliance, and settled expectations” (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994))).

77. When Plaintiffs were sentenced to death, the law gave them the option to choose lethal injection and reject electrocution. Since the Legislature authorized lethal injection in 1995, no person has been executed by electrocution against their will in South Carolina.

78. Accordingly, since the time of their crimes and sentencing, Plaintiffs have had a legitimate, reasonable, and settled expectation that they could select lethal injection as their method of execution. The judges and juries who imposed their death sentences similarly expected the sentence imposed would only be carried out by lethal injection or electrocution.

79. As discussed *infra*, the precise operation of the new law is vague and uncertain, but there is no dispute that it retroactively strips Plaintiffs of their statutory right to be executed by lethal injection, unless they choose otherwise. Indeed, stripping Plaintiffs of that right, and clearing the obstacle it created to Defendants’ executing them by less humane methods, was the express purpose of the new law and its proponents. Applying the 2021 amendments to Plaintiffs would bring to bear the precise concern that motivates the presumption against retroactive statutes: The Legislature here has used its “unmatched powers” to “sweep away settled expectations suddenly and without individualized consideration” in response “to political pressures” and in order to get “retribution against [an] unpopular group[s].” See *Landgraf*, 511 U.S. at 266, 270.

Count II: Ex Post Facto Violation

80. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

81. The United States and South Carolina Constitutions forbid ex post facto legislation. U.S. Const. art. I § 10 (“No State shall . . . pass any . . . ex post facto law”); S.C. Const. art. I § 4 (“No . . . ex post facto law . . . shall be passed”).

82. The principle that a law has no effect “before it was actually passed” originates in longstanding and “fundamental notions of justice.” *Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (quoting 1 J. Kent, Commentaries on American Law *455).

83. The Ex Post Facto Clauses of the State and Federal Constitutions forbid the Legislature from enacting any “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). Put differently, a law is ex post facto when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or “alters the situation of the party to his disadvantage,” *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). See also *Jernigan v. State*, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000).

84. Thus, although “a change in law that merely affects a mode of procedure, but does not alter substantial personal rights is not *ex post facto*,” a law that “poses a sufficient risk of increasing the measure of punishment” affects a prisoner’s substantial personal rights and is not merely procedural. *Barton v. S.C. Dep’t of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 413, 745 S.E.2d 110, 114, 120 (2013).

85. This standard and the United States Supreme Court opinions applying it “set[] the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001). South Carolina, therefore, “is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.” *City of Mesquite v. Aladdin’s Castle, Inc.*,

455 U.S. 283, 293 (1982). The Supreme Court of South Carolina has read the state Ex Post Facto clause to sweep more broadly than the federal Ex Post Facto clause. *See Jernigan*, 340 S.C. at 263–65, 531 S.E.2d at 510–12.

86. The Supreme Court of South Carolina has also recognized that certain methods of execution are more onerous than others, and this qualitative distinction has implications for determining whether a law changing the method of execution is ex post facto. For example, in the course of rejecting an ex post facto challenge, the South Carolina Supreme Court explained that a shift from hanging to electrocution was not ex post facto because the Court was “satisfied that electrocution is a more humane method of execution than hanging.” *Malloy*, 95 S.C. at 441, 78 S.E. at 99.

87. It follows that a retroactive law that changes the method of punishment to one that is less humane is more onerous than the prior law and therefore is impermissibly ex post facto.

88. The 2021 amendments to the execution statute are retroactive. 2021 S.C. Acts No. 43, R-56, S. 200, § 3. The only question, then, is whether the law “increases the punishment” or whether “its consequences alter[] the situation of a party, to his disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted).

89. The change from lethal injection as the default method of execution unless Plaintiffs choose otherwise to a default method of execution by electrocution (or firing squad if chosen) alters Plaintiffs’ situation to their disadvantage. Lethal injection is the least severe of all three punishments, and the 2021 amendments effectively revoke that lesser punishment. *See Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory).

90. When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the United States Supreme Court “the most humane [execution method] available.” *Baze v. Rees*, 553 U.S. 35, 62 (2008). When carried out properly, it can largely eliminate the risk of pain that comes with other methods of execution. *Id.* at 49 (noting that the first drug of the three-drug protocol “eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections”); *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (observing that a single-drug protocol is “widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols” (internal quotations omitted)). As a result, there is a “consensus among the States and the Federal Government that lethal injection is the most humane method of execution.” *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

91. In contrast to a properly administered execution by lethal injections, electrocution and firing squad are barbaric, carry a heightened risk of painful death, and desecrate the body of the deceased in a way that can only be considered less humane.

92. Even under “ideal” conditions (when the electrocution is not botched), it is nevertheless a barbaric method of execution. See ¶¶ 30–34, *supra*; John P. Wikswo, Jr. Aff. ¶¶ 11–12, 14–15 (April 27, 2021), attached as Exhibit I. An electrocuted person will likely experience a slow, painful death by suffocation as his internal organs are slowly cooked. *State v. Mata*, 745 N.W.2d 229, 269–78 (2008); *Dawson v. State*, 554 S.E.2d 137, 142, 143 (2001). Their organs will boil, their heads catch fire, their eyes pop out, and their bodies blister, giving off the nauseating odor of burning flesh. *Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennan, J., dissenting from denial of certiorari); *see also Dawson*, 554 S.E.2d at 144; Jonathan L. Arden Aff. ¶¶ 9–10 (May 14, 2021), attached as Exhibit J.

- a. Electrocutation is considered so torturous and outmoded that the last two state courts to consider it have found that killing a death sentenced inmate in the electric chair violates their state constitutions. *Mata*, 745 N.W.2d at 278 (finding that electrocution violated the Nebraska Constitution’s prohibition against cruel and unusual punishment, which mirrors the Eighth Amendment); *Dawson*, 554 S.E.2d at 144 (finding that electrocution violated the Georgia Constitution’s prohibition against cruel and unusual punishment).
- b. There is a consensus among medical and physiology experts that death by judicial electrocution is torturous. *See* Ex. I, Wikswo Aff. ¶ 15; Ex. J, Arden Aff. ¶ 17.
- c. South Carolina lawmakers have affirmatively acknowledged that electrocution is more onerous than lethal injection. *See Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B (Representative Harry Hallman, explaining the switch from electrocution to lethal injection was necessitated by the reality that “lethal injection is more humane than dying in the electric chair”).

93. Death by firing squad is more brutal and inhumane than death by lethal injection.

- a. Firing squad, like electrocution, carries a serious risk of error and therefore excruciating pain. *See* James R. Acker & Ryan Champagne, *The Execution of Wallace Wilkerson: Precedent and Portent*, 42 Crim. Justice Rev. 349, 354 (2017) (describing the botched firing squad execution of Wallace Wilkerson).
- b. Even when an execution by firing squad goes according to plan, the condemned person’s heart is “ripped to pieces by bullets” and the person is left to bleed to

death. *E.g.*, Ed Pilkington, *Utah firing squad executes death row inmate*, The Guardian, June 18, 2010, <https://www.theguardian.com/world/2010/jun/18/firing-squad-executes-death-row-inmate>. The prisoner's body is left with baseball-sized holes and internal tissues splattered on the outside of the corpse. *See* Ex. J, Arden Aff., Appendix 3 (photographs of Ronnie Gardner after his execution by firing squad); *Should Firing Squads Replace Lethal Injections?*, VICE News (Mar. 21, 2017), <https://www.youtube.com/watch?v=BOKYCqee2YY>.

94. Electrocution and firing squad are less humane punishments than lethal injection. Stripping Plaintiffs of their right to be executed by lethal injection and forcing their execution by either electrocution or firing squad “increases the punishment”—from death by a more humane means to death by torturous means—and “alters [their] situation[s] . . . to [their] disadvantage.” *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted).

95. Enforcing the 2021 statute and electrocuting or shooting Plaintiffs would contravene the explicit purpose of the Ex Post Facto Clause: “to secure substantial personal rights against arbitrary and oppressive legislative action.” *Malloy*, 237 U.S. at 183.

Count III: Due Process Violation—Void for Vagueness

96. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

97. Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007).

98. “[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies.” *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006).

99. Specifically, a statute is unconstitutionally vague “if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

100. The amended statute is unconstitutionally vague because it “lack[s] any guidelines or standards regarding” the definition of the key statutory term: available. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2019). Additionally, the statute is silent as to the sequence of events it requires. As a result of this inherent vagueness, parties whose actions and choices are governed by the statute—Plaintiffs and Defendants Stirling and SCDC—must guess as to its meaning and therefore as to its application.

101. The statute requires Defendant Stirling or his successor to certify to the availability or unavailability of the three methods of execution, but it offers no guidance as to the meaning of the word “available” or as to the timing of the certification. Defendants have interpreted the word “available” to mean that SCDC is capable of using a particular method on the day of a scheduled execution, but the South Carolina Supreme Court rejected this interpretation by staying Plaintiff Sigmon’s and Owens’s executions when defendants asserted that only electrocution was available. The fact that the statute is silent both as to the meaning of “available” and as to the timing of the Director’s certification to the Supreme Court forces Plaintiffs to guess as to the statute’s meaning and how it governs their right to elect.

**Count IV: Statutory Violation Based on the Meaning of
“Available”**

102. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

103. Even if the statute is not impermissibly vague on its face, the courts—not Director Stirling, not SCDC, and not Governor McMaster—are charged with saying what the word “available” means. *See Abbeville Cnty. School Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163–64 (2014) (“It is emphatically the province and duty of the judicial department to say what the law is. This hallowed observation is the bedrock of the judiciary’s proper role in determining the constitutionality of laws, and the government’s actions pursuant to those laws.” (cleaned up)).

104. Although the statute is silent regarding the meaning of “available,” the Supreme Court’s only pronouncement on the statute—the orders staying Plaintiffs Sigmon’s and Owens’s executions—offers some insight and makes clear that whatever “available” means, it cannot have the meaning that Defendants have given it thus far. *See Ex. H.*

105. Specifically, under the orders, Defendants have at least some affirmative obligation to make the statutory methods “available” and to use good faith efforts to offer Plaintiffs all three methods pursuant to his “statutory right . . . to elect the manner of [their] execution.” *Ex. H.* Moreover, “available” has a temporal meaning broader than the one Defendants have thus far given it; under the orders, Defendants are required to “maintain[] the availability of electrocution” and to make firing squad “currently available” before they may attempt to carry out any executions. *Ex. H.*

106. Whatever their obligations to make methods of execution available under the statute, Defendants have failed to meet those obligations. *See supra* ¶¶ 17–22.

Count V: Violation of South Carolina Constitution, art. I,
§ 8—Non-Delegation Doctrine Violation

107. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

108. Under Article I, section 8 of the South Carolina Constitution, “the Legislature may not delegate its powers to make laws.” *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978). This is because the Constitution requires that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other.” S.C. Const. art. I § 8. Specifically, although the Legislature “may authorize an administrative agency or board ‘to fill in up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose,” the Legislature may not vest “unbridled, uncontrolled, or arbitrary power” in another branch of government. *Bauer*, 271 S.C. at 232–33, 246 S.E.2d at 876 (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)).

109. Although “there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated,” the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876–77. Thus, a statutory delegation is constitutional only “if the officer, board, or commission to whom the authority is alleged to have been delegated is given no power to add to or take away from the law as enacted, if nothing is left to discretion as to what shall constitute the form and substance of the statute.” *State ex rel. Richards v. Moorer*, 152 S.C. 455, 150 S.E. 269, 273 (1929) (emphasis added); see also *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“[A] statutory delegation is constitutional as long as [the Legislature] ‘lays down by legislative act an intelligible principle to which the person or body authorized to exercise

the delegated authority is directed to conform.” (cleaned up) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989))).

110. The 2021 amendments violate the non-delegation principle because they vest Defendant Stirling or his successor with unbridled discretion to determine whether a method is “available,” and therefore by which method a condemned person will die. *See Hobbs v. Jones*, 412 S.W.3d 844, 855–56 (Ark. 2012) (invalidating Arkansas’s method of execution statute as an impermissible delegation of legislative power where the statute in question “passed to the executive branch, in this case the [Arkansas Department of Corrections], the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution.”). Because the word “available” is vague on its face, and because the statute offers no “intelligible principle” to which Director Stirling or his successor “is directed to conform,” the amended law grants unqualified power to the Director of the Department of Corrections to decide how it will carry out executions. *See Gundy*, 139 S. Ct. at 2123 (quoting *Mistretta*, 488 U.S. at 372). Put differently, the statute is unconstitutional because it leaves to the discretion of an executive branch officer the “discretion as to what shall constitute the form and substance of the statute.” *Moorer*, 152 S.C. at 455, 150 S.E.2d at 273.

111. This grant of authority is also inconsistent with the purpose of the 2021 amendments, which is to prescribe methods of execution, to give condemned people a right to elect how they will be executed, and to define the process by which a condemned person makes an election between the various authorized methods. *See Ex. H.*

- a. Consistent with this purpose, the statute requires Defendant SCDC to “establish protocols and procedures for carrying out executions pursuant to this section.” S.C. Code Ann. § 24-3-530(F) (2021).

- b. However, because the statute is so vague as to preclude any collective understanding of its meaning, it gives Director Stirling or his successor the power to decide which methods are “available,” based on criteria that are not subject to judicial review or any administrative oversight.
- c. “The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if [the Legislature] gave the same power [to determine availability] . . . to members of its staff.” *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting).

112. The practical consequences of the legislative delegation here are substantial. Under the statute as written, the Director’s determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where “the courts, when presented with a challenge of the agency’s actions, would, there being no limitations on the agency’s authority, be unable to judicially review its actions”).

113. For example, if Plaintiffs elect death by lethal injection and the Director certifies that lethal injection is unavailable, the statute provides no mechanism by which Plaintiffs can challenge that assessment. Because the statute is silent as to the meaning of “available,” “there is an absence of standards for guidance of the [Director’s] action,” making it “impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed.” *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the Legislature effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority “to suspend or revoke a license for any cause which it deems satisfactory”).

114. Defendant Stirling might determine that a specific method is not “available” for any reason, or for no reason. If Defendant SCDC is unable to obtain the necessary equipment for the selected method in time to meet the date on the execution warrant—e.g., humane lethal injection drugs or appropriate weapons for the firing squad—he could deem it unavailable with no scrutiny or review of what steps he had taken, or foresworn, along the way. A method not being “available” or being “unavailable” could be based on any number of undefined, undisclosed reasons, such as SCDC employees’ unwillingness to partake in the execution; temporary conditions, such as the COVID-19 pandemic, rendering the method unsafe, expensive, or impractical for SCDC staff; the method’s use exceeding Defendant SCDC’s annual budget for carrying out executions; or simply that SCDC does not desire to present the condemned inmate with that option anymore. If Defendant Stirling made such a determination, Plaintiffs would be powerless under the statute to challenge it.

115. Because the amended statute grants unbridled discretion to Defendant Stirling to determine what the law is, and because it “sets up no standard to guide the Department and contains no limitations” on what constitutes “available” under the statute, it violates the non-delegation doctrine. *Harbin*, 226 S.C. at 595, 86 S.E.2d at 471.

**Count VI: Electrocutation and the Firing Squad are Prohibited
by the South Carolina Constitution**

116. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

117. The federal constitution “sets the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 836, 840 (2001). Thus, South Carolina “is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the

Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982).

118. Article I, Section 15 of the South Carolina Constitution provides, in relevant part: “Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.” S.C. Const. art. I § 15. *Cf.* U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

119. Where the language in the South Carolina Constitution differs from language in the federal constitution, the state court’s interpretive task is to determine whether the state constitution “provide[s] greater protection than the federal Constitution.” *Forrester*, 343 S.C. at 644, 541 S.E.2d at 840.

120. Although the Supreme Court of South Carolina has never addressed a challenge to a method of execution under the state constitution, Article I, Section 15 of the South Carolina Constitution sweeps more broadly than the Eighth Amendment as a matter of text, legislative history, and precedent from other jurisdictions. *Cf. State v. Wilson*, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992) (noting, in dictum, that for the purposes of proportionality review, the state and federal constitutions offer equal protection because “United States Supreme Court effectively treats the ‘and,’ as an ‘or’ in their Eighth Amendment analysis”).

121. Article I, Section 15 prohibits three distinct categories of punishment using the disjunctive form “or” (rather than the conjunctive “and” in the federal Constitution): cruel punishment, corporal punishment, and unusual punishment. This drafting form is unique among the constitutions in all American jurisdictions and counsels in favor of a methods-of-execution test

that accounts for all three prohibited forms of punishment and that does not require a plaintiff to plead an alternative method of execution.

122. As detailed above, electrocution and the firing squad are “cruel” because they both “involve torture or a lingering death” beyond “the mere extinguishment of life.” *In re Kemmler*, 136 U.S. 436, 447 (1890).

123. Electrocution and firing squad are unusual because they are authorized for use in a vanishingly small number of jurisdictions and are rarely used as methods of execution.

- a. Only seven states authorize execution by electrocution.⁶ Of those seven, electrocution is a back-up in six, meaning it is used only if the prisoner selects it, if other methods are held to be unconstitutional, or if other methods are legally unavailable.⁷ South Carolina is the only jurisdiction in the world where a person can be executed by electrocution without selecting that method. The state is in a self-created category of one, reflecting a far stronger national consensus that the punishment is inappropriate than the consensus that controlled in *Atkins*, *Roper*, *Graham*, and *Miller*.
- b. Only four states authorize the use of the firing squad.⁸ None use it as a default method of execution.

⁶ The seven states are: Alabama, Ala. Code § 15-18-82.1(a); Florida, Fla. Stat. § 922.105(1); Kentucky, Ky. Rev. Stat. § 431.220(b); Mississippi, Miss. Code Ann. § 99-19-51(3); Oklahoma, Okla. Stat. tit. 22, § 1014(C); South Carolina, S.C. Code Ann. § 24-3-530(A); and Tennessee, Tenn. Code § 40-23-114(b).

⁷ See Ala. Code § 15-18-82.1(a); Fla. Stat. § 922.105(1); Ky. Rev. Stat. § 431.220(b); Miss. Code Ann. § 99-19-51(3); Okla. Stat. tit. 22, § 1014(C); Tenn. Code § 40-23-114(b).

⁸ The four states are Mississippi, Oklahoma, South Carolina, and Utah.

- c. Electrocutation and firing squad are rarely used in practice, and their use declined rapidly after American jurisdictions embraced lethal injection as a more humane method. Since 2010, only two percent of executions in the United States have been by electrocution, compared to 63 percent through the 1980s. Since 1976, there have only been three executions by firing squad in the United States—all in Utah. Firing squad is as uncommon a method of execution as hanging.

124. Electrocutation and firing squad are corporal because they mutilate the bodies of those they kill.

- a. Electrocutation mutilates the body by charring the flesh, cooking and destroying the internal organs, and leaving the shaven corpse marred with burns and bruises—regardless “whether or not the electrocution protocols are correctly followed and the electrocution equipment functions properly.” *See Dawson*, 554 S.E.2d at 143 (describing state autopsy reports, which detailed how “the bodies are burned and blistered with frequent skin slippage from the process”); *Mata*, 745 N.W.2d at 278 (holding that electrocution’s “proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man”). *See also* Appendices to Exhibit J.
- b. Firing squad mutilates the body by exploding the chest with high-powered rifles, leaving holes in the corpse, exposing internal tissue, destroying internal organs, and soaking the prisoner’s clothing, the sand bags that surround it, and the ground with blood. *See* Appendices to Exhibit J.

125. The disjunctive framing of Article I, Section 15 means that punishments are forbidden if they are cruel, corporal, *or* unusual. Plaintiffs pleads that electrocution and the firing squad are cruel, corporal, *and* unusual. But this Court need only agree with Plaintiffs on one to find the challenged method unconstitutional.

**Count VII: Requiring a Choice in Which a Prisoner Must
“Select” Between One Constitutional and One
Unconstitutional Method of Execution Violates the Prisoner’s
Statutory Right to Elect the Manner of His Execution**

126. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

127. The Supreme Court of South Carolina has concluded that, under the current statute, death-sentenced inmates have a right “to elect the manner of their execution.” Order, *Sigmon*, No. 2002-024388; Order, *Owens*, No. 2006-038802. According to the Supreme Court, SCDC violates this right under circumstances “in which only a single method of execution is available.” *Id.*

128. To satisfy the statute, Defendants must present a death-sentenced inmate with at least two methods of execution on which he can exercise his statutory right of election. In order for that right to be meaningful, both of the methods presented to him must be constitutional. If either of the two options presented to an inmate is unconstitutional, the statutory right of election is rendered meaningless in violation of the statute.

**Count VIII: Electrocution and Firing Squad, as Applied to
Plaintiff Terry, Violate the South Carolina Constitution**

129. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

130. Plaintiff Terry has a unique set of medical conditions that put him at an increased risk for a torturous execution. He has been diagnosed with essential hemorrhagic thrombocytopenia, a rare genetic disorder related to blood cancers; post-herpetic neuralgia, a

painful nerve disorder that may develop following a shingles infection; and polyneuropathy of unknown origins. These medical conditions require Terry to take various powerful medications that, inter alia, alter his mental status, change his perception of pain, and increase his risk of unusual and painful bleeding complications. Terry also suffered a serious fracture to his left ankle, which required placement of large screws and metal plates in his left leg, and an equally serious fracture to his right hip, which necessitated a full hip replacement.

131. Under the federal constitution, as-applied method-of-execution claims are judged under the same standard as all other method claims. *Bucklew*, 139 S. Ct. at 1126.

132. South Carolina courts are entirely free to determine a different as-applied test for method of execution claims. *Aladdin's Castle, Inc.*, 455 U.S. at 293. 84. The disjunctive framing of Article I, Section 15 means that punishments are forbidden if they are cruel, corporal, or unusual.

133. As a result of Plaintiff Terry's medical conditions and the medications he is prescribed to manage them, Mr. Terry is at a heightened risk for an unusually painful execution. Specifically, treatment for essential hemorrhagic thrombocytopenia includes the use of hydroxyurea, a powerful medication that increases the risk of unusual bleeding. Mr. Terry is also prescribed various medications to manage his post-herpetic neuralgia and mental health conditions. Those medications, combined with his underlying conditions, affect Mr. Terry's nerves and pain receptors and increase the likelihood of complications and severe pain from an execution by firing squad.

134. On information and belief, SCDC's firing squad protocol will pose a substantial risk of unnecessary pain and suffering for Plaintiff Terry because it fails to adequately account for the risk of a misfire that could cause Terry to slowly and painfully bleed to death. Additionally, on

information and belief, the protocol does not adequately account for the possibility of other complications that could arise because of Mr. Terry's unique pharmacological circumstances.

135. Because of Plaintiff Terry's injuries to his hips and ankle, he has a significant amount of metal in his lower extremities. Because metal is a strong conductor of electricity, any attempt to execute Mr. Terry by electrocution would create a dramatically increased risk of fire, sparking, burning of the flesh around the metal implants, and electrical diversion away from Mr. Terry's essential organs and into the metal in his lower extremities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Declare that execution by electrocution is unconstitutional under the South Carolina constitution.
2. Declare that execution by firing squad is unconstitutional under the South Carolina constitution.
3. Declare that execution by electrocution is unconstitutional under the South Carolina constitution as applied to Plaintiff Terry.
4. Declare that execution by firing squad is unconstitutional under the South Carolina constitution as applied to Plaintiff Terry.
5. Grant a permanent injunction prohibiting Defendants from carrying out, or attempting to carry out, any executions by electrocution or the firing squad unless a death-sentenced inmate affirmatively selects that as the method of execution.
6. Grant a permanent injunction prohibiting Defendants from carrying out, or attempting to carry out, any executions by electrocution or the firing squad

unless Plaintiffs have a meaningful choice between two constitutional methods of execution.

7. Grant declaratory relief, as requested in this Complaint, to invalidate the statute as applied to Plaintiffs to the extent it forces an individual to be executed by either electrocution or firing squad.
8. Grant declaratory relief, as requested in this Complaint, to invalidate the statute as applied to Plaintiffs as impermissible retroactive legislation, to the extent that it changes the default method of execution from lethal injection to electrocution.
9. Grant declaratory relief, as requested in this Complaint, to invalidate the statute as applied to Plaintiffs because it is ex post facto legislation.
10. Grant declaratory relief, as requested in this Complaint, to invalidate the portions of the statute that are impermissibly vague, or in the alternative, to define the term “available” so as to give parties covered by the amended statute guidance as to the statute’s meaning.
11. Grant declaratory relief, as requested in this Complaint, to invalidate the statute to the extent that it effectuates an unconstitutional delegation of legislative power.
12. Grant any further relief as the Court deems just and proper.

Respectfully submitted

Dated: April 11, 2022

By: s/Lindsey S. Vann

J. Christopher Mills
J. CHRISTOPHER MILLS, LLC
2118 Lincoln Street
Columbia, SC 29202
(803) 745-9533

Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
506 Pettigru (29601)
P.O. Box 6938
Greenville, SC 29606
(864) 760-4000

John H. Blume, III
CORNELL LAW SCHOOL
159 Hughes Hall
Ithaca, NY 14853
(607) 255-1030

Lindsey S. Vann
Emily Paavola
Hannah Freedman
Brendan Van Winkle
JUSTICE 360
900 Elmwood Avenue
Suite 200
Columbia, SC 29201
(803) 765-1044

Elizabeth Franklin-Best
ELIZABETH FRANKLIN-BEST, P.C.
2725 Devine Street
Columbia, South Carolina 29205
(803) 331-3421

Counsel for Plaintiffs

Exhibit A

SMITH ROBINSON

Forward thinking. Results driven.

Smith Robinson Holler DuBose and Morgan, LLC

COLUMBIA 2530 Devine Street, Columbia, SC 29205
P: 803.254.5445 F: 803.254.5007

SUMTER 126 N. Main Street, Sumter, SC 29151
P: 803.778.2471 F: 803.778.1643

CAMDEN 935 Broad Street, Camden, SC 29020
P: 803.432.1992 F: 803.432.0784

Reply To: Daniel C. Plyler
Columbia Office

May 19, 2021

The Honorable Daniel E. Shearouse
Clerk of Court for South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

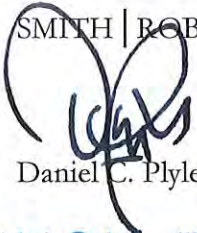
RE: Richard Bernard Moore, SK # 6003
Brad Keith Sigmon, SK # 6008
Freddie Eugene Owens, SK # 5065

Dear Mr. Shearouse:

I have been retained to represent the South Carolina Department of Corrections (the "Department"). I have been authorized to alert the Supreme Court that, due to the recent amendment to S.C. Code Ann. Section 24-3-530, the Department now is now able to carry out executions by electrocution.

Thank you in advance for your time and consideration.

Very truly yours,

SMITH | ROBINSON

Daniel C. Plyler

cc: J. Christopher Mills, Esquire (chris@chrismillslaw.com)
Lindsey S. Vann, Esquire (lindsey@justice360sc.org)
Emily C. Paavola, Esquire (emily@justice360sc.org)
Hannah Freedman, Esquire (hannah@justice360sc.org)
Megan Barnes, Esquire (megan@justice360sc.org)
Brendan Van Winkle, Esquire (brendan@justice360sc.org)
Joshua Snow Kendrick, Esquire (josh@kendrickleonard.com)
Melody Brown, Esquire (mbrown@scag.gov)

Exhibit B

SMITH ROBINSON

Forward thinking. Results driven.

Smith Robinson Holler DuBose and Morgan, LLC

COLUMBIA 2530 Devine Street, Columbia, SC 29205
P: 803.254.5445 F: 803.254.5007

SUMTER 126 N. Main Street, Sumter, SC 29151
P: 803.778.2471 F: 803.778.1643

CAMDEN 935 Broad Street, Camden, SC 29020
P: 803.432.1992 F: 803.432.0784

Reply To: Daniel C. Plyler
Columbia Office

June 3, 2021

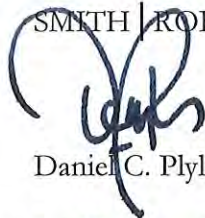
The Honorable Daniel E. Shearouse
Clerk of Court for South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: Brad Keith Sigmon, SK # 6008

Dear Mr. Shearouse:

Pursuant to S.C. Code Ann. Section 24-3-530(B), the Director of the Department of Corrections is required to certify by affidavit under the penalty of perjury to the Supreme Court the available methods of execution. Please find enclosed the certification of Director Bryan Stirling regarding the available methods of execution.

Very truly yours,

SMITH ROBINSON

Daniel C. Plyler

cc: J. Christopher Mills, Esquire (chris@chrismillslaw.com)
Lindsey S. Vann, Esquire (lindsey@justice360sc.org)
Emily C. Paavola, Esquire (emily@justice360sc.org)
Hannah Freedman, Esquire (hannah@justice360sc.org)
Megan Barnes, Esquire (megan@justice360sc.org)
Brendan Van Winkle, Esquire (brendan@justice360sc.org)
Joshua Snow Kendrick, Esquire (josh@kendrickleonard.com)
Gerald "Bo" King, Esquire (Gerald_king@fd.org)
Melody Brown, Esquire (mbrown@scag.gov)

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

The State,

Respondent,

v.

Brad Keith Sigmon,

Appellant.

Appellate Case No. 2002-024388

Greenville County
(Trial Court Case No. 2001GS2307629,
2001GS2307630, 2001GS2307631)

**AFFIDAVIT OF BRYAN P. STIRLING
DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

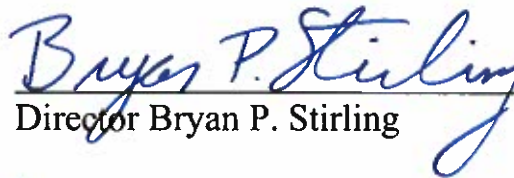
PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who
being duly sworn, deposes and states as follows:

1. I am over the age of eighteen and competent to give this testimony.
2. I serve as the Director of the South Carolina Department of Corrections (hereinafter "Department"), having first been appointed as interim to this position in October of 2013 and later confirmed by the South Carolina Senate as Director thereafter.
3. Pursuant to S.C. Code Ann. Section 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receiving a notice of execution issued by the South Carolina Supreme Court.
4. According to S.C. Code Ann. Section 25-3-530, there are three, statutorily approved methods of execution. Specifically, the General

Assembly has approved electrocution, lethal injection, and firing squad as methods for carrying out a lawful sentence of death.

5. On Thursday, May 27, 2021, my office received a copy of an Execution Notice issued by the Clerk for the South Carolina Supreme Court regarding Brad Keith Sigmon.
6. I hereby certify that, as of this date, the only statutorily approved method of execution available to the South Carolina Department of Corrections is electrocution.

FURTHER AFFIANT SAYETH NOT.


Director Bryan P. Stirling

SWORN TO BEFORE ME THIS 3rd

DAY OF June, 2021

 (SEAL)

NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 3/12/2024

Exhibit C

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

NOTICE OF ELECTION

In Re Brad Keith Sigmon, SK # 6008

Notice pursuant to S.C. Code Ann. Section 24-3-530(E)

Pursuant to S.C. Code Ann. Section 24-3-530(E), the South Carolina Department of Corrections is hereby providing you written notice of your right to election of method of execution, as well as the available methods of execution. The June 3, 2021 Affidavit of Director Bryan P. Stirling is attached. As stated in that Affidavit, the only statutorily approved method of execution currently available to the South Carolina Department of Corrections is electrocution.

I elect lethal injection

S/ *Brad Sigmon*

Brad Keith Sigmon

Acknowledgement of Receipt

Dated: June 4, 2021

WITNESSES:

[Signature]

Jacqueline Murrell

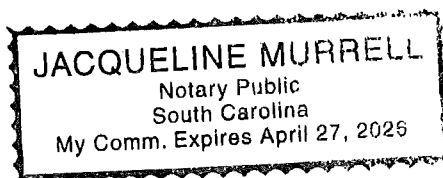


Exhibit D

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787, Columbia, South Carolina 29221

Pursuant to Code Section 17-25-400, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated Willie Davis as his duly authorized agent for the purpose of making service of the Notice of Election on the below named individual.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) AFFIDAVIT OF PERSONAL SERVICE

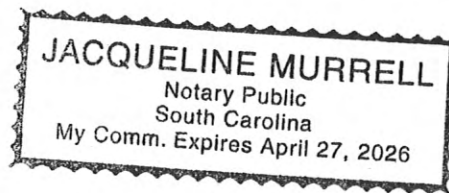
On the 11th day of June 2021, I served the Notice of Election, Affidavit by Bryan P. Stirling, and S.C. Code Ann. Section 24-3-530 on Freddie Eugene Owens by delivering personally and leaving a copy of the same at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina 29210. Deponent is not a party to this action.

S/ *Willie Davis*
Willie Davis

SWORN TO AND SUBSCRIBED before
me this 11th day of June 2021

Jacqueline Murrell (L.S.)
Notary Public for South Carolina

My Commission Expires: 4.27.26



ACCEPTANCE OF SERVICE

Service of a copy of the Notice of Election, Affidavit by Bryan P. Stirling, and S.C. Code Ann. Section 24-3-530 is accepted at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina 29210, South Carolina, this 11th day of June 2021.

S/ *Freddie Eugene Owens*
Freddie Eugene Owens

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

Appellate Case No. 2006-038802

Greenville County
(Trial Court Case No. 1998GS2305220)

**AMENDED AFFIDAVIT OF BRYAN P. STIRLING
DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who
being duly sworn, deposes and states as follows:

1. I am over the age of eighteen and competent to give this testimony.
2. I serve as the Director of the South Carolina Department of Corrections (hereinafter "Department"), having first been appointed as interim to this position in October of 2013 and later confirmed by the South Carolina Senate as Director thereafter.
3. Pursuant to S.C. Code Ann. Section 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receiving a notice of execution issued by the South Carolina Supreme Court.
4. According to S.C. Code Ann. Section 25-3-530, there are three, statutorily approved methods of execution. Specifically, the General

Assembly has approved electrocution, lethal injection, and firing squad as methods for carrying out a lawful sentence of death.

5. On Tuesday, June 1, 2021, my office received a copy of an Execution Notice issued by the Clerk for the South Carolina Supreme Court regarding Freddie Eugene Owens.
6. I hereby certify that, as of this date, the only statutorily approved method of execution available to the South Carolina Department of Corrections is electrocution, (see attached response).

FURTHER AFFIANT SAYETH NOT.


Bryan P. Stirling

SWORN TO BEFORE ME THIS 11th

DAY OF June, 2021

 (SEAL)

NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 3/12/2024

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

NOTICE OF ELECTION

In Re Freddie Eugene Owens, #5065

Notice pursuant to S.C. Code Ann. Section 24-3-530(E)

Pursuant to S.C. Code Ann. Section 24-3-530(E), the South Carolina Department of Corrections is hereby providing you written notice of your right to election of method of execution, as well as the available methods of execution. The June 11, 2021 Affidavit of Director Bryan P. Stirling is attached. As stated in that Affidavit, the only statutorily approved method of execution currently available to the South Carolina Department of Corrections is electrocution. *I elect lethal Injection*

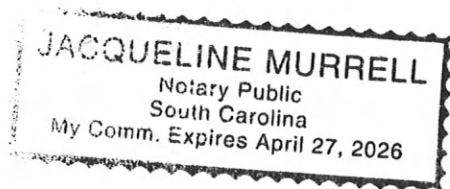
S/ *Freddie Eugene Owens*
 Freddie Eugene Owens
 Acknowledgement of Receipt

Dated: June 11, 2021

WITNESSES:

[Signature]

Jacqueline Murrell



**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

Appellate Case No. 2006-038802

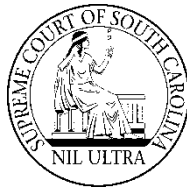
Greenville County
(Trial Court Case No. 1998GS2305220)

**AFFIDAVIT OF BRYAN P. STIRLING
DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who
being duly sworn, deposes and states as follows:

1. I am over the age of eighteen and competent to give this testimony.
2. I serve as the Director of the South Carolina Department of Corrections (hereinafter "Department"), having first been appointed as interim to this position in October of 2013 and later confirmed by the South Carolina Senate as Director thereafter.
3. Pursuant to S.C. Code Ann. Section 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receiving a notice of execution issued by the South Carolina Supreme Court.
4. According to S.C. Code Ann. Section 25-3-530, there are three, statutorily approved methods of execution. Specifically, the General

Exhibit E



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

June 4, 2021

Bryan Peter Stirling, Esquire
Director, South Carolina Department of Corrections
4444 Broad River Road
Columbia, SC 29210

Re: The State v. Brad Keith Sigmon
Appellate Case No. 2002-024388

Dear Mr. Director:

Your affidavit dated June 3, 2021, has been received.

You are requested to provide an explanation as to why two methods of execution under the statute, lethal injection and firing squad, are currently unavailable. This explanation should be served and filed by noon on Tuesday, June 8, 2021.

Very truly yours,

CLERK

cc: Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire

Megan Elizabeth Barnes, Esquire
Joshua Snow Kendrick, Esquire
Barton Jon Vincent, Esquire
Daniel Clifton Plyler, Esquire

Exhibit F



HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

June 8, 2021

RECEIVED

Jun 08 2021

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court for South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: The State v, Brad Keith Sigmon
Appellate Case No. 2002-024388

Dear Mr. Shearouse:

This letter is in response to your June 4, 2021 letter asking for an explanation as to why two of the statutorily approved methods of execution, lethal injection and firing squad, are not available in the execution of Brad Keith Sigmon.

As to lethal injection, the South Carolina Department of Corrections (SCDC) has been unable, despite numerous and diligent attempts, to acquire the drugs necessary, in useable form, to perform a lethal injection. SCDC, like many other departments of corrections across the nation,¹ has been repeatedly told, in no uncertain terms, by manufacturers of the drugs needed for a lethal injection that they will not sell SCDC such drugs. Attached is a copy of the most-recent correspondence from a major manufacturer of the drugs needed for lethal injection as an example of the numerous correspondence SCDC has received. *See* Exhibit A. SCDC has received similar letters from manufacturers of the necessary drugs over the years.

Since all of SCDC's efforts to obtain the necessary drugs from a manufacturer of such drugs have failed, SCDC has also explored having a licensed pharmacy and pharmacist compound the drugs. Those efforts have also been unsuccessful.

As for firing squad, SCDC does not currently have the necessary policies and protocols, as required by the statute, for an execution by firing squad. SCDC began working on acquiring the necessary information needed for the development of policies and protocols for a firing squad as soon as the Bills that were making their way through the General Assembly were amended to add firing squad as a statutorily approved method of execution. SCDC's process of developing the policies and protocols for a firing squad entails working with other States that already have firing squad available as a method of

¹ *See Glossip v. Gross*, 576 U.S. 863, 135 S.Ct. 2726, 196 L.Ed.2d 761 (2015)

The Honorable Daniel Shearouse
Clerk to the Supreme Court of South Carolina
June 8, 2021
Page 2

execution, and SCDC is currently working on establishing policies and protocols for an execution by firing squad and expects to have those policies and protocols finalized in the next few weeks. After those policies and procedures are finalized, the process will then turn to implementation, and the time frame for implementation will be dependent on the finalized policies and procedures.

Very truly yours,



Bryan P. Stirling

cc: Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
Megan Elizabeth Barnes, Esquire
Joshua Snow Kendrick, Esquire
Barton Jon Vincent, Esquire
Daniel Clifton Plyler, Esquire

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

Exhibit G

May 10, 2021

The Honorable Henry McMaster
Governor, State of South Carolina

Alan Wilson
Attorney General

Bryan Stirling
Head, Department of Corrections

RECEIVED

Jun 08 2021

S.C. SUPREME COURT

RECEIVED

JUN 07 2021

DIRECTOR

Dear Governor McMaster, Mr. Wilson, and Mr. Stirling:

Hikma is a global pharmaceutical company committed to improving patient lives by providing access to high quality, affordable medicines. Our medicines are used by medical professionals and patients millions of times each day to treat illness and save lives. This has been our mission for more than 40 years.

As Hikma has done in past years, I am writing to remind you of our objection in the strongest possible terms to the use of any of our products for lethal injection and to request confirmation in writing that the state of South Carolina or any facility run directly by the state of South Carolina is not in possession of any Hikma/West-Ward products that it intends to use for capital punishment.

Despite our best efforts to ensure our medicines are used only for their intended medicinal purposes, including a requirement that they only be supplied to pre-authorized customers who agree not to sell them to Departments of Correction or other entities that intend to use them for capital punishment, some states continue to attempt to procure our products from distributors and other intermediaries for this purpose. Not only is this contrary to our intention of manufacturing medicines for the health and well-being of patients in need, but also it is completely counter to our company values.

As a result, we have had to extend the restriction of products to include a broad range of medicines. This list of restricted products is kept current on our website at www.hikma.com. We would like to make clear that our objection to the use of our medicines in capital punishment should be applied to all our products, whether manufactured within or outside the US.

We also request that the Director and other relevant South Carolina Department of Corrections officials not circumvent our carefully prepared controls or take any actions that would undermine the specially drafted legal provisions in our agreements. In the event we are forced to implement additional controls to prevent diversion and misuse of our medicines, such action may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the good people of South Carolina.

High quality, generic medicines play a vital role in improving health. As such, we hope you will be our partner in furthering our values and upholding our policy prohibiting the use of our medicines in capital punishment.



Corporate Headquarters
Hikma Pharmaceuticals USA Inc.
200 Connell Drive 4th Floor
Berkeley Heights, NJ 07922

T 1.908.673.1030 F
1.908.673.1042

Kindly respond to this request by June 11, 2021.

Thank you.

A handwritten signature in cursive script, reading "Steven H. Weiss".

Steven H. Weiss
Head of US Communications and Public Affairs
sweiss@hikma.com

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

Exhibit H

The Supreme Court of South Carolina

The State, Respondent,

v.

Brad Keith Sigmon, Appellant.

Appellate Case No. 2002-024388

and

Brad Keith Sigmon, Petitioner,

v.

The State of South Carolina, Respondent.

Appellate Case No. 2021-000584

ORDER

Petitioner was sentenced to death following his convictions for two counts of murder and first-degree burglary. This Court affirmed Petitioner's convictions and sentences on direct appeal, and the United States Supreme Court denied Petitioner's request for a writ of certiorari. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005), *cert. denied*, 548 U.S. 909 (2006). Following the denial of state post-conviction relief and federal habeas corpus relief, the United States Supreme Court denied Petitioner's request for a writ of certiorari. *Sigmon v. Sterling*, No. 8:13-cv-01399-RBH, 2018 WL 4691197 (D.S.C. Sep. 30, 2018), *aff'd*, 956 F.3d 183 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021). Petitioner's execution has been scheduled for June 18, 2021.

Petitioner now seeks a stay of execution pending review of his request for a writ of habeas corpus in this Court's original jurisdiction. In addition, Petitioner seeks a

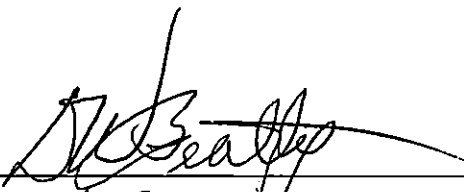
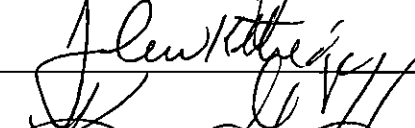
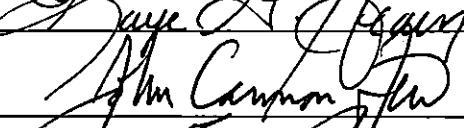
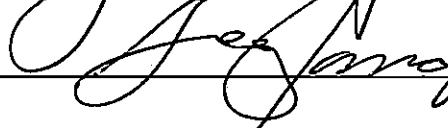
stay of execution until such time as his allegation that permitting his execution to proceed with only one authorized method of execution violates S.C. Code Ann. § 24-3-530 (2021) is determined.

Because Petitioner has failed to show a constitutional violation constituting a denial of fundamental fairness shocking to the universal sense of justice, we deny his request for a writ of habeas corpus in our original jurisdiction. *See* Rule 245(a), SCACR (providing the Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties, unless the public interest is involved, or special grounds of emergency or other good reasons exist why the original jurisdiction of the Court should be exercised); *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (holding that to receive habeas corpus relief in this Court's original jurisdiction, a petitioner must show a constitutional "violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice" (quoting *State v. Miller*, 84 A.2d 459, 463 (N.J. Super. Ct. App. Div. 1951))). As a result, the motion for a stay of execution pending review of Petitioner's request for a writ of habeas corpus is denied.

As to Petitioner's request to stay his execution pending a determination of whether section 24-3-530 has been violated, the Director of the South Carolina Department of Corrections has provided an affidavit certifying that, as of June 3, 2021, the only statutorily approved method of execution available in South Carolina is electrocution. Further, in response to an inquiry from the Clerk of the Court, the Director has provided an explanation as to why two methods of execution under section 24-3-530, lethal injection and firing squad, are currently unavailable.

According to the Director's response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies.

Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina
June 16, 2021

cc:

Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
Megan Elizabeth Barnes, Esquire
Joshua Snow Kendrick, Esquire
Alan McCrory Wilson, Esquire
Bryan Peter Stirling, Esquire
Barton Jon Vincent, Esquire
Daniel Clifton Plyler, Esquire
J. C. Nicholson, Jr., Esquire

The Supreme Court of South Carolina

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

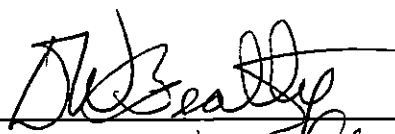
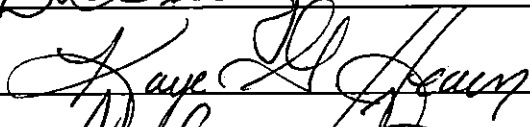
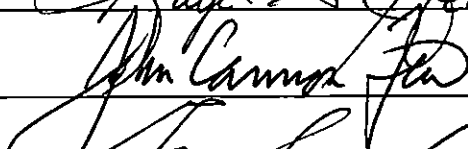
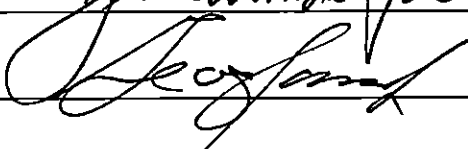
Appellate Case No. 2006-038802

ORDER

Petitioner seeks a stay of execution. The State has filed a return, and Petitioner has filed a reply. The Director of the South Carolina Department of Corrections has provided an affidavit certifying that, as of June 11, 2021, the only statutorily approved method of execution available in South Carolina is electrocution. Further, in response to an inquiry from the Clerk of the Court, the Director has provided an explanation as to why two methods of execution under S.C. Code Ann. § 24-3-530 (2021), lethal injection and firing squad, are currently unavailable.

According to the Director's response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies.

Under these circumstances, in which only a single method of execution is available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.


C.J.

J.

J.

J.
Kittredge, J., not participating.

Columbia, South Carolina
June 16, 2021

cc:

Donald J. Zelenka, Esquire
Bryan Peter Stirling, Esquire
Barton Jon Vincent, Esquire
Melody Jane Brown, Esquire
Daniel Clifton Plyler, Esquire
Emily C. Paavola, Esquire
Alan McCrory Wilson, Esquire

Exhibit I

SWORN STATEMENT OF JOHN P. WIKSWO, JR., Ph.D

COUNTY OF DAVIDSON)
)
STATE OF TENNESSEE)

Affiant John P. Wikswa, Jr., swears as follows:

1. I hold a Bachelor's Degree in Physics from the University of Virginia, a Master's Degree in Physics from Stanford University, and a Ph.D. in Physics from Stanford University. I am the Founding Director of the Vanderbilt Institute for Integrative Biosystems Research and Education (VIIBRE), and at Vanderbilt University I am the Gordon A. Cain University Professor, A.B. Learned Professor of Living State Physics, and a Professor of Biomedical Engineering, Molecular Physiology & Biophysics, and Physics.

2. I began investigating and considering judicial electrocution protocols and electrocution equipment in 1992. I have continued to do so for the past twenty-nine years.

3. American jurisdictions first adopted electrocution as a means of execution in the late 1800s and early 1900s. At the time, the prevailing view was that a sufficiently strong current would, when applied would result in an instantaneous and painless death. That view has since been discredited.

4. There are a small number of basic electrical principles that inform my understanding of how judicial electrocutions accomplish death.

a. Ohm's law describes the relationship between the three factors that govern electrical circuits: the current, in amperes (I), which is a measure of the flow of electrons per second; the voltage (E), which expresses the electrical pressure that drives the current; and resistance (R), which is a measure of impedance to current flow. According to Ohm's Law, the strength of a current flowing through a circuit is equal to the voltage applied divided by the total resistance in the circuit, or more simply, $I = \frac{E}{R}$.

b. The electric power delivered in a judicial electrocution is the product of the current and is measured in watts (W).

c. The electrical energy delivered in a judicial electrocution is the product of the power and the time, in seconds, over which the power is delivered. Energy is measured in joules (J).

d. There are two types of electrical circuits, both of which remain in wide use across the world. In a direct current (DC) circuit, current flows in the same direction at all times and with nearly continuous strength. In an alternating current (AC) circuit, the direction of the current flow constantly reverses, going from full strength to zero in one

direction, then from zero to full strength in the other direction. Current alternations in an AC circuit occur in a uniform manner, with a fixed frequency, measured in hertz (Hz).

i. DC is most commonly used to charge batteries for large power supplies (like electric cars) or to efficiently transfer large amounts of power from a generating source, like a solar panel, to a DC-to-AC converter so that it can be added to the electrical grid.

ii. Of all the electricity used in the United States today, an overwhelming majority is in the form of AC, as this is what is used to power most buildings. Although other countries use different frequencies, the most common frequency in the United States is 60 Hz, meaning that the current alternates sixty times per second. Some generators supply current at higher frequencies, for example aircraft power systems operate at 400 Hz, but it is unusual for a building in the United States to be supplied with power at any frequency other than 60 Hz. AC electric power can be converted to higher or lower voltages by means of transformers. A typical household electrical wall outlet delivers current at 120 volts, reduced by a transformer outside a dwelling or business from a much higher local transmission line voltage, such as 13,800 volts.

5. Based on my decades of research and the empirical evidence that accumulated in the century-plus that has passed since the first judicial electrocution, I am now confident that there is a substantial risk that in a significant number of cases death by electrocution is neither painless nor instantaneous for the reasons described in detail below.

6. The electrocution protocols and equipment that I have reviewed during the past twenty-nine years were designed to administer to a prisoner a 60 Hz alternating electrical voltage of between 1,500 and 3,000 volts and a current of 4 to 10 amps, or possibly more. These protocols were intended to render prisoners instantaneously unconscious, but they do not accomplish that goal.

7. The electrocution protocols and equipment I reviewed accomplished this result by attaching electrodes to seated prisoners' heads and to one or both of their lower legs.

8. The information I have received regarding South Carolina's plan to carry out an electrocution event is consistent with the information described in paragraphs 6 and 7.

9. In the course of reviewing the electrocution protocols and equipment described above, I also did the following:

a. Reviewed scientific literature concerning the application of electrical current to living organisms;

b. Reviewed scientific literature describing the physiological trauma associated with lightning strikes, electrocution in industrial accidents, and

electroconvulsive therapy;

c. Reviewed non-scientific material relating to, among other things, anecdotal accounts from persons who have come into contact with a high-voltage electrical current;

d. Reviewed autopsy reports of electrocuted prisoners from jurisdictions other than South Carolina;

e. Read statements from persons who witnessed judicial electrocutions of prisoners; and

f. Conducted my own research on cardiac, skeletal muscle, and neural responses to electrical stimulation. In this work, we have analyzed electrocardiogram data from patients having an acute myocardial infarction, studied factors that govern the process of cardiac fibrillation, and demonstrated the existence of the virtual cathodes and virtual anodes that serve as the fundamental tissue-level mechanisms for electrical defibrillation of the heart. We have recorded in detail the magnetic field produced by electrical activity in the heart, skeletal muscle, and nerves, and described these fields using detailed mathematical models of the electrical stimulation and response of electrically active tissues. We made detailed measurements on how the strength of electrical shocks determine the response of peripheral nerves to electrical stimulation.

10. In addition to the information I reviewed about judicial electrocutions generally, attorneys from Justice 360 asked me to review the following information specific to South Carolina's electrocution process:

a. A three-page fact sheet from the South Carolina Department of Corrections (SCDC) entitled "The Death Penalty in South Carolina";

b. South Carolina Department of Corrections (SCDC) Execution Directives, Document SK-22.03, issued January 5, 1999;

c. South Carolina Department of Corrections (SCDC) Execution Procedures as delineated in document number SK-22.02 issued on May 1, 2002;

d. The February 4, 2009 affidavit of Robert E. Ward for Luke A. Williams, III, SCDC #SK-4874 v. Jon Ozmint, SCDC, and contained therein the South Carolina Department of Corrections (SCDC) Execution Procedures as delineated in document number SK-22.03 issued on May 1, 2008;

e. Eleven letters dated 1912 and 1913 regarding the fabrication and use of apparatus (electric chairs) for judicial electrocution and the acquisition of sponges;

f. Pages from the Report of State Electrician and Engineer to the General Assembly of the State of South Carolina at the Regular Session Beginning January, 1926;

g. Pages from the Report of State Electrician and Engineer to the General Assembly of the State of South Carolina at the Regular Session Beginning January, 1927;

h. Newspaper and other accounts of South Carolina judicial electrocutions and other events from 1893 through 1996; and

i. A Microsoft Excel spreadsheet prepared by Justice 360 attorneys that lists 248 electrocutions carried out in South Carolina, with information about each electrocution, including the date of the electrocution, the height and weight of the electrocuted person, and the electrocuted person's gender, race, and age. The spreadsheet also lists the following information, where it is available: the maximum voltage used; the reported amperage applied; the number of shocks applied; the duration of the execution; whether witnesses saw smoke, fire, or sparks; whether witnesses reported any odors; and whether the person had a heartbeat after the execution.

11. Based on the information I have reviewed, I conclude to a reasonable degree of scientific certainty that there is a substantial risk that a prisoner electrocuted using South Carolina's Electrocution Protocol and electrocution event will remain alive, conscious, and sensate for some period of time during the electrocution process and, as a result, will experience for some period of time the excruciating pain and suffering associated with the phenomena that occur when a high voltage electrical current contacts a human being.

12. Specifically, after reviewing the electrocution protocols, equipment, and other materials described above, I arrived at the following conclusions and opinions about them:

a. Prisoners can remain alive for some period of time during the electrocution event. I base this conclusion on the following:

i. There are numerous cases of judicial electrocutions, including in South Carolina, wherein the prisoner was still alive after one or more electrical shocks, as evidenced by breathing or a beating heart. Hence, they remained alive during the attempted execution.

ii. A prisoner's heart will not necessarily stop instantaneously when the high voltage electrical current contacts the prisoner's body.

iii. Even when contact with high voltage electrical current causes a prisoner's heart to stop beating at its normal rate, when the current ceases, there is a high probability that the prisoner's heart will spontaneously resume beating.

iv. In contrast to skeletal muscle, which tetanizes into a contracted state throughout the duration of an AC shock, cardiac muscle does not tetanize during continuous AC stimulation.

v. In order to prevent this resumption of the heartbeat, electrocution

aims to induce the heart to enter a mode of excitation known as fibrillation. However, electrical shocks whose voltage is above the upper limit of vulnerability (the shock strength above which an electrical shock cannot induce fibrillation) are unlikely to induce fibrillation. While the electrical energy in joules delivered to the prisoner can be computed from the current, voltage, and duration of the shocks, it is difficult to determine in energy actually delivered to the heart in a judicial or accidental electrocution. Anecdotally, electric shocks at 120 V are much more likely to cause cardiac fibrillation than are shocks over 1000 V.

vi. If the electrical shock does not induce fibrillation but prevents the heart from beating at its normal rate, termination of the electrical shock could enable the heart to resume beating spontaneously.

vii. During a strong alternating current electrical shock, contractions of the heart may become entrained to, or synchronized with, the alternating current, leading to defibrillation.

viii. Even when a prisoner's heart fibrillates during an electrocution execution, death does not occur instantaneously. Rather, death results only after a period of time as the fibrillation of the prisoner's heart reduces cardiac output to the point that it is insufficient to maintain life.

ix. When high voltage electrical current contacts a prisoner, the skeletal muscles he requires for breathing tetanize, meaning they enter a state of sustained contraction, and the prisoner cannot breathe to supply oxygen and eliminate carbon dioxide. Thus, a prisoner subjected to an electrocution execution described above dies from asphyxiation and/or organ damage due to thermal heating, i.e., cooking. These processes require a period of time to produce death.

x. Should an electrocution shock fail to kill the prisoner, it would be possible for the prisoner to resume breathing again and prisoner's heart to resume beating. While the rhythms of breathing may be irregular, they could prolong the prisoner's pain and suffering.

xi. No scientific evidence contradicts the above statements.

b. Prisoners can remain conscious and sensate for some period of time during the electrocution event. There is evidence that this has happened in electrocutions in South Carolina. I base this conclusion on the following:

i. A prisoner will lose consciousness during an electrocution event through loss of brain function. Loss of brain function occurs through (1) a direct electrical stimulation of the neurons in the brain; or (2) insufficient blood circulation to the brain due to cardiac asystole, shock entrainment, fibrillation, or asphyxia due to either cardiac or respiratory arrest.

ii. Upon contacting the prisoner's body at the top of his or her head, the electrical current follows to the leg electrode(s) along paths of least resistance. The prisoner's skull presents significantly greater resistance for the current than does the prisoner's skin. As a result, the vast majority of the electrical current travels around the perimeter of the prisoner's head and down the prisoner's torso and legs until it leaves his or her body through an electrode applied to the calf of one leg, or an electrode on each leg. As the current alternates, it follows paths of least resistance in the opposite direction.

iii. Because the skull effectively insulates the brain from the electrical current flowing from and to the head electrode/sponge, the electrical current may not immediately incapacitate the prisoner's brain. Rather, the ability of the prisoner's brain to function becomes compromised over time by a combination of factors: (1) electrical stimulation of neurons; (2) the reduced portion of the current that reaches the prisoner's brain and stimulates unspecified neural circuits by the electric current; (3) indirect thermal transfer through the skull, thereby heating the nerves; (4) indirect thermal transport through the blood vessels of the prisoner's neck; and (5) loss of oxygen.

iv. The reduced portion of electrical current that reaches the prisoner's brain may, on occasion, depolarize a prisoner's brain, disrupting the brain's ability to transmit electrical current and inactivating (depolarizing or hyperpolarizing) the neurons. However, there is no scientific evidence that the prisoner's depolarized or hyperpolarized brain neurons will thereafter be incapable of repolarizing during the alternating current stimulation.

v. Should depolarization or hyperpolarization of a prisoner's brain occur, a 60 Hz alternating current provides for repolarization of the prisoner's brain on the subsequent half-cycle.

vi. Upon termination of the shock, the neurons in the brain may resume functioning unless they have been heated to a temperature at which neuron function is not possible or otherwise damaged, for example by electroporation of the nerve membranes in response to the transient voltage applied to them.

vii. No scientific evidence contradicts the above statements.

c. Because prisoners can remain alive, conscious, and sensate during at least a portion of the duration of a judicial electrocution event, for the following reasons they can experience excruciating pain and suffering during the event:

i. When the high voltage electrical current contacts a prisoner and travels through his or her body, it burns the prisoner, causing extreme pain.

ii. When the high voltage electrical current contacts a prisoner and

travels through his or her body, it thermally heats, i.e., cooks, his or her body and internal organs, causing extreme pain.

iii. When the high voltage electrical current contacts a prisoner and travels through his or her body it directly excites most if not all sensory, motor, secretory, and autonomic nerves along the paths the current follows, causing extreme pain.

iv. When the high voltage electrical current contacts the prisoner and travels through his or her body it can excite some brain neurons, causing extreme pain as well as sensations of sound, light, dread, and fear.

v. When the high voltage electrical current contacts the prisoner and travels through his or her body, his or her skeletal flexor and extensor muscles that control straightening or bending of the arms and legs simultaneously tetanize, causing extreme pain. The muscles will remain tetanized until the current ceases.

vi. When the high voltage electrical current contacts the prisoner and travels through his or her body, the skeletal muscles he or she requires for breathing tetanize, and the prisoner can neither inhale nor exhale. As a result, the prisoner experiences the sensation of suffocating. The intense metabolic demands of muscle tetany aggravate the prisoner's sense that he is suffocating.

vii. The prisoner's perception of time during the electrocution process can become distorted so that he or she may perceive (1) each of the sixty-per-second alternating cycles of electrical current; and (2) the electrical trauma as lasting dramatically longer than it would appear to a bystander. As an example, there is a report in the literature that an electrical lineman, during an accidental high-voltage electrical shock, watched the individual spokes of a bicycle wheel turn slowly as a rider was passing by during the shock.

viii. Because contact with high voltage electrical current causes muscle tetany, and because the electrocution protocols I reviewed command that the prisoner be harnessed tightly onto the electrocution equipment, a prisoner is unable to signal that he is experiencing pain and suffering during an electrocution.

d. Because of the unpredictability and variability of each prisoner's electrical resistance due to differences in height, weight, bone density and body fat and that of the connections to his or her body during an electrocution execution, the current delivered to each prisoner will vary significantly from the currents delivered to other prisoners. As a result, the duration of time that individual prisoners remain alive, conscious, and sensate is unknown and will vary substantially from prisoner to prisoner.

e. Because prisoners can remain alive at the conclusion of an electrocution execution, some of the electrocution protocols I reviewed provided that after the

executioner shuts off power to the electrocution equipment, a medical professional must wait for a period of time, usually four to five minutes, before examining a prisoner's body for signs of life. Although South Carolina's most recently available protocol does not specifically call for a waiting period, the historical accounts I reviewed indicate that in some electrocutions in South Carolina, the EMT waited for the body to cool before examining it. During this period, prisoners who survive the electrocution process die from thermal heating, i.e., cooking, of their vital organs, and asphyxiation.

13. Since 1912, South Carolina has carried out judicial electrocutions using protocols that called for application of a wide range of maximum voltages, with a minimum of 1,350 volts in 1930 to a maximum of 7,000 volts in 1962. The majority of electrocutions for which there is reliable evidence were carried out using a maximum application of 2000 to 3000 volts. There is evidence consistent with painful or torturous deaths in electrocutions carried out according to protocols across the range of voltage requirements.

a. There is evidence consistent with torturous executions in thirty percent of all electrocutions in South Carolina's history for which there is any reliable information.

i. Witnesses to seven executions reported seeing smoke or fire; witnesses at three reported sparks; nine electrocuted people had a heartbeat after the first electrocution attempt; and fourteen people were reported to have involuntarily clenched their fists or demonstrated other evidence of involuntary muscle contractions.

ii. The witness reports from historical executions in South Carolina are consistent with witness reports from more recent executions in other jurisdictions.

b. The most recently available information indicates that South Carolina's electrocution protocol consists of a cycle of "2,000 volts at five amps for five seconds followed by 1,000 volts at two amps for eight seconds followed by approximately 250 volts for two minutes." Electric Chair Facts at page 3. This protocol is inconsistent with basic principles of electricity.

i. Given that the electrical resistance of the prisoner is unknown prior to the electrocution procedure and may vary during that procedure it is impossible by the laws of physics in general and Ohm's law in particular, to guarantee that BOTH criteria in South Carolina's most recent protocol—2,000 or 1,000 volts AND 5 or 2 amps—are met. There is no way, as a matter of basic electrical science, to ensure that both of these criteria (voltage and amperage) can be met simultaneously, and hence I find the most recent South Carolina Electrocution Protocol to be inaccurate from both the scientific and engineering perspective.

14. Based on my review of the material described in Paragraph 13(b), above, and my consideration of that material in conjunction with the material described in Paragraph 13(b)(i),

above, I conclude and opine as follows:

a. The most recently available South Carolina Electrocution Protocol calls for (1) an initial five-second application of 2,000 volts at five amperes, 60 Hz alternating electrical current; (2) a second eight-second application of 1,000 volts at two amperes, 60 Hz alternating electrical current; and (3) a final application of 250 volts for two minutes. This protocol is substantially the same as the protocol South Carolina first used when it carried out its first judicial electrocution in 1912.

b. South Carolina's electrocution equipment requires the prisoner to sit in a chair. Electrodes are attached to the seated prisoner's head and one leg, and cables connected to a high-voltage transformer deliver the stated voltage to the prisoner.

c. The initial five-second application of electrical current will not provide a time long enough for a prisoner to die because (1) electrical current applied during an electrocution execution will not necessarily stop the prisoner's heart; and (2) the skeletal muscles the prisoner requires for respiration will relax when the current stops, and air will flow into the prisoner's lungs.

d. Based on South Carolina's most recently available Electrocution Protocol, my conclusions and opinions expressed in Paragraphs 12(b), 12(c), and 14(c), above, apply to the South Carolina protocol and equipment. Specifically, prisoners executed using South Carolina's Electrocution Protocol and electrocution equipment can, for some period of time, remain alive, conscious, and sensate during the electrocution event and can experience the excruciating pain and suffering associated with the phenomena that occur when a high voltage electrical current contacts a human being.

e. Autopsy reports from judicial executions in other states, which use protocols substantially similar to South Carolina's, describe burns to the head, legs, and body that are fully consistent with the thermal heating that occurs as the electrical current passes between the electrodes and the prisoner, or between different parts of a prisoner's body.

i. The autopsy reports describe thermal burns on the anterior and posterior portions of the neck that are consistent with substantial electric current flow through the skin and soft tissues of the neck, which in turn would have been a result of the electrical insulating properties of the bones of the skull that would have prevented substantial current from passing through the brain and the spinal cord.

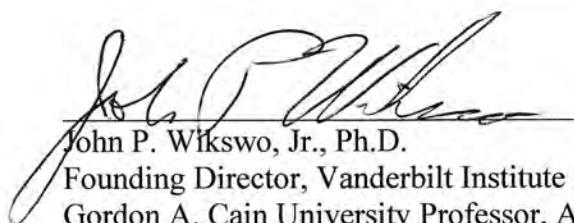
ii. Some autopsy reports describe thermal burns to the hands, lower back, thighs, and other regions of the body, including between tissue folds. These burns suggest that in those electrocutions, the electric current found an alternative path between the head and calf electrodes.

iii. Some autopsy reports describe superficial blunt force injuries and

abrasions to the scalp, forehead, chin, foot, upper arms, and calf. These injuries are consistent with witness reports of the prisoner jerking against the straps and electrodes after application of the electric current and the resulting violent muscle contraction and tetany.

15. A review of the information described above—both from other jurisdictions and specifically from South Carolina—makes clear to a reasonable degree of scientific certainty that South Carolina cannot carry out an execution by electrocution without running a significant risk of subjecting prisoners to excruciating pain.

FURTHER AFFIANT SAITH NAUGHT



John P. Wikswo, Jr., Ph.D.

Founding Director, Vanderbilt Institute for Integrated Biosystems Research and Education
Gordon A. Cain University Professor, A.B. Learned Professor of Living State Physics,
Vanderbilt University
Professor of Biomedical Engineering, Molecular Physiology & Biophysics, and Physics,
Vanderbilt University

STATE OF TENNESSEE

COUNTY OF DAVIDSON

Sworn and subscribed before me on this the 27 day of ~~March~~^{April}, 2021.




NOTARY PUBLIC

My commission expires:

My Commission Expires

May 23, 2022
Date

Exhibit J

Affidavit of Jonathan L. Arden, MD

I, Jonathan L. Arden, do hereby state the following of my own knowledge and under penalty of perjury:

1. I have practiced in the field of forensic pathology for more than 35 years. After receiving my MD degree from the University of Michigan in 1980, I completed training in anatomic pathology at the New York University Medical Center (1980-1983) and in forensic pathology at the Office of the Chief Medical Examiner for the State of Maryland (1983-1984). I have been certified in both anatomic and forensic pathology by the American Board of Pathology since 1985. I am currently licensed to practice medicine in five states. I spent most of my career as a government-employed medical examiner, including nine years with the Office of Chief Medical Examiner for the City of New York where I finished as First Deputy Chief Medical Examiner, and more than five years as the Chief Medical Examiner of Washington, DC. I am currently President of Arden Forensics, PC, a consulting practice in forensic pathology and medicine, and I hold a part-time appointment as a Forensic Pathologist in the Office of the Chief Medical Examiner for the State of West Virginia.

2. I have testified as an expert witness in various state and federal courts, as well as in grand juries and depositions, a total of more than 900 times. My fees are not contingent upon the outcome of any case in which I consult.

Materials Reviewed

3. In preparing this affidavit, I reviewed the following materials:

a. Autopsy Reports from a total of 80 electric chair executions in five different states, along with diagrams, notes, Toxicology Reports, some photographs, and other supporting documents. The autopsies I reviewed were for the following people:

- i. John Lewis Evans, III (AL 1983)
- ii. John Smith (GA 1983)
- iii. Carl Shriner (FL 1984)
- iv. Ernest Dobbett (FL 1984)
- v. Alpha Stephens (GA 1984)
- vi. Richard Adams (FL 1984)
- vii. David Washington (FL 1984)
- viii. James Henry (FL 1984)
- ix. Timothy Palmes (FL 1984)

- x. Anthony Antone (FL 1984)
- xi. Arthur Goode (FL 1984))
- xii. Ivon Stanley (GA 1984))
- xiii. Marvin Francois (FL 1985)
- xiv. James David Raulerson (FL 1985)
- xv. Johnny Paul Witt (FL 1985)
- xvi. Roosevelt Greene (GA 1985)
- xvii. John Young (GA 1985)
- xviii. Jerome Bowden (GA 1986)
- xix. Arthur Lee Jones (AL 1986)
- xx. David Funchess (FL 1986)
- xxi. Ronald Straight (FL 1986)
- xxii. Daniel Thomas (FL 1986)
- xxiii. William Tucker (GA 1987)
- xxiv. Wayne Ritter (AL 1987)
- xxv. Beauford White (FL 1987)
- xxvi. Timothy McCorquodale (GA 1987)
- xxvii. Joseph Mulligan (GA 1987)
- xxviii. William Mitchell (GA 1987)
- xxix. Willie Darden (FL 1988)
- xxx. Jeffrey Daugherty (FL 1988)
- xxxi. Henry Willis (GA 1989)
- xxxii. Herbert Lee Richardson (AL 1989)
- xxxiii. Aubrey Adams (FL 1989)
- xxxiv. Ted Bundy (FL 1989)

- xxxv. Horace Dunkin (AL 1989)
- xxxvi. Jesse Tafero (FL 1990)
- xxxvii. John Swindler (AR 1990))
- xxxviii. Anthony Bertolotti (FL 1990)
- xxxix. James Hamblen (FL 1990)
- xl. Raymond Clark (FL 1990)
- xli. Roy Harich (FL 1991)
- xlii. Robert Francis (FL 1991)
- xlili. Larry Heath (AL 1992)
- xliv. Cornelius Singleton (AL 1992)
- xlv. Nollie Martin (FL 1992)
- xlvi. Edward Kennedy (FL 1992)
- xlvii. Robert Henderson (FL 1993)
- xlviii. Larry Johnson (FL 1993)
- xlix. Michael Durocher (FL 1993)
- l. Roy Stewart (FL 1994)
- li. Willie Clisby (AL 1995)
- lii. Bernard Bolander (FL 1995)
- liii. Varnell Weeks (AL 1995)
- liv. Jerry White (FL 1995)
- lv. Phillip Atkins (FL 1995)
- lvi. Nicholas Ingram (GA 1995)
- lvii. Ellis Felker (GA 1996)
- lviii. Larry Lonchar (GA 1996)
- lix. John Bush (FL 1996)

- lx. John Mills (FL 1996)
- lxi. Harold McQueen (KY 1997)
- lxii. Billy Waldrop (AL 1997)
- lxiii. Pedro Medina (FL 1997)
- lxiv. Henry Hays (AL 1997)
- lxv. Edward Horsley (AL 1997)
- lxvi. Walter Hill (AL 1997)
- lxvii. David Cargill (GA 1998)
- lxviii. Gerald Stano (FL 1998)
- lxix. Judias Buenoano (FL 1998)
- lxx. Leo Jones (FL 1998)
- lxxi. Daniel Remeta (FL 1998)
- lxxii. Allen Davis (FL 1999)
- lxxiii. Brad Baldwin (AL 1999)
- lxxiv. Victor Kennedy (AL 1999)
- lxxv. Freddie Wright (AL 2000)
- lxxvi. Pernell Ford (AL 2000)
- lxxvii. David Ray Duren (AL 2000)
- lxxviii. Robert Lee Tarver (AL 2000)
- lxxix. Linda Block (AL 2002)
- lxxx. Daryl Holton (TN 2007)

b. A Master Chart prepared by attorneys from Justice 360 summarizing the autopsy findings;

c. Media articles about the 80 electric chair executions referenced above;

d. South Carolina Department of Corrections (SCDC) Execution Procedures, document number SK-22.02, issued on May 1, 2002, the most recently available

electrocution protocol for South Carolina;

- e. An affidavit from John P. Wikswo, Jr., PhD, dated April 27, 2021;
- f. Photographs of Ronnie Lee Gardner's body and clothing after he was executed by firing squad;
- g. Media articles about Mr. Gardner's execution; and
- h. I have relied upon my education, training, knowledge and experience as a physician, forensic pathologist, and a medical examiner.

Synopsis of Pertinent Facts

4. Review of the Autopsy Reports demonstrates that the prisoners executed by the electric chair generally had similar autopsy findings, including:

- a. Burn rings about the heads, corresponding to the ring-shaped head electrodes;
- b. Burns to the lower extremities, often corresponding to the leg electrodes;
- c. Burns elsewhere on the bodies, notably including the scrotum and thighs;
- d. Epidural hematomas;
- e. Brain swelling; and
- f. Bruising &/or abrasions of soft tissues, particularly associated with straps/restraint devices on the electric chairs.

5. Review of photographs of Mr. Gardner's body shows a gaping entrance gunshot wound complex in the front of his chest with substantial external bleeding on his chest and abdomen.

6. Attached to this affidavit are appendices containing autopsy photographs showing some of these findings.

Analysis and Opinions on Electrocution

7. Passage of electrical current through the human body can cause death primarily through three mechanisms: (1) interruption of electrical functioning of the brain, (2) interruption of electrical functioning of the heart, or (3) thermal damage (e.g., burning, charring, and cooking) to bodily tissues.

- a. To interrupt electrical functioning of the brain or heart, sufficient current must flow in a path through the brain or heart, respectively. Current flowing through any part of the body will encounter electrical resistance of the tissues, which varies according to the type of tissue (e.g., skin versus blood contained in vessels), and according to the

method of conduction between the current source and the body (e.g., direct contact to skin, use of a conducting material such as the sponges under the electric chair electrodes, or even arcing of current across space into the body).

b. Current flowing through a resistance will generate heat, which can burn or char tissue directly, and it can transmit heat that cooks tissue. *See* Appendices.

8. The electric chairs employed in the executions I reviewed have a ring electrode about the top of the head, and a leg electrode attached at a calf, such that the current path will flow between them. The 2002 South Carolina protocol I reviewed for the electric chair also has a ring electrode around the head and a leg electrode attached at a calf.

a. No scientific measurements or simulations have been offered to demonstrate that sufficient current flows from the ring electrode directly through the brain to interrupt its electrical functioning immediately upon application of the current that the person is, definitively, rendered unconscious immediately.

b. As is explained in greater detail in Dr. Wikswo's affidavit, the resistance to current is less in the skin and soft tissues as compared to the skull bone encasing the brain, so much of the current would be expected to flow from the scalp to the leg by the superficial soft tissues.

9. Current electric chair protocols available for review do not attempt to direct current in a manner that would preferentially interrupt electrical functioning, and thus contraction, of the heart. Furthermore, even if the electric chair were to cause immediate heart stoppage upon application of the current, the person would remain conscious for at least 15 seconds after cessation of cardiac activity because blood remaining in the brain continues to provide oxygen to the brain (even in the absence of circulation).

10. Thermal burns were present in all the autopsies I reviewed, including severe burns with charring of the tissues. *See* Appendices.

a. Although the anatomical features of burns as seen at autopsy do not permit distinguishing burns that occurred before, versus after death, it is unreasonable to assume that all the burns occurred post-mortem as there have been documented instances in which a person remains alive after the application of the current yet suffers severe burns. To a reasonable degree of medical certainty, at least some of the burning occurs during the process of current flow before death.

b. Many of the autopsies revealed epidural hemorrhages, which is bleeding between the dura (i.e., the membrane that lines the cranial cavity) and the inner surface of the skull bone. Although epidural hemorrhages may result from blunt head trauma, most often in association with skull fractures, they also are created as post-mortem artifacts of heat exposure, e.g., seen in victims of house fires. The epidural hemorrhages seen in the electric chair executions are indicative of the cooking effect of the heat produced by the electrical current.

11. Several of the decedents had brain swelling observed and described at autopsy.

a. Brain swelling is normally a vital process that takes significant time to develop (commonly on the order of hours). I see no likely mechanism for the creation of brain swelling in these decedents other than it resulting from thermal damage from the heat caused by the passage of current, i.e., another cooking effect of the electric chair on the bodies.

b. Brain swelling does not occur after death, so this is another example of damage to a vital organ caused during life by the application of electrical current to the body.

12. Electric chair protocols, including South Carolina's 2002 protocol, call for moist sponges between the electrodes and the underlying skin, ostensibly to lessen resistance and to promote current flow. However, burning at the electrode sites was nearly universal in the autopsies I reviewed, which indicates that significant resistance at the skin was present, rather than efficient conduction of the current. *See Appendices.*

13. The electric chair protocols have substantial similarities across various states and across time. The South Carolina protocol that is available is sufficiently similar to the protocols used to execute the people whose autopsies I reviewed to expect that South Carolina's electric chair executions would cause similar autopsy findings. I did ask for autopsies of persons executed in South Carolina by electrocution, but I was informed that the South Carolina Department of Corrections refused to provide them.

14. As mentioned above, the protocols have no scientific basis, other than the generality that passage of electrical current through the body may cause fatal electrocution. The assertion that a person is rendered immediately unconscious by the current flowing from the head ring electrode is nothing more than an assumption.

15. The autopsies demonstrated that all the executed people sustained significant burning and charring, as well as cooking of tissues, which would be excruciatingly painful, even if they only remained conscious during current application for a few seconds. *See Appendices.* It is also notable that multiple electrocuted prisoners had burns of the thighs and scrotum, which would be extremely painful.

16. If the mechanism of heart stoppage is presumed to be operative in execution by electric chair, then the state must concede that the person would remain conscious for a minimum of about 15 seconds after application of current, during which time the person would similarly experience excruciating pain.

17. Some of the protocols that use sequential applications of current in the electric chair are nonsensical and inherently contradictory to the stated aim of "instantaneous" or "painless" death by electrocution.

a. If the first application of current should be sufficient to cause death, then there is no scientific or medical basis for subsequent current applications, unless the state simply does not know how much current and how much time is necessary to cause death.

b. To that point, multiple executions by electric chair have resulted in a person

who still had a heartbeat, i.e., was not dead, after the first jolt of electric current, indicating that the person did not experience instant death. For example, prisoners have continued to breathe after the first jolt, showing that the techniques and protocols claiming an instant death are baseless and at least inconsistent in achieving their intended goal.

c. Similarly, the fact that at least one of these people (Jerry White) was observed to have screamed upon application of the current demonstrates that the assumption that unconsciousness ensues immediately is unfounded. *See Ron Word, Inmate Dies in Electric Chair for Robbery Slaying*, ASSOCIATED PRESS (December 4, 1995).

18. In summary, if the electric chair causes death by means of heart stoppage, or by cooking of tissues and vital organs, the prisoner will experience excruciating conscious pain and suffering. If the lethal mechanism is electrical interruption of brain functioning, then conscious pain and suffering during the process cannot be reasonably excluded.

19. All opinions are expressed with reasonable medical certainty. I reserve the right to amend any statements or opinions if presented with additional significant information, as well as the right to rebut opinions expressed within my areas of expertise.

Analysis and Opinion on the Firing Squad

20. Execution by firing squad is conducted by a squad of multiple people simultaneously firing rifles at a target approximately overlying the heart of the prisoner. Typically, multiple shooters are firing live ammunition, while one or more are firing blank ammunition. The result is multiple, concurrent rifle wounds to the heart and surrounding structures. High-powered rifle wounds generally cause severe disruption and destruction of bodily tissues.

21. The mechanism of death by firing squad is disruption of the heart, resulting in cessation of circulation of blood to the vital organs.

22. Abrupt cessation of circulation, regardless of its cause, does not cause immediate unconsciousness. As explained in Paragraph 8, even if gunshot wounds to the heart caused immediate heart stoppage, the person would remain conscious for at least 15 seconds after cessation of cardiac activity because blood remaining in the brain continues to provide oxygen to the brain (even in the absence of circulation).

23. Execution by firing squad will cause abrupt cessation of circulation when the heart is disrupted by the gunshot wounds, but in the absence of direct injury to the brain, the prisoner will remain conscious for at least 15 seconds while the brain continues to function, using the oxygen in the blood remaining in the brain.

24. Multiple rifle wounds to the chest will cause extensive damage to the skin and chest wall soft tissues, as well as multiple fractures of the ribs and sternum (i.e., breastbone). Disrupting injuries to the chest wall and rib cage would be excruciatingly painful per se, and even more so upon any movement, such as flinching, or trying to breathe.

25. Consistent with Paragraph 16, if the mechanism of death in a firing squad execution is heart stoppage, then the state must concede that the prisoner would remain conscious for a

minimum of about 15 seconds after being shot, during which time the person would experience excruciating pain.

I hereby declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

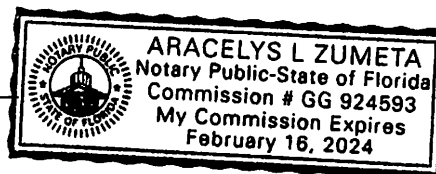
Date: 7/23/2021

Signed: [Signature]

Sworn and subscribed before me this 23rd day of July, 2021.

Notary Public: [Signature]

My Commission Expires: Feb. 16, 2024



Appendix 1
Daryl Holton Autopsy Photographs
Executed by Electrocutation
Tennessee, 2007

7 photographs from the autopsy of Daryl Holton have been removed from the Public Index per the Clerk of Court's finding that they are "highly inflammatory or otherwise potentially harmful," pursuant to Rule 41.2(d), SCRC.

The photographs are filed with the Clerk's Office and are available for viewing at the courthouse, pursuant to Rule 41.2(d)(2).

Appendix 2
Jesse Tafero Autopsy Photographs
Executed by Electrocution
Florida, 1990

1 photograph from the autopsy of Jesse Tafero has been removed from the Public Index per the Clerk of Court's finding that it is "highly inflammatory or otherwise potentially harmful," pursuant to Rule 41.2(d), SCRCP.

The photograph is filed with the Clerk's Office and is available for viewing at the courthouse, pursuant to Rule 41.2(d)(2).

Appendix 3
Ronnie Lee Gardner Autopsy Photographs
Executed by Firing Squad
Utah, 2010

State of Utah, Department of Health

48 N. Mario Capecchi Dr.
Salt Lake City, Ut. 84113
(801) 584-8410
Fax (801) 584-8435

Office of the Medical Examiner

Todd C. Grey, M.D.
Chief Medical Examiner
Edward A. Leis, M.D.
Deputy Chief Medical Examiner
Erik D. Christensen, M.D.
Assistant Medical Examiner
Pamela S. Ulmer, D.O.
Forensic Pathology Fellow
Keith Stephens
Chief Investigator

REPORT OF EXAMINATION

Name: **GARDNER, Ronnie** Case #: **R201000870** Age: 49 Race: Caucasian Sex: Male
Date/Time of Death: 06/18/2010 - 00:20 Date/Time of Autopsy: 06/18/2010 - 07:45
Examination By: Erik D. Christensen, M.D.
Investigative Agency: Utah Department of Corrections
Witnesses: Brent Wiechman, Utah Department of Corrections

Manner of Death: HOMICIDE
Cause of Death: Gunshot wounds of chest

FINAL PATHOLOGIC DIAGNOSES

- I. Indeterminate-range perforating gunshot wounds of chest (4).
 - A. Four entrance wounds in left central chest.
 - B. Four exit wounds with shoring on left side of back.
 - C. Lead fragments ("snowstorm") on postmortem radiograph of chest.
 - D. Associated with fragmentation of anterior chest wall, heart, left lung, liver, stomach and pancreas.
- II. Restraint impressions, bilateral wrists.
- III. Benign laryngeal nodules.
- IV. Postmortem toxicology:
 - A. Tramadol, blood: 1.7 mg/L.
 - B. O-desmethyltramadol, blood (tramadol metabolite): 0.13 mg/L.
 - C. Alprazolam, blood: 0.052 mg/L.
 - D. Oxycodone (free), blood: 0.019 mg/L.
 - E. Acetaminophen, blood: 3.0 mg/L.
 - F. Gabapentin, blood: 10 mg/L.

OPINION: This 49 year old Caucasian male, Ronnie Lee Gardner, died as a result of multiple gunshot wounds of the chest. This was as a result of judicial execution by firing squad.



Erik D. Christensen, M.D.
Assistant Medical Examiner
Date signed: 9/29/2010

EDC/kp

4 photographs from the autopsy of Ronnie Lee Gardner have been removed from the Public Index per the Clerk of Court's finding that they are "highly inflammatory or otherwise potentially harmful," pursuant to Rule 41.2(d), SCRC.

The photographs are filed with the Clerk's Office and are available for viewing at the courthouse, pursuant to Rule 41.2(d)(2).

Exhibit K

EXHIBIT F –
DECLARATION OF
JEFFREY D.
PETERSOHN, M.D.

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 D. Randall Gilmer (Bar No. 14001)
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*Attorneys for Defendants Daniels,
 Wickham, Gittere, Reubart, Drummond,
 Minev, Green and Fox (NDOC Defendants)*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ZANE M. FLOYD,

Plaintiff,

v.

CHARLES DANIELS, DIRECTOR,
 NEVADA DEPARTMENT OF
 CORRECTIONS, ET AL.,

Defendants.

Case No. 3:21-cv-00176-RFB-CLB

**DECLARATION OF JEFFREY D.
 PETERSON, M.D.**

I, Jeffrey D. Petersohn, M.D., hereby declare based on personal knowledge and/or information and belief, that the following assertions are true.

1. I have been retained to provide expert testimony in the case *Floyd v. Daniels, et al.*, Case No. 3:21-cv-00176-RFB-CLB, currently pending before the United States District Court for the District of Nevada.

EDUCATION AND WORK EXPERIENCE

2. I am a board-certified anesthesiologist, receiving board certification from the American Board of Anesthesiology in 1990.

3. I attended medical school at Hahnemann University School of Medicine, located in Philadelphia, Pennsylvania, where I received my M.D. in 1984. Following

1 medical school and my internship, I undertook residencies in both internal medicine and
2 anesthesiology, completing my anesthesiology residency in 1987.

3 4. Prior to attending medical school, I received my Bachelor of Arts in biophysics
4 from The Johns Hopkins University, located in Baltimore, Maryland.

5 5. I have been in private practice since 1988 specializing in anesthesiology. I
6 have further subspecialized in pain management since 1996.

7 6. From 2010-2019, I also taught anesthesiology as a Clinical Associate Professor
8 of Anesthesiology and Perioperative Medicine at Drexel University College of Medicine,
9 located in Philadelphia, Pennsylvania.

10 7. In 2019, I was appointed an Associated Professor in the Department of
11 Anesthesiology at the University of Chicago in Chicago, Illinois.

12 8. The remaining aspects of my training, education and experience can be found
13 in my curriculum vitae, which has been made available to this Court, the parties, and the
14 public as “**Attachment 1**” to this Declaration. The only redaction made on the CV relates
15 to my personal cell phone and email address.

16 SCOPE OF ENGAGEMENT

17 9. The purpose of my retention as I understand it is to provide this Court with
18 my opinion as to the current method-of-execution protocol adopted by the Nevada
19 Department of Corrections, which I understand is located on the Court docket at ECF No.
20 93-1, and as amended on June 21, 2021 at ECF No. 99-1. I refer to this protocol throughout
21 this declaration as the “NDOC Protocol.”

22 10. I had no role in the NDOC’s deliberations associated with finalizing the NDOC
23 Protocol. Instead, I have been retained to provide this Court with my understanding of the
24 effects the NDOC Protocol will have on individuals who face the unfortunate and solemn
25 sentence of death for their crimes.

26 11. In addition to providing medical and scientific explanations as to what is
27 expected or anticipated to occur should the NDOC Protocol be utilized, I have also been
28 asked to opine as to whether Mr. Floyd’s requested alternative method of execution, which

1 I understand to be either firing squad or the use of a one drug alternative of either
2 pentobarbital or sodium thiopental, would likely result in less pain or suffering to Mr. Floyd
3 than the current drug regiment contained in the NDOC Protocol.

4 12. By providing my medical opinion as to what is anticipated to occur to a
5 reasonable degree of medical certainty, I am not advocating for any particular form of lethal
6 injection. The statements contained in this Declaration should be considered only from the
7 perspective of providing this Court and the public with the medical facts as to what will or
8 is likely to occur. It is not my intent to advocate for one method-of-execution over another
9 nor to advocate for the death penalty.

10 **DOCUMENTS REVIEWED IN PREPARATION OF THIS DECLARATION**

11 13. In preparing my opinion as to the NDOC Protocol and Mr. Floyd's proposed
12 alternatives to the NDOC Protocol, I have reviewed multiple documents, including the
13 following documents that have been filed with the Court:

- 14 a. The NDOC Protocol dated June 9, 2021, and as amended on June 21,
15 2021 (ECF No. 93-1 and Nos. 99-1);
- 16 b. Plaintiff's Motion for Preliminary Injunction and Stay of Execution,
17 dated June 18, 2021, ECF No. 98;
- 18 c. Plaintiff's Motion for Stay of Execution, dated April 21, 2021, ECF No.
19 10;
- 20 d. Plaintiff's Motion for Temporary Restraining Order with Notice and
21 Preliminary Injunction, dated April 16, 2021, ECF No. 6;
- 22 e. Plaintiff's Exhibit 12, ECF No. 4-12;
- 23 f. Plaintiff's Exhibit 11, ECF No. 4-11;
- 24 g. Plaintiff's Exhibit 10, ECF No. 4-10;
- 25 h. Plaintiff's Exhibit 3, ECF No. 4-3; and
- 26 i. Plaintiff's Complaint, dated April 16, 2201, ECF No. 2.

27 14. I have not been asked to refrain from reviewing any particular documents,
28 either filed in court or otherwise.

**THE NDOC PROTOCOL IS LIKELY TO CAUSE A DEATH WITHOUT
SIGNIFICANT PAIN OR SUFFERING**

15. The NDOC Protocol provides for the use of a four drugs in the following order and dosages:

- a. Fentanyl in the amount of 2,500 micrograms, or alternatively alfentanil in the amount of 25,000 micrograms (mcgs);
- b. Ketamine in the amount of 1,000 milligrams (mgs);
- c. Cisatracurium in the amount of 200 mgs; and
- d. Potassium Chloride or Potassium Acetate in the amount of 240 milliequivalents (mEq).

16. The NDOC Protocol also provides for the removal of cisatracurium from the four-drug sequence. If that option is used, the NDOC Protocol notes that potassium chloride or potassium acetate would follow the injection of ketamine. The dosages for the drugs remain the same.

17. The NDOC Protocol also provides for the ability for additional amounts of each of these medications being provided to the inmate.

18. The NDOC Protocol also provides that the individual facing death will be offered the opportunity several times throughout the day to take an oral sedative that would commonly be used to allay anxiety.

19. Based on these drugs, dosages, and sequencing, and without advocating for the use of lethal drugs as a form of capital punishment, I have concluded upon a reasonable degree of medical certainty that the use of the drugs will result in the following physiological responses:

FENTANYL OR ALFENTANIL

20. The use of fentanyl or alfentanil, both potent opiates, will produce profound sedation, euphoria, and analgesia.

21. To explain what I mean by analgesia in this context, I will rely on the words of Craig W. Stevens, Ph.D, Professor of Pharmacology, in the report provided by Mr. Floyd

1 earlier in this litigation, albeit it was originally written for a different case using a different
2 protocol. That report, located at ECF No. 4-12 states that fentanyl is a painkiller used for
3 the treatment of moderate to severe pain. ECF No. 4-12 at 16. He also states that because
4 of its analgesic effects it “inhibit[s] the activity of the pain neurons” producing “relief of
5 pain.” *Id.* I also agree with his premise that fentanyl “is 100 times more potent than
6 morphine.” *Id.*

7 22. The injection of either fentanyl or alfentanil at the dosages contained in the
8 NDOC Protocol will substantially decrease alertness and respiratory drive.

9 23. I agree that the use of these drugs may cause chest rigidity which may make
10 it more difficult for an individual to breathe. However, the analgesia effect of the 2500mcgs
11 or 25,000mcgs dose of these drugs will be rapid, taking away any sensation the individual
12 may have of either chest rigidity or a sensation of it being difficult to breathe in seconds,
13 with hypoxia and unconsciousness occurring with minutes.

14 24. The inability of the individual being able to feel discomfort, severe or
15 otherwise relating to chest rigidity or difficulty breathing is further evidenced by the
16 successful treatment of thousands of individuals who, intentionally or accidentally, overdose
17 on fentanyl on a yearly basis. Despite this epidemic, caused in part due to the euphoric
18 nature fentanyl provides to individuals, I am unaware of any study or anecdotal evidence
19 that any of the individuals remember or complain about any discomfort associated with
20 chest rigidity or difficulty in breathing caused by the overdose.

21 25. To be sure, it is reasonable to conclude the high dose of fentanyl or alfentanil
22 provided for the NDOC Protocol, without life-saving measures, will cause unconsciousness
23 and death in itself.

24 26. In this regard, I agree with the statement made by Dr. Greenblatt in his
25 declaration provided by Plaintiff as Exhibit 11. There, he stated that fentanyl “can be lethal
26 in minute amounts.” ECF No. 4-11 at 27, ¶ 71. And I therefore agree that should fentanyl
27 (or alfentanil) be used in a clinical setting, it is important that it “be handled only by
28 appropriately trained, medical professionals.” *Id.* However, because here, the NDOC

1 Protocol is designed to end in the death of an individual, the lethal nature of these drugs
2 in minute amounts (even less than the 2,500mcg or 25,000mcg), the need for appropriately
3 trained medical professionals is mitigated (although the NDOC Protocol notes there will be
4 an attending physician or other appropriate medical personnel present), as the reason they
5 are needed is to ensure the use of fentanyl or alfentanil does not result in death of the
6 patient when used in the clinical setting. It is for this reason that Dr. Stevens noted that
7 fentanyl is part of “a dangerous group of medicines that are responsible for many
8 intentional and unintentional fatalities.” ECF No. 4-12 at 19.

9 27. While I have not addressed Dr. Waisel’s statements relating to fentanyl in
10 here, that is intentional. Given his opinion focused fentanyl at a much smaller dose of
11 1,000mcg, making any comparison to his statements pertaining to fentanyl unhelpful to
12 the analysis of the current NDOC Protocol. Indeed, the opinions of the other individuals
13 Mr. Floyd provided as exhibits to his Complaint—but did not reference at all in his most
14 recent Motion for Stay—are all of limited assistance as none of them address the use of
15 fentanyl or alfentanil with the use of ketamine as called for in the current NDOC Protocol.

16 28. Mr. Floyd’s Motion filed on June 18, 2021 does not cite to any medical or
17 scientific experts, medical reports, medical or scientific studies, or any other peer reviewed
18 documentation. Nonetheless, in addition to the medical evidence presented above
19 regarding fentanyl and alfentanil, which I believe adequately and appropriately informs
20 this Court as to why Mr. Floyd’s statements, as a matter of medical science, are not
21 supported, I do find it important to inform the Court that while Mr. Floyd correct asserts
22 that alfentanil’s active analgesic effect is shorter than that of fentanyl, there is no medical
23 support for Mr. Floyd’s conclusory statement that “alfentanil is too short acting to safely
24 serve as a first drug administered in a three- or four-drug protocol. ECF No. 98 at 15:6.

25 29. The NDOC Protocol calls for all medications to be injected in a timeframe of
26 approximately twelve (12) minutes, if using the four-drug option, or nine (9) minutes if
27 using the three-drug option. This time may be increased by a few minutes depending on
28 the amount of time needed to perform the consciousness checks contained in the NDOC

1 Protocol. Based on that timing, while Mr. Floyd is correct that alfentanil lasts a shorter
2 amount of time than fentanyl, the time of its analgesic effect surpasses the time needed for
3 the NDOC Protocol to be completed through the last injection of either potassium chloride
4 or potassium acetate.

5 30. The NDOC Protocol also has taken into account the potential of additional
6 alfentanil (or any drug) being needed as it allows for additional dosages to be provided to
7 titrate to effect. This is another safeguard against Mr. Floyd's unsubstantiated medical
8 assertion that alfentanil will not last long enough.

9 KETAMINE

10 31. The NDOC Protocol calls for ketamine to be injected as the second drug.
11 Ketamine will block a particular transmitter, known as NMDA. Based on the 1,000mg dose
12 contained in the NDOC Protocol, the medical result will be to produce deep analgesia and
13 sedation, including "dissociative anesthesia," which is best described as a comatose,
14 immobilized state of consciousness. Indeed, a dose of approximately 160mg will to a
15 reasonable degree of medical certainty result in a rapid onset of a profound lack of any pain
16 awareness or even the individual's circumstances. By contrast, the NDOC Protocol calls for
17 1,000mg of ketamine to be injected—an amount 6x larger than the therapeutic dose of
18 160mg referenced in the previous sentence.

19 32. Due to the rapid, profound, and significant pain relief associated with
20 ketamine, it is a drug of choice for anesthesiologists for emergency surgeries or for the care
21 of patients with burn injuries. Ketamine has a unique property called "dissociative
22 anesthesia," which produces complete unawareness in the patient.

23 33. The pain-relieving effects of ketamine coupled with the fentanyl or alfentanil
24 may likely result in irreversible unconsciousness and respiratory suppression resulting in
25 death, even without adding either cisatracurium or either potassium-based drugs set forth
26 in the NDOC Protocol. However, even if it does, the unconsciousness and respiratory
27 suppression will not cause, to a reasonable degree of medical certainty pain or discomfort
28

1 given the dissociation, deep analgesic and pain killing properties contained in not only
2 ketamine, but also fentanyl and alfentanil.

3 34. While Mr. Floyd has not provided any medical evidence or support his
4 opposition to ketamine, he focuses on generalized issues regarding what may occur during
5 its use or upon awakening a patient from the induced state it provides, specifically claiming
6 that it can cause psychosis or hypersalivating, which could lead to vocal cord spasms or
7 vomiting. *See generally* ECF No. 98 at 15:17-16:2. However, hypersalivation occurs in less
8 than 1% of patients provided ketamine and is therefore not likely to occur, especially when
9 ketamine is provided to the individual as the second drug following either fentanyl or
10 alfentanil. In addition, the concern of psychosis for individuals being resuscitated after
11 using ketamine in a clinical setting is not relevant in this context, as again, the individual
12 is not anticipated to be resuscitated.

13 35. Mr. Floyd has not provided any reports or other medical or scientific evidence
14 or opinion regarding the use of ketamine and therefore there is no alternative opinions for
15 me to address or explain.

16 CISATRACURIAM

17 36. Cisatracurium, which may be used as the third drug in the NDOC Protocol, is
18 a muscle relaxant that, in a dosage amount of 200mg will result in paralysis. The paralysis
19 will result in the individual not being able to move the diaphragm, interfering in further
20 ability of the individual being able to breathe—assuming the individual is still doing so after
21 being injected with the high volume of fentanyl (or alfentanil) and ketamine that the
22 individual has already been injected with per the NDOC Protocol. To the extent the
23 individual is still breathing when cisatracurium is injected, given the profound respiratory
24 suppression and unconsciousness brought on by fentanyl/alfentanil and ketamine, the
25 individual will, to a reasonable degree of medical certainty, not feel anything. Rather, the
26 cisatracurium will hasten the onset of death by impairing the respiratory functions even
27 more profoundly than the introduction of fentanyl or alfentanil. However, due to the
28 profound respiratory depression produced by the fentanyl or alfentanil, cisatracurium may

1 be omitted from the NDOC Protocol should NDOC choose to proceed under the 3-drug
2 regimen.

3 37. Mr. Floyd has again provided no medical or scientific evidence regarding the
4 use of cisatracurium in the NDOC Protocol. Because there is no discussion of the use of the
5 drug along with fentanyl/alfentanil, ketamine, and either potassium chloride or potassium
6 acetate, the little discussion of cisatracurium raised in the expert of the other cases
7 provided by Mr. Floyd at the time of the filing of his Complaint is of little assistance as
8 those uses cannot be easily compared to its usage and dosage in the current NDOC Protocol.
9 In this regard, I note that Dr. Waisel's discussion and criticism of cisatracurium was in the
10 context of a protocol that called for the use of diazepam and a much lower dose of fentanyl,
11 whereas here, the amount of fentanyl/alfentanil and ketamine provided to the individual
12 is such a high dosage, the ability of the individual to "be aware for 3-5 minutes *after* the
13 person stops breathing" as suggested by Dr. Waisel is simply not a medical concern,
14 especially given the other analgesic and dissociative state the individual will be in after the
15 injection of fentanyl/alfentanil and ketamine.

16 38. Dr. Waisel's concerns based on the previous protocol are also assuaged in the
17 NDOC Protocol because in the protocol Dr. Waisel considered, he opined the concern was
18 using cisatracurium as the "killing agent" without first being given an anesthetic agent, *see*
19 ECF no. 4-3 at 4, ¶ 6, whereas here, as discussed above, the individual two medications
20 used an anesthetic agents routinely. In addition, unlike in the protocol previously reviewed
21 by Dr. Waisel, cisatracurium will be followed by the use of either potassium chloride or
22 potassium acetate, which, as Dr. Waisel states, "stops the heart very quickly." *Id.*
23 Therefore, Dr. Waisel's concerns of cisatracurium being the killing agent are not present in
24 the NDOC Protocol.

25 39. Dr. Stevens concerns regarding cisatracurium were also based on his opinion
26 that midazolam would not "render a person insensate to pain," ECF No. 4-12 at 10, an issue
27 not relevant here given the use of both fentanyl/alfentanil and ketamine for that purpose.
28

1 Dr. Stevens also opines that “cisatracurium must not be given to an inmate¹ unless the
2 inmate is already in a state of general anesthesia, otherwise there would be severe pain and
3 suffering experienced by the inmate.” *Id.* at 22. However, here, assuming that could be
4 concern, the NDOC Protocol has built in assurances that the individual will be in a state
5 of general anesthesia, not only through the use of high dosages of fentanyl/alfentanil and
6 ketamine initially, but also through the use of consciousness checks and the ability to use
7 additional ketamine before the introduction of cisatracurium.

8 40. Dr. Greenblatt’s concerns regarding cisatracurium are similar to those
9 provided by Dr. Stevens, namely that the individual “must be made insensate prior to [its]
10 delivery.” ECF No. 411 at 15, ¶ 39. As the inmate will be rendered unconscious, i.e.
11 insensate by the fentanyl/alfentanil and ketamine, this is not a concern to be considered.

12 **Potassium Chloride or Potassium Acetate**

13 41. The last drug in the NDOC Protocol, whether as part of the three- or four-
14 drug combination is either potassium chloride or potassium acetate at a dosage of 240mEq.
15 As the effective ingredient in these drugs is potassium, regardless of which salt is used, I
16 will simply refer to this as potassium without differentiation.

17 42. The use of potassium will stop the individual’s heart, resulting in cardiac
18 arrest.

19 43. While potassium is known to be irritating to veins if injected rapidly, which I
20 understand Mr. Floyd has referred to as “extreme pain,” that is not a concern as used in
21 the NDOC Protocol due to the use of both fentanyl/alfentanil and ketamine prior to it being
22 injected. The effects of the fentanyl/alfentanil and ketamine will result in such a profound
23 state of anesthesia and unconsciousness, and to a reasonable degree of medical certainty
24 ensure, that the individual will feel nothing when the potassium is injected.

25 **Response to Mr. Floyd’s General Objections to These Medications**

26 44. Mr. Floyd generally objects to the use of either of three- or four-drug procedure
27 because it has never been used before and therefore it may not be effective or should not be
28

¹ I use the term “inmate” only as this is a quote from Dr. Stevens.

1 presumed to be effective. However, this assertion, made by Mr. Floyd without any medical
2 support or evidence, strains medical credibility. To be sure, the effects of each of the
3 proposed drugs contained in the NDOC Protocol are well understood, but on lower dosages,
4 the dosages called for in the NDOC Protocol, and both separately and as used in various
5 combinations. There simply is no medical reason to believe that these drugs, as set forth in
6 the NDOC Protocol and used in the manner contained therein, will not result in death of
7 the individual. To be clear, just as if these drugs were being used in the operating room,
8 absent manual and intentional efforts to support the airway, and assuming potassium is
9 not omitted from the NDOC Protocol, it is not medically foreseeable that the NDOC
10 Protocol would be nonlethal. Indeed, given the dosages of fentanyl or alfentanil
11 administered, the respiratory depression produced by these drugs alone is medically likely
12 to be sufficient to produce death.

13 **Comparing the NDOC Protocol to Mr. Floyd's Single Drug Alternatives**

14 45. Mr. Floyd also suggests that a single dose of either sodium thiopental or
15 pentobarbital would be preferable to the drugs contained in the NDOC Protocol as the
16 single does of either sodium thiopental or pentobarbital, in Mr. Floyd's opinion, would
17 "significantly reduce the substantial risk of pain inherent in Nevada's current protocol."
18 ECF No. 98 at 1:11–12.

19 46. I respectfully disagree with Mr. Floyd's unsupported medical assertion in this
20 regard. Neither sodium thiopental nor pentobarbital produce analgesia when used
21 separately. By contrast, the NDOC Protocol's use of fentanyl/alfentanil, coupled with the
22 mandatory use of ketamine, with or without the individual choosing to voluntarily use oral
23 sedatives leading up to the execution, will, to a reasonable degree of medical certainty,
24 result in a deep state of not only unconsciousness but also sedation and analgesia. Mr.
25 Floyd's position therefore that either sodium thiopental or pentobarbital are likely to
26 "significantly reduce the substantial risk of pain" lacks merit as it is without medical
27 foundation.
28

Comparing the NDOC Protocol to Firing Squad

47. Mr. Floyd also claims—without citation to any medical support in the body of this Motion or attached as an exhibit—that the use of a firing squad would, among other things, “cause[] a faster and less painful death than execution by lethal injection.” ECF No. 98 at 18:21–22.

48. While I agree with Mr. Floyd that a firing squad, assuming it goes as planned, will cause a quicker death, I do not agree to a reasonable degree of medical certainty that the death would be less painful. This is because while the death, again assuming the bullet or bullets do not miss the intended target, whether it be the brainstem or heart, would be quicker, it would also be brought about without the use of any medication that would render the individual unconscious, sedate, or in a state of anesthesia, the timeframe between when the individual is shot until death would result in a traumatic injury that, to a reasonable degree of medical certainty, would result in incomparable pain when compared to the drugs the NDOC Protocol will provide the individual intravenously. Three of the four drugs are routinely used in surgical setting for the very purpose of ensuring that the patient does not feel pain during surgery.

49. In addition, while I concede that death by firing squad is quicker if the bullet or bullets hits the intended targets, there are many medical case reports detailing bullets passing through the skull without causing loss of consciousness or death. If the bullet or bullets were to miss major neural pathways or the brainstem, it is likely the individual shot will remain conscious—and without any painkiller to assist with the excruciating pain of being shot.

50. In sum, there is simply no medical evidence to support the proposition that death by firing squad is likely to result in less pain than the use of medications specifically designed to reduce pain, unconsciousness, or both.

Conclusion

51. Without condoning or supporting the use of the NDOC Protocol or any other medication for purposes of ending one’s life by way of lethal injection, I attest that, to a

1 reasonable degree of medical certainty, the NDOC Protocol has been designed and prepared
2 in a manner that will result in a death likely lacking in significant pain or discomfort.

3 52. This conclusion is based on my medical education and experience.

4 53. I can also attest that even if there some modicum of pain or discomfort may
5 be associated with the use of the NDOC Protocol, that pain or discomfort is likely, to a
6 reasonable degree of medical certainty, likely to be less than the pain or discomfort
7 associated with being shot to death by way of a firing squad.

8 54. Nor is any pain or discomfort associated with the NDOC Protocol likely to be
9 any more than the pain or discomfort one would experience if sodium thiopental or
10 pentobarbital was used in lieu of the drugs called for in the NDOC Protocol.

11 55. I declare under penalty of perjury pursuant to 28 U.S.C. section 1746 that the
12 foregoing is true and correct.

13 EXECUTED this 23rd day of June, 2021.

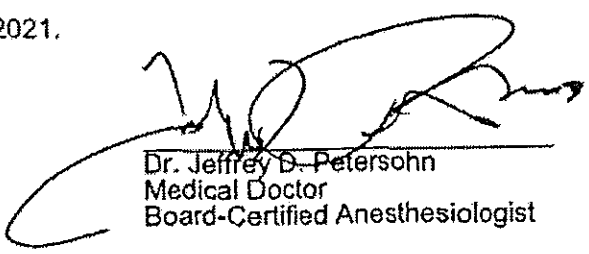
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16 _____
Dr. Jeffrey D. Petersohn
Medical Doctor
Board-Certified Anesthesiologist
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2 reasonable degree of medical certainty, likely to be less than the pain or discomfort
3 associated with being shot to death by way of a firing squad.

4 54. Nor is any pain or discomfort associated with the NDOC Protocol likely to be any
5 more than the pain or discomfort one would experience if sodium thiopental or pentobarbital
6 was used in lieu of the drugs called for in the NDOC Protocol.

7 55. I declare under penalty of perjury pursuant to 28 U.S.C. section 1746 that the
8 foregoing is true and correct.

9 EXECUTED this 23rd day of June, 2021.

10
11
12 
13 Dr. Jeffrey D. Petersohn
14 Medical Doctor
15 Board-Certified Anesthesiologist
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ATTACHMENT — CV

Jeffrey D. Petersohn, M.D.

Cell: (609) 432-6477
Email: jdpetersohn@gmail.com

ACADEMIC APPOINTMENTS

2010-2019 Clinical Associate Professor, Department of Anesthesiology and Perioperative Medicine. Drexel University College of Medicine. Philadelphia, PA
2019 Associate Professor, Department of Anesthesiology, University of Chicago. Chicago, IL

ACADEMIC TRAINING

1975-1979 B.A., Biophysics. The Johns Hopkins University, Baltimore, MD
1980-1984 M.D. Hahnemann University School of Medicine, Philadelphia, PA
1984-1985 Intern, Internal Medicine. Hahnemann University Hospital, Philadelphia, PA
1985 Resident, Internal Medicine, Hahnemann University Hospital, Philadelphia, PA
1986-1987 Resident, Anesthesiology, Hahnemann University Hospital, Philadelphia, PA

CLINICAL/PROFESSIONAL PRACTICE OF MEDICINE

1988-1989 Middle Tennessee Anesthesiology, PC Nashville, TN – Anesthesiology group practice
1990-1991 Delaware County Memorial Hospital, Lansdowne, PA – Anesthesiology group practice
1991-1992 Chairman, Department of Anesthesiology- Franklin Square Hospital/Franklin Square Anesthesiology Associates, Philadelphia, PA – Anesthesiology group practice including cardiac anesthesia
1992-1995 Chairman, Department of Anesthesiology, Burdette Tomlin Memorial Hospital, Cape May Court House, NJ – Multispecialty community anesthesiology practice including establishment of pain clinic.
1995-1996 Staff anesthesiologist, Atlantic City Medical Center, Atlantic City, NJ. Regional hospital anesthesiology practice including regional trauma center. Established Center for Pain Medicine
1996-present PainCare, PC, president. Private Interventional Pain Medicine practice – Linwood, NJ and Englewood, CO.
Subspecialty consultative referral practice offering full-spectrum interventional pain care including transforaminal injections, diagnostic/therapeutic orthopedic, spinal and peripheral nerve injections, RF lesioning, diagnostic discography, interventions for discogenic pain, kyphoplasty, spinal cord and DRG stimulation, interspinous spacers, sacroiliac joint fusion, lumbar transforaminal and interlaminar full-endoscopic discectomy/foraminotomy/facetectomy.

BOARD CERTIFICATION AND LICENSURE

1990 American Board of Anesthesiology, Diplomate in Anesthesiology

- 1996 American Board of Anesthesiology, Certificate of Added Qualifications in Pain Medicine
- 2006, 2016 American Board of Anesthesiology, Recertification, Certificate of Added Qualifications in Pain Medicine – valid through 2026

Current unrestricted medical licensure: Commonwealth of Pennsylvania, State of Colorado (SPL 2019), State of New Jersey.

Current DEA certification Schedules II-V
 Current ACLS/BLS certification
 US Citizen

SCHOLARSHIP

Peer-reviewed publications in the primary literature, exclusive of abstracts:

- 2008 Petersohn J, Conquergood L, Leung M. Acute histologic effects and thermal distribution profile of disc biacuplasty using a novel water-cooled bipolar electrode system in an *in vivo* porcine model. *Pain Medicine* 2008, Jan-Feb; 9(1):26-32.
- 2012 Petersohn J. Advances in biological techniques for treatment of lumbar discogenic pain. *Techniques in Regional Anesthesia and Pain Medicine*. 2012, 16(2):89-94. 2012
- 2013 Sadacharam K, Petersohn J, Green MS. Inadvertent subdural injection during cervical transforaminal epidural steroid injection. *Case Reports in Anesthesiology* 2013, article ID 847085, doi:10.1155/2013/847085.
- 2015 Franco C, Buvanendran A, Petersohn J, Menzies R, Pham-Menzies L. Innervation of the anterior capsule of the human knee: Implications for radiofrequency ablation. *Regional Anesthesia and Pain Management* 2015 Jul-Aug; 40(4):363-368.
- 2016 Desai M, Kapural L, Petersohn J, Vallejo R, Mekhail N, Menzies R, Creamer M, Gofeld M. A prospective randomized multicenter open label clinical trial comparing intradiscal biacuplasty to conventional medical management for discogenic lumbar back pain. *Spine* 2016, July 1; 41(13):1065-1074.
- 2016 Petersohn J. Radiofrequency strategies to target peripheral large joint orthopedic pain. *Techniques in Regional Anesthesia and Pain Management* 2016, Jul-Oct; 19(3-4): 131-137.
- 2017 Desai M, Kapural L, Petersohn J, Vallejo R, Menzies R, Creamer M, Gofeld M. Twelve month follow up of a randomized clinical trial comparing intradiscal biacuplasty to conventional medical management for discogenic lumbar back pain. *Pain Medicine* 2017, April 1; 18(4): 751-763.

Book chapters:

- 2011 Petersohn J. "Sympathetic neural blockade: in Lennard T. et.al. (eds). Pain Procedures in Clinical Practice, 3rd ed. Elsevier Saunders.
- 2012 Petersohn J. "Discogenic pain: Intradiscal therapeutic injections and use of intradiscal biologic agents" in Deer T. et. al. (ed) Diagnosis, management and treatment of discogenic pain. Elsevier, Philadelphia.
- 2015 Desai M, Petersohn J, O'Brien J, Cyriac M, Lati C. "Lumbar disc displacement" in Hayek S, Desai M, et. al. (eds) Pain Medicine: an interdisciplinary case-based approach. Oxford University Press, New York.
- 2015 Petersohn J, Padmanabhan, Desai M. "Whiplash associated disorder and cervical facet pain" in: Hayek S, Desai M, et. al. (eds) Pain Medicine: an interdisciplinary case-based approach, Oxford University Press, New York.
- 2017 Petersohn J. "Cervical transforaminal/nerve root injections: Fluoroscopy" in Narouze, S (ed). Multimodality imaging guidance in interventional pain management." Oxford University Press, New York.
- 2017 Petersohn J. "Cervical radiculopathy" in Desai M (ed) The Spine Handbook. Oxford University Press, New York.
- 2021 Petersohn, J. "Spinal diagnostics" in Abd-Elseyed A, et. al. (ed) Minimally invasive procedures in pain management. Oxford University Press, New York (manuscript in preparation).
- 2021 Petersohn, J, Gupta M. "Spinal endoscopy" in Abd-Elseyed A, et. al. (ed) Minimally invasive procedures in pain management. Oxford University Press, New York (manuscript in preparation).

Research abstracts

- 2009 Petersohn J, "Role of repetitive provocation discography", International Spine Intervention Society Annual Meeting, Toronto, Canada. Pain Medicine 2009 September(5):382-383.
- 2010 Petersohn J. "Outcomes of algorithmic treatment of lumbar z-joint pain using single diagnostic medial branch block and RF lesioning with mandated treatment of co-existing or novel sacroiliac pain". International Spine Intervention Society, Maui, HI.
- 2011 Petersohn J. "Improved diagnostic precision with use of declined posterior oblique technique for lumbar medial branch block" American Academy of Pain Medicine Washington, DC.

- 2015 DiMauro J, Petersohn J, Menzies R, Buanendran A, Franco C. "A novel technique for obturator articular branch block". American Society for Regional Anesthesia and Pain Management.
- 2016 Gofeld M, Desai MJ, Kapural L, Petersohn JD, Vallejo R, Menzies R, Creamer M. Long term results (12 months) of a prospective, multicenter, open label clinical trial comparing Intradiscal biacuplasty to conventional medical management for discogenic lumbar back pain.
- 2016 Aman MM, Petersohn J. "Saphenous nerve cooled radiofrequency ablation for the treatment of refractory lower extremity chronic regional pain syndrome". American Society of Anesthesiology.

Clinical trials – unpublished

- 2015-2016 Principal Investigator Halyard Health Pain Visualization Clinical Pilot Study. Demonstration of clinical diagnostic utility of cortical evoked potentials in humans to identify painful lumbar zygapophyseal joints. Status: complete. Data and publication embargoed as proprietary by study sponsor.

HONORS, PRIZES, AND AWARDS

- 1984 Senior Honors in Pediatrics and Internal Medicine, Hahnemann University College of Medicine
- 2016 Aliaga Research 1st Prize, "RF implications of anterior geniculate capsular neuroanatomy", American Society of Interventional Pain Physicians

INVITED SPEAKING

Local/Regional

- 1988 "Embolic events in clinical anesthesia" – Tennessee Association of Nurse Anesthetists.
- 1989 "Addiction Issues in Chronic Pain Management", Academy of Medicine of New Jersey.
- 1999 "Opiate use in the New Millennia" – Bridgeton Hospital , NJ
- 1999 "Contemporary Use of Slow-Release Opiates" – Atlantic City Medical Center, Mercer Medical Center (Medical resident lectures).
- 2001 "Pharmacology of opiate analgesics" – Atlantic County Pharmacy Society.
- 2002 "Forensic use of discography" - American Trial Lawyers Association, New Jersey.
- 2006 "My Aching Neck". Central Jersey Claims Association, October.
- 2010 "RF Lesioning in the Treatment of Low Back Pain" Grand Rounds- Department of Anesthesiology Hahnemann University Hospital, Philadelphia, PA. June.
- 2011 "Indications and planning for cooled RF lesioning techniques" Illinois Society for Interventional Pain Practice. Chicago, IL March.
- 2011 "Advanced techniques in RF lesioning" Grand Rounds – Department of Anesthesiology Hahnemann University Hospital, Philadelphia, PA. October.
- 2012 "Discogenic Pain" Grand Rounds – Department of Anesthesiology, Hahnemann University Hospital, Philadelphia, PA. October.
- 2012 "The Proper Use and Abuse of Epidural Steroid Injections" Grand Rounds – Department of Anesthesiology, Hahnemann University Hospital, Philadelphia, PA December.

- 2016 "Diagnosing lumbosacral pain by application of overlapping pathoanatomic subsets" Grand Rounds – Department of Anesthesiology, Hahnemann University Hospital October.

National

- 2006 "Biacuplasty for Treatment of Discogenic Pain". International Spine Intervention Society, Salt Lake City, Utah, July.
- 2006 "Driving Innovative Products into Physician's hands – A Clinicians Perspective", Kimberly Clark Medical, Orlando, Florida, October.
- 2007 "Biacuplasty – Procedural Considerations", Spinemark, Dallas, Texas March 2007 also MERI, Memphis, Tennessee, November.
- 2007 "Transdiscal Annuloplasty Technique, Rehabilitation and Complications" (Lecturer and cadaveric workshop instructor). Cleveland Clinic, Cleveland, Ohio, April.
- 2007 "RFL Lesioning in Cervical, Thoracic and Lumbar Spine", Advanced Techniques in RF lesioning (Course Director, lecturer and clinical instructor). Vitruvian Institute, Baltimore, Maryland, April.
- 2007 "Transdiscal Annuloplasty and Physics of Cooled RF lesioning", "The Painful Sacroiliac Joint" (Course Director, lecturer and clinical instructor) Vitruvian Institute, Baltimore, Maryland, August.
- 2008 "Clinical applications of RF lesioning", Invited lecture to the New York Physical Medicine and Rehabilitation Society, Hospital for Special Surgery, New York, NY, September.
- 2009 RFL Lesioning in Cervical, Thoracic and Lumbar Spine (Lecture and cadaveric workshop – Pfiedler Enterprises), Aurora, CO, April.
- 2010 "Anatomy and Technique for Lumbar Cooled RF Lesioning" (Lecture and cadaveric workshop) Pfiedler Enterprises/Kimberly Clark Medical, Miami, FL January.
- 2010 "Complications and Risk Reduction Strategies for Cervical and Thoracic ESI/SNR's", "Complications of RF Lesioning." Invited lecture - American Academy of Pain Medicine Annual Meeting, San Antonio, TX, February.
- 2010 "Anatomy and Technique for Lumbar and Thoracic Cooled RF Lesioning" (Lecture and cadaveric workshop) Pfiedler Enterprises/Kimberly Clark Medical, Boston, MA, February.
- 2010 "Anatomy and Technique for Lumbar Cooled RF Lesioning" (Lecture and cadaveric workshop) Pfiedler Enterprises/Kimberly Clark Medical, Burr Ridge, IL April.
- 2011 "Anatomy and Technique for Lumbar Cooled RF Lesioning" (Lecture and cadaveric workshop) Pfiedler Enterprises/Kimberly Clark Medical, Miami Anatomic Research Center, February.
- 2012 "Thoracic RF lesioning techniques" Lecture and cadaveric workshop (Pain Fellows Course) Rush University Medical Center, Chicago, IL October.
- 2013 "Finesse in cervical injections", "Digital subtraction angiography". The Cleveland Clinic 15th Annual Pain Management Symposium. Sarasota, Florida February.
- 2014 "Digital subtraction angiography", "Cooled RF ablation", "Treatment of sacroiliac joint pain" Lectures. Thoracic facet RFL – cadaveric workshop. The Cleveland Clinic 16th Annual Pain Management Symposium. Las Vegas, NV February.
- 2014 "Digital subtraction angiography" Lecture. "Cervical transforaminal injection" Workshop lead instructor. American Society of Regional Anesthesia and Pain Medicine. San Francisco, CA December.
- 2015 "RF denervation for management of hip and knee pain" Invited lectures and cadaver workshop. Hospital for Special Surgery, New York, New York January.
- 2015 "Biacuplasty" New Jersey State Society of Interventional Pain Physicians, New Brunswick, NJ June.

- 2016 "RF denervation of the hip and knee" Cadaveric workshop. New Jersey/New York Societies of Interventional Pain Physicians, Jersey City, NJ November.
- 2016 "Complex regional pain syndrome" Lecture. "Migraine headache", "RF denervation of the knee" Problem based learning discussion. "RF denervation of cervical and thoracic facet joints", "RF denervation of hip and knee" Cadaveric workshop. American Society of Regional Anesthesia and Pain Medicine, San Diego, CA. November
- 2017 "Biacuplasty", "Monopolar cooled RF lesions" Lecture, cadaveric workshop New Jersey/New York Societies of Interventional Pain Physicians Jersey City, NJ October.
- 2017 "Head and cervical spine blocks: fluoroscopy" (Workshop lead instructor), "Hip and knee blocks and RFL: fluoroscopy" (Workshop lead instructor). American Society for Regional Anesthesia and Pain Medicine, Orlando, FL November.
- 2018 "Degenerative disc disease (DDD) 2018: New Insights and Recent Evidence for Spine Interventions", "Legislative Update/State of the Society" Lecture. "RF denervation of the hip and knee" Cadaveric workshop. New Jersey/New York Societies of Interventional Pain Physicians. Jersey City, NJ November.
- 2018 "Notable Recent Evidence for Spine Interventions", "Reading and Interpretation of Spinal Imaging and EMG: Correlating Studies to Pain Symptoms: Correlating MRI findings to Pain Generators", Direct and indirect spinal decompression, disc decompression -Workshop lead instructor. Moderator for poster session. American Society of Regional Anesthesia and Pain Medicine 18th annual meeting, San Antonio, TX November.
- 2019 "Practice Management Lectures: Private practice with in-office operating room"; "Basic lumbar injections and basics RF cadaver workshop"- Lead Instructor, "Discography and biacuplasty cadaver workshop" – Lead Instructor; "Basic kyphoplasty and vertebroplasty techniques cadaver workshop" – Lead instructor, "RF lesioning of the sacroiliac joint cadaver workshop" – Senior instructor. American Society for Regional Anesthesia and Pain Medicine 19th annual meeting, New Orleans, LA.

International

- 2006 "Diagnosis and Treatment of Discogenic Pain" – Guangzhou Society of Anesthesiologists, Guangzhou, China.
- 2008 "Minimally invasive treatments for low back pain", "Clinical Use of Discography", "Imaging of back pain", Live video demonstration of provocative discogram, Live video demonstration of lumbar disc biacuplasty operative procedure. Invited lecturer and Clinical Instructor. 8th Asia Pacific Congress of Cardiovascular and Interventional Radiology. Kuala Lumpur, Malaysia, June.
- 2008 "Pearls and pitfalls in clinical discography", "Biacuplasty for discogenic pain: Physics of bipolar cooled RF, procedure, potential complications and post-op care", Invited lecturer. 1st Symposium for use of Radiofrequency Applications in Pain Management, Taichung, Taiwan, June.
- 2010 "Thoracic RF lesioning using cooled-RF probe technology". Invited lecture and cadaveric workshop. University of Leuven. Leuven, Belgium October.
- 2012 "Biologic factors in discogenic pain" Lecture. 3rd World Congress of Minimally Invasive Spine Surgery and Techniques. Praia do Forte, Bahia, Brazil August.
- 2013 "Cooled RF lesions for cervical zygapophyseal pain". Lecture and cadaveric workshop. Academisch Medisch Centrum. Amsterdam, Netherlands June.
- 2013 "Cooled RF lesions for cervical zygapophyseal pain". Lecture and cadaveric workshop. Academisch Medisch Centrum. Bangkok, Thailand October.
- 2013 "Comprehensive review of interventional treatments for peripheral joint pain", "Comprehensive review and comparison of disc treatments; how to improve the

- outcome”, “Discography: Its current use and controversies” Lectures and cadaveric workshops. Comprehensive Reviews of Spinal Imaging and Radiofrequency in Interventional Pain Procedures. World Institute of Pain. London, England December.
- 2014 “Spinal cord stimulation for axial pain”, “Minimally invasive treatment of discogenic pain” Lectures and cadaveric workshop. Annual Review Course World Institute of Pain, St. Georges University School of Medicine. London, England June.

INVITED, ELECTED, OR APPOINTED EXTRAMURAL SERVICE

- 2006-2008 North American Spine Society, CME Committee, member
- 2006-2008 North American Spine Society SpineLine Editorial Board, member
- 2008-2014 Kimberly Clark Medical Pain Management Advisory Board, member
- 2009-2011 International Spinal Intervention Society Standards Committee, member
- 2009-2011 North American Spine Society, Evidence Based Medicine task force
- 2012-2014 GE Medical Imaging Advisory Board, member
- 2013-2015 Secretary, New Jersey State Society of Interventional Pain Physicians
- 2014-2018 American Society for Regional Anesthesia. National 2018 Meeting Planning Committee, member
- 2015-2017 Treasurer, New Jersey State Society of Interventional Pain Physicians
- 2015-2019 Novitas Medicare – Regions J/L (Pennsylvania/New Jersey) Clinical Advisory Committee, Interventional Pain specialty representative
- 2017-2019 President, New Jersey State Society of Interventional Pain Physicians
- 2017 Guest Editor, Special issue on radiofrequency lesioning techniques. Techniques in Regional Anesthesia and Pain Medicine.
- 2019 New York/New Jersey Societies of Interventional Pain Physicians – Annual meeting course co-director.
- Various Manuscript reviewer for Pain Medicine (2006-present), Pain Practice (2009-present), Regional Anesthesia and Pain Medicine (2019)

PROFESSIONAL SOCIETIES

- 1996-2017 (International) Spine Intervention Society
- 2006-2011 North American Spine Society –
- 2015-2017 American Society of Interventional Pain Physicians
- 2013-present American Society for Regional Anesthesia and Pain Medicine
- 2012-present New Jersey State Society of Interventional Pain Physicians

EDUCATION

Drexel University College of Medicine (M.D.):

(a) Didactic

- 2011-2018 Departmental Grand Rounds – various topics including “Receptor pharmacology in pain”, “Use and abuse of epidural steroid injections”, “Advanced RF lesioning techniques”, “Understanding low back pain by pathoanatomic subsets” – annual lecture

(b) Clinical

- 2010-2019 Clinical residency training site in Interventional Anesthesiology for CA-2, CA-3 residents.
Typically 2-4 months per academic year.

Graduate medical education (residency and clinical fellowships):

(a) Didactic

2014, 2015 Chicago Regional Fellows Course in RF Lesioning techniques
 2010-2019 Daily clinic and OR rotation for CA-2 and CA-3 residents, 2-4 months per year

Continuing medical education:

2007 "Clinical Use of Discography", "Pearls and Pitfalls in Clinical Discography", Lecturer and Clinical Instructor, Discography. North American Spine Society, Tucson, Arizona, March.
 2007 "Lumbar epidural steroid injections", "Transforaminal epidural steroid injections: Rationale, methods and outcomes." Lecturer and Clinical Instructor. North American Spine Society Annual Meeting, Austin, Texas, October.
 2008 "Clinical Use of Discography", "Pearls and Pitfalls in Clinical Discography", Lecturer and Clinical Instructor,. North American Spine Society, Chicago, Illinois, March.
 2008 "The sacroiliac joint: The good, the bad, the ugly", Georgia Society for Interventional Pain Practice Annual Meeting, Lake Oconee, GA, August.
 2009 "Analgesic Discography – Con." Invited program debate speaker. International Spine Intervention Society Annual Meeting, Toronto, CA, July.
 2009 "Cooled RF lesioning techniques - Disc biacuplasty, SI denervation", Invited lectures - Georgia Society for Interventional Pain Practice Annual Meeting, Lake Oconee, GA, August.
 2010 "Cooled RF Lesions for Thoracic and Lumbar z-joint pain" New Jersey Society for Interventional Pain Practice New Brunswick, NJ January.
 2010 "RFL Lesioning in Cervical, Thoracic and Lumbar Spine" (Lecture and cadaveric workshop – Pfiedler Enterprises. Spinemasters Institute, Burr Ridge, IL (Chicago), April.
 2011 "RFL Lesioning in Cervical, Thoracic and Lumbar Spine" (Lecture and cadaveric workshop – Pfiedler Enterprises. Miami Anatomic Research Center, February.
 2012 "Cervical Axial Pain", "A pain in the buttock" (Lectures and cadaveric workshop) – Pfiedler Enterprises. Tampa, FL. March, also Las Vegas, NV October..
 2013 "Finesse in Cervical Injections", "Digital Subtraction Angiography" Invited CME lecture. The Cleveland Clinic 15th Annual Pain Management Symposium, Sarasota, FL February.
 2013 "Comprehensive review of interventional treatments for peripheral joint pain", Comprehensive review and comparison of disc treatments; how to improve the outcome". "Discography: Its current use and controversies" Lectures and cadaveric workshop Comprehensive Reviews on Spinal Imaging and Radiofrequency in Interventional Pain Procedures. World Institute of Pain. London, England December.
 2014 "Digital subtraction angiography", "Cooled RF ablation", "Treatment of sacroiliac joint pain", Invited lectures and cadaveric instructor – Thoracic facet RFL. The Cleveland Clinic 16th Annual Pain Management Symposium, Las Vegas, NV February.
 2014 "Digital subtraction angiography" lecture, cadaver workshop in Cervical transforaminal epidural injection technique. American Society for Regional Anesthesia and Pain Medicine Annual Scientific Meeting San Francisco, California December.
 2016 "RF denervation of the hip and knee" Cadaveric Workshop. New York and New Jersey Societies of Interventional Pain Physicians Annual Meeting. Jersey City, NJ November.
 2016 "Migraine headache", "RF denervation of the knee" – Problem based learning discussion." "RF denervation of cervical and thoracic facet joints", "RF denervation of the hip and knee" Cadaveric workshops. American Society for Regional Anesthesia and Pain Medicine, San Diego, CA November.

- 2017 "Cervical and thoracic transforaminal epidural injections", "RF denervation of the hip and knee" Cadaveric workshops. American Society for Regional Anesthesia and Pain Medicine, Orlando, FL November.
- 2018 "Cervical radiculopathy and stenosis" Lecture. Florida Society of Interventional Pain Physicians, Palm Beach, FL July.
- 2018 "Professionalism in Interventional Pain Practice", "Critical review of Knee RF outcome literature", "New frontiers in discogenic pain", New Jersey/New York Societies of Interventional Pain Physicians. Jersey City, NJ November.
- 2018 "Reading and Interpretation of Spinal Imaging and EMG: Correlating studies to Pain Symptoms/Correlating MRI Findings to Pain Generators" Lecture CME. "Low back pain in 2018: New Insights and Better Outcomes/Notable Recent Evidence for Spine Interventions" Lecture discography and biacuplasty", "Direct and indirect lumbar decompression" Cadaver workshop . American Society for Regional Anesthesia and Pain Medicine 17th Annual Meeting, San Antonio, TX November.

SERVICE

Committee membership:

- 1992-1992 Medical Executive Committee, Operating Room Committee. Franklin Square Hospital, Philadelphia, PA.
- 1992-1995 Medical Executive Committee, Surgical Services Committee. Burdette Tomlin Memorial Hospital, Cape May Court House, NJ
- 2015- present Novitas Medicare JL - Clinical Advisory Committee Member
- 2021 Novitas Medicare – National subject matter expert testimony – Epidural steroid injections
- 2019-2021 CME Committee – Swedish Hospital, Englewood, CO

Exhibit L



ALAN WILSON
ATTORNEY GENERAL

March 18, 2022
(via e-filing and hand delivery)

The Honorable Patricia A. Howard
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: *State v. Owens*, Appellate Case No. 2006-038802;
State v. Sigmon, Appellate Case No. 2002-024388;
Sigmon v. State, Appellate Case No. 2021-000584.

Dear Ms. Howard:

The referenced appellate matters relate to capital cases in which execution notices had previously been issued but later stayed by this Court. In stay orders issued on June 16, 2021, this Court directed the State to notify the Court when:

... the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

Today, the Department of Corrections has advised me that they have met these conditions. (See Letter of Bryan P. Stirling, dated March 18, 2022, copy attached). Consequently, I am providing a copy of Mr. Stirling's letter to this Court to comply with the direction in the Court's June 16, 2021 orders.

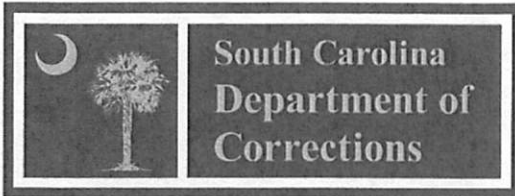
Sincerely,


Alan Wilson
Attorney General

cc: Bryan P. Stirling, Esquire. (via email only) (stirling.bryan@doc.sc.gov)
Barton J. Vincent, General Counsel, SCDC (via email only) (Vincent.Barton@doc.sc.gov)
Daniel C. Plyler, Esquire (via email only) (Daniel.plyler@smithrobinsonlaw.com)
Emily C. Paavola, Esquire (via email only) (Emily@justice360.org)
Megan Barnes, Esquire (via email only) (megan@iustice360sc.org)
Joshua S. Kendrick, Esquire (via email only) (josh@kendrickleonard.com)

(continued on next page)

Gerald W. King, Esquire (via email only) (Gerald_King@fd.org)
Elizabeth J. Peiffer, Esquire (via email only) (epeiffer@vcrrc.org)
Robert E. Lee, Esquire (via email only) (roblee@vcrrc.org)



HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

March 18, 2022

VIA E-mail and U.S. Postal Service
The Honorable Alan Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, S.C. 29211

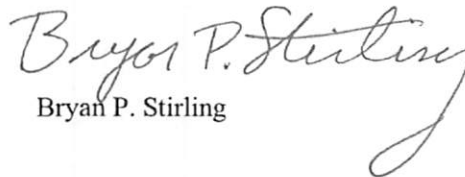
RE: *State v. Owens*, App. Case No. 2006-038802
State v. Sigmon, App. Case No. 2002-024388
Sigmon v. State, App. Case No. 2021-000584

Dear Attorney General Wilson:

This letter is in reference to the above cases and the Department of Corrections' ability to carry out its statutory duty pursuant to S.C. Code Section 24-3-530. On June 16, 2021, the Court issued two Orders in the above-referenced matters, which vacated previous execution notices and "direct[ed] the Clerk of the Supreme Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad." *State v. Sigmon*, App. Case No. 2002-024388 & *Sigmon v. State*, App. Case No. 2021-000584 (S.C. Sup. Ct. June 16, 2021); *State v. Owens*, App. Case No. 2006-038802 (S.C. Sup. Ct. Order dated June 16, 2021). In compliance with these Orders, the Department of Corrections has maintained the availability of electrocution and has developed and implemented the appropriate protocols and policies to carry out executions by firing squad. The Department of Corrections therefore is prepared to carry out any future order of execution by firing squad or electrocution. In accordance with section 24-3-530(B), upon receipt of a notice of execution from this Court, the Director of the Department of Corrections will determine and certify by affidavit whether the statutorily approved methods of execution are available. In compliance with the above Orders that direct the State to notify the Clerk of the Department's ability to carry out executions, I am so advising in order that you may notify the Clerk.

Should you have any questions or require additional information, please do not hesitate to contact me at 803.896.2967. Thank you.

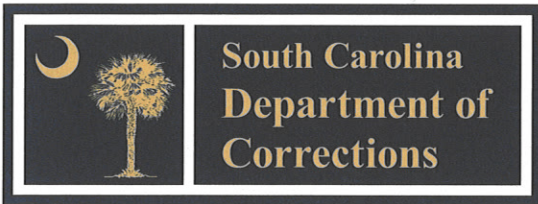
Sincerely,


Bryan P. Stirling

BPS/ndh

cc: The Honorable Henry McMaster

Exhibit M



HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

April 8, 2022

VIA E-mail and U.S. Postal Service
The Honorable Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29202

Re: Affidavit of Bryan P. Stirling

Dear Clerk Howard:

Pursuant to S.C. Code § 24-3-530 (B) please find attached an Affidavit from Bryan P. Stirling attesting to the available methods for execution in South Carolina. Thank you.

Sincerely,


N. Dayne Haile

Attachment

cc: Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
Robert Michael Dudek, Esquire
Susan Barber Hackett, Esquire
Alan McCrory Wilson, Esquire
Lindsey Sterling Vann, Esquire
Hannah Lyon Freedman, Esquire
John H. Blume, III, Esquire
Melody Jane Brown, Esquire
Barton Jon Vincent, Esquire
Salley W. Elliott, Esquire
Bryan P. Stirling, Esquire
Whitney Boykin Harrison, Esquire
Gerald Malloy, Esquire
Daniel Plyler, Esquire
Austin Reed, Esquire

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

The State,

Respondent,

v.

Richard Bernard Moore,

Appellant.

Appellate Case No. 2001-021895

Spartanburg County
(Trial Court Case No. 2000GS4200619, 2000GS4200617, 2001GS4202460)

**AFFIDAVIT OF BRYAN P. STIRLING
DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS**

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who
having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen and am of sound mind and competent to give this testimony.
2. I serve as the Director of the South Carolina Department of Corrections ("Department"), having first been appointed to this position in an interim capacity in October of 2013 and later confirmed by the South Carolina Senate as Director thereafter.
3. According to S.C. Code Ann. § 24-3-530, there are three statutorily approved methods of execution. Specifically, the General Assembly has approved electrocution, lethal injection, and firing squad as methods for carrying out a lawful sentence of death.
4. Pursuant to S.C. Code Ann. § 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution

#1 BPS

upon receipt of a notice of execution issued by the South Carolina Supreme Court.

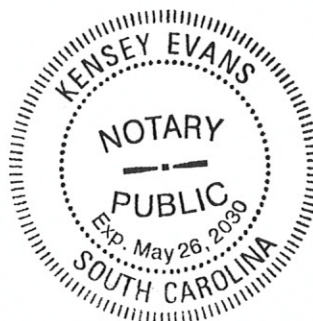
5. On Thursday, April 7, 2022, the Department received an Execution Notice issued by the Clerk of the South Carolina Supreme Court for Richard Bernard Moore in accordance with S.C. Code Ann. §§ 17-25-370, -380.
6. I hereby certify that, as of April 8, 2022, the only statutorily approved methods of execution available to the Department are electrocution and firing squad.
7. Despite diligent efforts, the Department has been unable to obtain or acquire the necessary drugs for execution by lethal injection.
8. The Department's efforts have included contacting manufacturers, all of which have refused to sell the drugs to the Department. The Department has also contacted various compounding pharmacists regarding compounding the drugs for the Department, but those efforts also have been unsuccessful. Additionally, the Department has attempted to purchase the bulk components for the drugs and have them compounded, and those efforts have likewise proven unsuccessful.
9. As a result, lethal injection is not available to the Department as a method of execution.
10. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling
Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 8th DAY OF April, 2022
[Signature] (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: May 26, 2030

#2 (PNS)



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH
 SIGMON, GARY DUBOSE TERRY, and
 RICHARD BERNARD MOORE,

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS' ANSWER TO
 PLAINTIFFS' THIRD AMENDED
 COMPLAINT**

Defendants Bryan P. Stirling, in his official capacity as Director of the South Carolina Department of Corrections (“Director Stirling”), and the South Carolina Department of Corrections (“SCDC”), and Intervenor-Defendant Henry McMaster, in his official capacity as Governor of the State of South Carolina (“Governor McMaster” or “Governor”) (collectively, “Defendants”), by and through the undersigned counsel, hereby answer and otherwise respond to Plaintiffs’ Third Amended Complaint for Permanent Injunctive Relief and for a Declaratory Judgment (“Complaint”). Defendants expressly reserve the right to file additional dispositive motions addressing some or all of the claims asserted in the Complaint. Except as expressly and specifically admitted, qualified, or explained herein below, Defendants deny each and every allegation in the Complaint and demand strict proof thereof. With respect to the numbered paragraphs of the Complaint, inclusive of footnotes, graphics, sources, and exhibits cited or incorporated therein, Defendants respond as follows:

FIRST DEFENSE

1. As to Paragraph 1 of the Third Amended Complaint, Defendants admit that Plaintiffs assert various challenges to 2021 S.C. Acts No. 43 (“Act 43”) but deny that Plaintiffs have stated plausible or cognizable legal claims and deny that Plaintiffs are entitled to any relief.

2. As to Paragraph 2 of the Third Amended Complaint, Defendants admit that each Plaintiff has been lawfully sentenced to death and that each Plaintiff is in the custody of SCDC. Defendants admit that SCDC and Director Stirling are charged, by statute, with carrying out those judgements and sentences. Except as expressly admitted, Defendants deny the allegations in this Paragraph.

3. As to Paragraph 3 of the Third Amended Complaint, Defendants admit the allegations in this Paragraph.

4. As to Paragraph 4 of the Third Amended Complaint, Defendants deny any allegations in this Paragraph that are inconsistent with the criminal convictions of each Plaintiff.

5. As to Paragraph 5 of the Third Amended Complaint, the legal authority in this Paragraph speaks for itself. Defendants deny any allegations in this Paragraph inconsistent with that authority.

6. As to Paragraph 6 of the Third Amended Complaint, Defendants admit that SCDC and its Director are charged, by statute, with carrying out those judgements and sentences. Except as expressly admitted, Defendants deny the allegations in this Paragraph.

7. As to Paragraph 7 of the Third Amended Complaint, SCDC’s duties are set forth in Title 24 of the South Carolina Code of Laws. Defendants deny the allegations in this Paragraph to the extent they are inconsistent with Title 24.

8. As to Paragraph 8 of the Third Amended Complaint, Director Stirling is the director

of SCDC. Defendants refer to the cited statutes in Title 24 regarding Director Stirling's duties and deny the allegations in this Paragraph to the extent they are inconsistent with Title 24.

9. As to Paragraph 9 of the Third Amended Complaint, the Governor's duties are established by the South Carolina Constitution and the South Carolina Code of Laws. Defendants refer to those authorities regarding the Governor's duties and deny the allegations in this Paragraph to the extent they are inconsistent with those authorities.

10. As to Paragraph 10 of the Third Amended Complaint, Defendants admit the Governor and SCDC Director are sued in their official capacities. Except as expressly admitted, Defendants deny the allegations in this Paragraph.

11. As to Paragraph 11 of the Third Amended Complaint, Defendants admit that Act 43 amended section 24-3-530 of the South Carolina Code of Laws. Defendants deny any allegations in this Paragraph inconsistent with Act 43.

12. As to Paragraph 12 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

13. As to Paragraph 13 of the Third Amended Complaint, Defendants refer to the pre-amended version of section 24-3-530 and deny any allegations in this Paragraph inconsistent with that authority.

14. As to Paragraph 14 of the Third Amended Complaint, Defendants admit the Governor signed Act 43 into law on May 14, 2021 and refer to Act 43. Defendants deny any allegations in this Paragraph inconsistent with Act 43.

15. As to Paragraph 15 of the Third Amended Complaint, Defendants refer to Act 43. Defendants deny any allegations in this Paragraph inconsistent with Act 43.

16. As to Paragraph 16 of the Third Amended Complaint, Defendants refer to the cited

authority in this Paragraph and deny any allegations inconsistent with this authority.

17. As to Paragraph 17 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

18. As to Paragraph 18 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

19. As to Paragraph 19 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority. Defendants further deny any attempts by Plaintiffs to shift any burden or rewrite Act 43.

20. As to Paragraph 20 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

21. As to Paragraph 21 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

22. As to Paragraph 22 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

23. As to Paragraph 23 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority. Defendants further note that Terry has now filed another PCR application, and the South Carolina Supreme Court has directed its Clerk “not to issue a notice of execution and allow the PCR matter to proceed as set forth in *In re Stays of Execution in Capital Cases*.” Am. Order, *State v. Terry*, No. 1997-006197 (S.C. April 6, 2022).

24. As to Paragraph 24 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

25. As to Paragraph 25 of the Third Amended Complaint, Defendants refer to the cited

authority in this Paragraph and deny any allegations inconsistent with this authority.

26. As to Paragraph 26 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

27. As to Paragraph 27 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

28. As to Paragraph 28 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

29. As to Paragraph 29 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

30. As to Paragraph 30 of the Third Amended Complaint, Defendants admit that South Carolina first used the electric chair in 1912. Defendants deny any remaining allegations in this Paragraph.

31. As to Paragraph 31 of the Third Amended Complaint, Defendants admit that the last execution by electrocution in South Carolina took place in 2008, at the election of the condemned inmate, and that the last execution by electrocution in South Carolina for which the inmate had no election was 1991. Defendants deny any remaining allegations in this Paragraph.

32. As to Paragraph 32 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

33. As to Paragraph 33 of the Third Amended Complaint, Defendants deny the

allegations in this Paragraph.

34. As to Paragraph 34 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

35. As to Paragraph 35 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

36. As to Paragraph 36 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

37. As to Paragraph 37 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

38. As to Paragraph 38 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

39. As to Paragraph 39 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

40. As to Paragraph 40 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

41. As to Paragraph 41 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

42. As to Paragraph 42 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

43. As to Paragraph 43 of the Third Amended Complaint, Defendants lack sufficient

knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

44. As to Paragraph 44 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

45. As to Paragraph 45 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

46. As to Paragraph 46 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

47. As to Paragraph 47 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

48. As to Paragraph 48 of the Third Amended Complaint, Defendants admit that in 2021 South Carolina adopted Act 43 and statutorily authorized SCDC to administer firing squad as a method of execution. Defendants deny the remaining allegations in this Paragraph.

49. As to Paragraph 49 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

50. As to Paragraph 50 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

51. As to Paragraph 51 of the Third Amended Complaint, Defendants lack sufficient

knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

52. As to Paragraph 52 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

53. As to Paragraph 53 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

54. As to Paragraph 54 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

55. As to Paragraph 55 of the Third Amended Complaint, Defendants admit that the firing squad typically involves multiple rifles aimed at the condemned inmate's chest. Defendants deny the remaining allegations in this Paragraph.

56. As to Paragraph 56 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

57. As to Paragraph 57 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

58. As to Paragraph 58 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

59. As to Paragraph 59 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

60. As to Paragraph 60 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

61. As to Paragraph 61 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

62. As to Paragraph 62 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

63. As to Paragraph 63 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

64. As to Paragraph 64 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

65. As to Paragraph 65 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations or implications inconsistent with this authority. Defendants specifically deny that lethal injection is currently available in this State as an alternative method of execution and that any consensus exists as to “the most humane method of execution.”

66. As to Paragraph 66 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

67. As to Paragraph 67 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

68. As to Paragraph 68 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

69. As to Paragraph 69 of the Third Amended Complaint, Defendants refer to the cited authority in this Paragraph and deny any allegations inconsistent with this authority.

70. As to Paragraph 70 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

71. As to Paragraph 71 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

72. As to Paragraph 72 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations in this Paragraph and therefore deny those allegations.

73. As to Paragraph 73 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

74. As to Paragraph 74 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

75. As to Paragraph 75 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority or with Act 43.

76. As to Paragraph 76 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

77. As to Paragraph 77 of the Third Amended Complaint, Defendants admit that Act 43 amended the procedures for execution established in section 24-3-530 of the South Carolina Code of Laws. Defendants deny any remaining allegations in this Paragraph.

78. As to Paragraph 78 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

79. As to Paragraph 79 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

80. As to Paragraph 80 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

81. As to Paragraph 81 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

82. As to Paragraph 82 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

83. As to Paragraph 83 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

84. As to Paragraph 84 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

85. As to Paragraph 85 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority. Defendants specifically deny that the *ex post facto* standard under the South Carolina Constitution is different from the *ex post facto* standard under the United States Constitution.

86. As to Paragraph 86 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

87. As to Paragraph 87 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

88. As to Paragraph 88 of the Third Amended Complaint, Defendants refer to the

authority cited in this Paragraph and deny any allegations inconsistent with that authority.

89. As to Paragraph 89 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

90. As to Paragraph 90 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority. Defendants specifically deny that lethal injection is currently available in this State as an alternative method of execution and that any consensus exists as to “the most humane method of execution.”

91. As to Paragraph 91 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

92. As to Paragraph 92 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

93. As to Paragraph 93 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

94. As to Paragraph 94 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

95. As to Paragraph 95 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

96. As to Paragraph 96 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

97. As to Paragraph 97 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

98. As to Paragraph 98 of the Third Amended Complaint, Defendants refer to the

authority cited in this Paragraph and deny any allegations inconsistent with that authority.

99. As to Paragraph 99 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

100. As to Paragraph 100 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

101. As to Paragraph 101 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

102. As to Paragraph 102 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

103. As to Paragraph 103 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

104. As to Paragraph 104 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

105. As to Paragraph 105 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

106. As to Paragraph 106 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

107. As to Paragraph 107 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

108. As to Paragraph 108 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

109. As to Paragraph 109 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

110. As to Paragraph 110 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

111. As to Paragraph 111 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

112. As to Paragraph 112 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

113. As to Paragraph 113 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

114. As to Paragraph 114 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

115. As to Paragraph 115 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

116. As to Paragraph 116 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

117. As to Paragraph 117 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

118. As to Paragraph 118 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

119. As to Paragraph 119 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

120. As to Paragraph 120 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

121. As to Paragraph 121 of the Third Amended Complaint, Defendants refer to the

authority cited in this Paragraph and deny any allegations inconsistent with that authority. Defendants lack sufficient knowledge or information regarding all other constitutions in the United States and therefore deny that allegation.

122. As to Paragraph 122 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

123. As to Paragraph 123 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

124. As to Paragraph 124 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

125. As to Paragraph 125 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

126. As to Paragraph 126 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

127. As to Paragraph 127 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority or with Act 43.

128. As to Paragraph 128 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

129. As to Paragraph 129 of the Third Amended Complaint, Defendants incorporate their responses to the preceding Paragraphs as fully set forth herein.

130. As to Paragraph 130 of the Third Amended Complaint, Defendants lack sufficient knowledge or information to admit or deny the allegations regarding Terry's alleged medical conditions. Defendants deny the allegations in this Paragraph that any medical conditions will

impact Terry's execution.

131. As to Paragraph 131 of the Third Amended Complaint, Defendants refer to the authority cited in this Paragraph and deny any allegations inconsistent with that authority.

132. As to Paragraph 132 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

133. As to Paragraph 133 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

134. As to Paragraph 134 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

135. As to Paragraph 135 of the Third Amended Complaint, Defendants deny the allegations in this Paragraph.

136. As to Paragraph 136 of the Third Amended Complaint, Defendants deny that Plaintiffs are entitled to any of the relief sought in their Prayer for Relief.

SECOND DEFENSE

137. Plaintiffs' Complaint should be dismissed under Rule 12(b)(6), SCRCP, for failure to state a claim upon which relief can be granted or failure to state facts sufficient to constitute a cause of action,

THIRD DEFENSE

138. Plaintiffs' Complaint should be dismissed as a substantively and procedurally improper attempt to delay Plaintiffs' executions or recast and advance claims, applications, or petitions foreclosed or prohibited by the Post-Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 *et seq.*, the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214, as amended, or other applicable state and federal laws.

FOURTH DEFENSE

139. Plaintiffs' Complaint should be dismissed under Rule 12(b)(1), SCRCP, for lack of subject-matter jurisdiction.

FIFTH DEFENSE

140. Plaintiffs are not entitled to injunctive relief of any kind because they are not likely to succeed on the merits, they cannot demonstrate irreparable harm, the balance of the equities does not tip in their favor, and an injunction would not be in the public interest.

SIXTH DEFENSE

141. The Act is constitutional and justified based on significant and legitimate state interests.

SEVENTH DEFENSE

142. Some or all of Plaintiffs' claims are barred by sovereign immunity and legislative immunity.

EIGHTH DEFENSE

143. In the event and to the extent any specific parts of the Act may be deemed unconstitutional, the remaining parts are severable.

NINTH DEFENSE

144. Some or all of Plaintiffs' claims fail because they raise nonjusticiable questions and seek relief that would violate the constitutional separation of powers and infringe upon the constitutional authority afforded to the Executive Branch.

TENTH DEFENSE

145. Plaintiffs lack standing to bring some or all of the claims raised in the Complaint and some or all of the claims asserted are either not yet ripe or are now moot.

ELEVENTH DEFENSE

146. Because Defendants have not violated and did not violate any clearly established federal or state statutory or constitutional rights and Defendants' actions are and were objectively reasonable in these circumstances, Defendants are entitled to qualified immunity as a complete bar to any federal claims in this action as a matter of law.

TWELFTH DEFENSE

147. Some or all of Plaintiffs' claims for declaratory relief fail because they are asking for the Court to declare alleged past conduct violated their rights, or in other words, that Defendants are liable to Plaintiffs.

THIRTEENTH DEFENSE

148. Defendants affirmatively assert generally all defenses to which they are or may be entitled under Rules 8(c) and 12(b), SCRCP.

FOURTEENTH DEFENSE

149. Defendants expressly reserve the right to amend their Answer and assert any further affirmative defenses at such time and to the extent warranted before, during, or after discovery or based on their investigation of the case or other relevant factual developments, and they hereby give notice of their intent to do so at the appropriate time.

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WHEREFORE, having fully answered and otherwise responded to Plaintiffs' Third Amended Complaint, Defendants respectfully requests that the Court dismiss Plaintiffs' Complaint with prejudice or otherwise deny the relief Plaintiffs seek, enter judgment in Defendants' favor on all counts, and award Defendants any other and further relief that the Court deems equitable, just, and proper.

Respectfully submitted,

s/Wm. Grayson Lambert

Thomas A. Limehouse, Jr. (S.C. No. Bar 101289)

Chief Legal Counsel

Wm. Grayson Lambert (S.C. Bar No.101282)

Senior Legal Counsel

OFFICE OF THE GOVERNOR

South Carolina State House

1100 Gervais Street

Columbia, South Carolina 29201

(803) 734-2100

tlimehouse@governor.sc.gov

glambert@governor.sc.gov

Counsel for Governor McMaster

s/Daniel C. Plyler

Daniel C. Plyler (S.C. Bar No. 72671)

Austin T. Reed (S.C. Bar No. 102808)

SMITH | ROBINSON

2530 Devine Street

Columbia, South Carolina 29205

(803) 254-5445

Daniel.Plyler@SmithRobinsonLaw.com

Austin.Reed@SmithRobinsonLaw.com

Counsel for Director Stirling and SCDC

April 29, 2022

Columbia, South Carolina

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF RICHLAND)

COURT OF COMMON PLEAS
2021-CP-40-02306

3
4 Freddie Eugene Owens; Brad)
Keith Sigmon; Gary Dubose)
5 Terry; and Richard Bernard)
Moore,)

6
7 Plaintiffs,)

8 vs.)

TRANSCRIPT OF RECORD

9 Bryan P. Stirling, in his)
official capacity as the)
Director of the South Carolina)
10 Department of Corrections;)
South Carolina Department of)
11 Corrections; and Henry)
McMaster, in his official)
12 capacity as Governor of South)
Carolina,)

13
14 Defendants.)

June 7, 2021
Columbia, South Carolina

15
16 B E F O R E:

17 THE HONORABLE JOCELYN NEWMAN, JUDGE.

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19 A P P E A R A N C E S:

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I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

JUNE 7, 2021

(WHEREUPON, the hearing commenced at
10:04 a.m.)

THE COURT: This is Freddie Eugene Owens and
Brad Keith Sigmon v. Bryan Stirling and South
Carolina Department of Corrections, as well as
Henry McMaster, in his official capacity.

We are here today on the Plaintiff's motion
for preliminary injunction.

MS. FREEDMAN: Good morning, Judge Newman.
Thank you very much for setting this hearing.

We are here today to address a crisis of the
Defendants' own making. They are attempting to
make South Carolina the first American jurisdiction
to revert to a more brutal, less humane, more
onerous method of execution after adopting lethal
injection as the primary method.

The Defendants are attempting to do so while
litigation is pending, and they are attempting to
do so pursuant to a judicially untested statute.
They are also attempting to do so pursuant to their
own interpretation of that statute.

As our filing yesterday indicates, we have
raised both a facial challenge and an as-applied
challenge to the language of the statute.

1 Pursuant to our facial challenge, we have
2 argued that there is no constitutional application
3 of this statute because the language, the meaning
4 of the word *available* is so vague as to render the
5 statute itself an impermissible delegation of
6 legislative power.

7 A preliminary injunction is warranted in these
8 circumstances. There can be no reasonable argument
9 that the Plaintiffs would not suffer permanent
10 harm, that they would not suffer this harm without
11 any legally available remedy if they are executed
12 while this litigation is pending and a court were
13 to later determine that the statute is
14 unconstitutional.

15 So under our facial challenge to the statute,
16 we have argued that there really is no
17 constitutional application because the word
18 *available* itself is subject to so many different
19 definitions and is so context-dependent that there
20 is no way for a court to determine an intelligible
21 principle.

22 The Defendants suggest that the Court, or that
23 they perhaps could cure this impermissible
24 delegation by simply giving the word *available* a
25 dictionary definition; but that can't be right

1 because the word *available*, as defined in the
2 dictionary, has so many different meanings.

3 So, for example, Merriam-Webster defines the
4 word *available* to mean "present or ready for
5 immediate use," but it could also mean "accessible
6 or obtainable; qualified or willing to do"
7 something, or to assume a responsibility; present
8 in such chemical or physical form as to be usable."

9 *Available* is therefore highly
10 context-dependent, and the statute here lacks any
11 context. The result is that Defendant Stirling is
12 left to interpret the statute himself and decide
13 not just what the statute means, but what the law
14 is.

15 The Defendant Stirling has been delegated
16 under this statute the authority to say what method
17 of execution is the law of the land in South
18 Carolina, and that is an impermissible delegation.

19 As we explained in our filing yesterday,
20 Arkansas had a similar situation under I think what
21 is objectively a much more detailed lethal
22 injection statute, and the Arkansas Supreme Court
23 held that that was impermissible delegation, that
24 the same is true here. But even if the Court did
25 not agree with our facial attack on the statute, we

1 still have now raised an as-applied challenge based
2 on the Defendant's actions while this litigation
3 has been pending. They have already interpreted
4 the statute according to their own use, and in a
5 way, the public does not have any understanding of
6 how they define the word *available*; we have not
7 heard them try and define the word *available*; and
8 there really is no definition that they can offer.
9 All we know at this point is that, according to
10 them, the word *available* means that they must carry
11 out these executions by electric chair immediately;
12 but that can't be right.

13 We also know that they are in the process of
14 developing a firing squad, and we also know that
15 lethal injection drugs are at least available in
16 other states. Since 2013 when Defendants say they
17 ran out of lethal injection drugs, 13
18 jurisdictions -- 13 states plus the federal
19 government have carried out 207 lethal injections,
20 including one since this litigation was filed
21 in Texas.

22 And so at a bare minimum, their interpretation
23 of the meaning of the word *available* has to
24 encompass something beyond how they read it. At a
25 bare minimum, the firing squad has to be considered

1 an "available option" under the statute. And I
2 think that that really just highlights the problem
3 both with the statute on its face. It delegates to
4 Director Stirling this massive legislative task of
5 defining what method of execution is South
6 Carolina's prescribed method; but it also
7 highlights the problems with the statute as they
8 have interpreted it. We have no way of knowing
9 what intelligible principle they are applying to
10 derive this interpretation of *available*. They have
11 offered none. Nobody, not the public, not the
12 Court, nobody has any understanding of how they
13 defined it.

14 Only eight states, including South Carolina,
15 have even retained the electric chair as an
16 available option on their books, and only four
17 jurisdictions, including South Carolina, authorize
18 the firing squad. And I think that this simple
19 fact highlights that we are really in a position to
20 return to a prior era.

21 And South Carolina, as I mentioned, would be
22 the very first jurisdiction in the United States to
23 go back to a prior method of execution that
24 everyone I think by an objective reading would
25 agree is less humane, more onerous, and more brutal

1 than lethal injection.

2 The Defendants have not really disputed our
3 argument that the firing squad and the electric
4 chair are less humane than lethal injection. Their
5 argument really is that the Eighth Amendment
6 doesn't bar those methods of execution.

7 We have challenged the electric chair under
8 the Eighth Amendment in a different pending
9 litigation, so we disagree with their arguments on
10 the Eighth Amendment, but that is beside the point.
11 For the purposes of the ex post facto clause or
12 retroactive legislation, our argument does not
13 depend on the Court's adopting of that Eighth
14 Amendment analysis. Instead, the argument simply
15 is that those methods of execution that the
16 legislature has adopted are less humane, are more
17 onerous, or in the words of Calder and Malloy, put
18 the Plaintiff at a disadvantage. There can really
19 be no dispute that that is the case, that the
20 electric chair is a disadvantage for the Plaintiffs
21 relative to the prior statute that authorized them
22 to choose between lethal injection and
23 electrocution.

24 And as the record stands before Your Honor
25 today, we have put into the record affidavits from

1 experts who have explained the brutality of the
2 electric chair. And on the other side there is
3 nothing. They have not offered any expert
4 information about -- to sort of rebut our argument
5 that the electric chair is much more brutal than
6 lethal injection.

7 I think one way that the Court could think
8 about our argument vis-a-vie retroactivity and ex
9 post facto as it compares to the Eighth Amendment
10 is the example that we raise in our reply.

11 Consider a situation where a state has a
12 statute that sets parole eligibility at 20 years.
13 The legislature amends that statute to set parole
14 eligibility at 30 years. There can't really be a
15 dispute under those circumstances, that applying
16 the 30-year parole eligibility statute
17 retroactively to somebody who was sentenced under
18 the 20-year statute would be an ex post facto
19 violation; but both of those punishments remain
20 constitutional.

21 The question does not depend on whether the
22 underlying punishment is itself constitutional.
23 The question is whether it is more onerous or
24 whether it disadvantages the Plaintiff. And it is
25 our position that that is exactly what the statute

1 does...it places the Plaintiff at a disadvantage
2 relative to the prior circumstances.

3 And for those reasons, we would ask Your Honor
4 to enter a preliminary injunction to maintain the
5 status quo pending this litigation so that Your
6 Honor has an opportunity to explain for the parties
7 and for the public what this statute means.

8 THE COURT: Thank you.

9 MS. FREEDMAN: Thank you.

10 THE COURT: Yes, sir?

11 MR. LAMBERT: Good morning, Your Honor. I'm
12 Grayson Lambert, on behalf of Governor McMaster.
13 There is a lot in these papers you have read in the
14 last couple of days and a lot to unpack here, but
15 the fact that there is so much doesn't mean there
16 is not an answer that is right here. And that
17 answer is to deny the motion to dismiss.

18 And before even getting into the merits, I
19 think it is important to address where this case is
20 and where all of these other cases are.

21 There is obviously this lawsuit challenging
22 Act 43. There is a separate lawsuit filed in
23 Federal District Court challenging electrocution of
24 the Eighth Amendment. Both Mr. Sigmon and
25 Mr. Owens have asked the Supreme Court to stay

1 their execution notices, and now Mr. Sigmon has
2 filed a separate state petition with the Supreme
3 Court raising an ineffective assistance of counsel
4 claim that has already largely been rejected by the
5 Fourth Circuit in his federal habeas proceeding.

6 The Supreme Court is, Your Honor, aware of the
7 act. It is aware of the situation of Mr. Owens and
8 Mr. Sigmon after the execution notices were issued.
9 The Supreme Court is aware of the debate over what
10 methods might be used here. The Court issued a
11 letter to Director Stirling asking for more details
12 about why lethal injection and firing squad are not
13 available, and the Supreme Court has before it the
14 copies of these pleadings raising these issues.

15 Whether this is framed as a preliminary
16 injunction in this court or a stay of the execution
17 notices in the Supreme Court, the end result is the
18 same, and it is to put a stop to the scheduled
19 executions of Mr. Sigmon and Mr. Owens. That is a
20 decision that should belong to the Supreme Court
21 that issued the execution notices. Ministerial or
22 not, they are orders -- notices and orders of that
23 court, and therefore it is that court's prerogative
24 as the highest court in our judicial system to
25 decide whether or not to stay those notices.

1 Therefore, simply, this Court does not have to
2 get into the merits of this, Your Honor. These are
3 questions that can be addressed by the Supreme
4 Court that it will necessarily have to consider as
5 it considers the state petitions both of the
6 Plaintiffs here have filed, and that is the right
7 form in which this should be brought.

8 Quite frankly, why this lawsuit wasn't brought
9 under the Court's original jurisdiction to begin
10 with is a question that hasn't been answered; but
11 putting that issue aside and getting to the merits
12 themselves, there are four challenges the
13 Plaintiffs have raised to the act.

14 There is a due process vested statutory right
15 that we didn't hear about this morning. There is a
16 vagueness argument that we also didn't hear much
17 about the way the act works. The Plaintiff focused
18 on two others, the ex post facto challenge and this
19 non-delegation one. And I'll take them in the
20 order the Plaintiff did this morning and start with
21 the non-delegation doctrine.

22 It is black letter law that when a court is
23 interpreting the statute and there is an undefined
24 term, a court looks to the ordinary dictionary
25 definition of the word as it was understood at the

1 time the act was passed.

2 *Available* has a meaning we can all look up in
3 the dictionary. And, of course, like many other
4 words, *available* may have more than one definition,
5 but if having more than one definition is the test
6 for a term that gets too much delegation, pretty
7 much every provision of the South Carolina Code is
8 going to be unconstitutional. You have to look for
9 the definition that fits in that particular
10 context.

11 In this act, particularly if you look at
12 Subsection B, it is upon receipt of the execution
13 notice. So there is a time. It says, Subsection
14 B, Upon receipt of the notice of execution, the
15 Director of the Department of Corrections shall
16 determine and certify by affidavit under penalty of
17 perjury to the Supreme Court whether the methods
18 provided in Subsection A are available.

19 So the question isn't just in the abstract
20 what does *available* mean, it is what does *available*
21 mean here. And it means if it can be used at that
22 time. This isn't a question of could a firing
23 squad be used at some point, could the lethal
24 injection drugs be obtained at some point, the
25 question is now, when this notice was issued by our

1 Supreme Court, what could the Department of
2 Corrections use to carry out the sentence that was
3 imposed by a jury and upheld on direct and
4 collateral appeals.

5 And *available* in this context is clear, Your
6 Honor. It has a knowing meaning of "can they do
7 this." And obviously the Supreme Court has asked
8 questions in this particular context of what does
9 *unavailable* mean for these two, but that is a
10 question the Supreme Court is clearly looking for
11 an answer and going to deal with itself.

12 But the Supreme Court doesn't seem to suggest
13 in its letter to Director Stirling that it doesn't
14 know what *unavailable* or *available* mean, it is
15 simply asking why is this not available now,
16 indicating that the Supreme Court understands what
17 that word means in this particular context.

18 The Arkansas case, Your Honor, on which the
19 Plaintiffs rely, admittedly supports them. The
20 problem is, it is an outlier in the case law. The
21 State of Texas explicitly rejected this argument.
22 And the United States Supreme Court, when it was
23 considering the Kentucky protocols, in Baze in
24 2008, acknowledged that those protocols were set by
25 correction officials and never even suggested that

1 there was a potential non-delegation clause with
2 that.

3 Moreover, the Arkansas Supreme Court in its
4 discussion of non-delegation noted that its
5 decision was in conflict with other states, but
6 their Arkansas non-delegation law was different
7 than other states, and therefore compelled the
8 particular result there.

9 There is no such similar non-delegation law in
10 South Carolina. Our doctrine draws much more from
11 the U.S. Supreme Court case law that it would never
12 impose on Congress the obligation to set the
13 specific protocols or drugs or other things.
14 Congress enjoys a much broader ability to delegate
15 certain policy making to various executive
16 departments. The statute, therefore, is not an
17 unconstitutional delegation of power.

18 That leaves the Plaintiffs with their ex post
19 facto challenge. And they make a big deal of, This
20 is an ex post facto challenge, this is not an
21 Eighth Amendment challenge. And they are right
22 about that. But to prove an ex post facto
23 challenge that is going to win, they are going to
24 have to show that another method of punishment is
25 so much more severe than an alternative method as

1 to make the method they are challenging effectively
2 unconstitutional.

3 So the punishment -- and correct me -- the
4 punishment to which Mr. Sigmon and Mr. Owens were
5 sentenced was death. It was not death by a
6 particular method. The State is able to carry out
7 that sentence through a lawful means. And the
8 United States Supreme Court noted that in Glossip
9 about five years ago that since Gregg reinstituted
10 the death penalty in the 70's, that court has never
11 invalidated a state's chosen procedure for carrying
12 out a sentence of death as the infliction of cruel
13 or unusual punishment.

14 As for the methods themselves, the Plaintiffs
15 have repeatedly cited back to Baze from 2008, which
16 followed Kentucky's three-drug protocol, where the
17 United States Supreme Court said, We come now to
18 where lethal injection is the most humane method,
19 and that is the progress of the death penalty. It
20 has defined the most humane method possible. And
21 indeed it is. That is why electrocution replaced
22 hanging, that is why lethal injections came.

23 What the Plaintiffs are asking you to ignore,
24 Your Honor, is the developing case law and the
25 calls from courts and from scholars to re-evaluate

1 the death penalty. No one less than Justice
2 Sotomayor stated in a denial from certiori -- a
3 dissent from denial of certiorari -- that lethal
4 injection was, she noted, that opted as more
5 humane, but in what she called a cruel irony, it
6 may turn out to be our most cruel method yet.

7 There is a great debate amongst courts,
8 amongst scientists, as to what is more humane and
9 what is less humane. That is why the Supreme Court
10 has said: For someone to prove one method is more
11 burdensome puts the Plaintiff at a disadvantage is
12 unconstitutional, it has to be a clear and
13 considerable showing of a significant reduction of
14 a risk of pain. And that is because the Supreme
15 Court has recognized, courts do not have the
16 expertise to get into these scientific debates of a
17 little bit here or a little bit there, but that is
18 why states are entitled to, as the Supreme Court
19 said, deference in determining their method of
20 execution.

21 Your Honor, this idea, I think it is
22 important, that the Plaintiffs have said, We are
23 going backwards. South Carolina is regrading --
24 redressing -- regressing -- if I can find the right
25 word -- regressing to a crueler, more inhumane

1 method.

2 Well, it is interesting as Justice Sotomayor
3 has said multiple times, We need to hear a
4 challenge that firing squad is significantly less
5 painful than lethal injection. Justice Kavanaugh
6 concurs and said, Firing squad should be a method
7 we consider. Multiple U.S. Circuit Judges and
8 Courts of Appeals have said, Firing squad looks
9 like it may be a better option.

10 This attempt to paint firing squad as more
11 barbaric or paint electrocution more barbaric than
12 lethal injection because it may look less pretty to
13 the outside observer misses the point of what the
14 actual analysis is, and that is focused on the
15 inmate who is subject to the execution.

16 THE COURT: Wasn't that an unsettled question,
17 though? There is debate about it, and there is
18 suggestion that, you know, perhaps this needs to be
19 looked into, and maybe a firing squad is not as
20 inhumane as people think; but that is an unsettled
21 question, is it not?

22 MR. LAMBERT: It is certainly a question the
23 United States Supreme Court has left open, but
24 because there is that debate, the Plaintiffs are
25 not likely to show a significant reduction in the

1 risk of pain to succeed on their challenge.

2 THE COURT: Well, if it is unsettled question,
3 right, I concede that that makes it difficult to
4 evaluate the likelihood of success on the merits of
5 the claim. However, wouldn't this litigation be
6 exactly what the Supreme Court justices are
7 inviting?

8 MR. LAMBERT: Your Honor, ultimately this is a
9 question they are seeking to take up. This is not
10 the vehicle in which to do it. Simply because, as
11 I mentioned at the outset, the posture of this
12 case -- if that is a question our Supreme Court
13 wants to take up, it could do that in the various
14 proceedings there, but then it gets back to the
15 issue at the beginning of, you know: Is this Court
16 able to effectively stay a Supreme Court order?

17 But I would note that these challenges now are
18 all reminiscent of the last minute flurry of
19 lawsuits that the Supreme Court has said shouldn't
20 happen. And I grant the Plaintiffs, you know, that
21 the firing squad is a relatively new method, but
22 this is one of -- relatively new method for South
23 Carolina, let me clarify. Firing squad -- that is
24 a useful point, Your Honor -- firing squad was
25 first used in the United States in 1608 in the

1 Colony of Virginia. Firing squad was a common
2 method, particularly in military executions,
3 throughout the 18th century. The idea that the
4 firing squad could violate the original
5 understanding of the Eighth Amendment is, I think,
6 untenable. And the Supreme Court has said -- and,
7 Your Honor, I see you are looking at me with some
8 skepticism, but I think the question is, What is
9 the standard on which these are evaluated? And we
10 are used to hearing the Eighth Amendment claim
11 raised in the Dulles language of evolving standards
12 of decency.

13 I think there are two responses to that. The
14 first one is a legal one, and that is simply that,
15 in Baze, Glossip, and Bucklew, the Supreme Court's
16 three most recent cases on method of execution
17 challenges, it has not applied that standard and it
18 has moved into looking at the original
19 understanding of the Eighth Amendment as to what is
20 a cruel and unusual punishment such that this
21 punishment would be somehow categorically different
22 than what the Plaintiff perceives as a sentence of
23 death.

24 And in those -- that original understanding --
25 the Court has said, We are worried about

1 punishments that are intended to inflict pain or
2 that super add pain beyond what is required to
3 carry out a sentence of death.

4 The Supreme Court has said, You are not
5 entitled to a painless execution. And no one is
6 entitled to necessarily a painless death. And then
7 most people don't enjoy that.

8 The second point on evolving standards of
9 decency is the idea that it must eliminate methods
10 of execution, views it as a wig history of saying,
11 We must be limiting methods. We must be reducing
12 capital punishment generally.

13 The evolution can go in various ways. And
14 perhaps the evolving standards of decency of this
15 state and of the country generally are to, We need
16 methods other than lethal injection. So we are
17 looking at using electrocution, we are looking at
18 firing squad. And that is the way society is
19 evolving as to what we think is a fair and proper
20 method of carrying out a validly imposed death
21 penalty.

22 So simply falling back to the old evolving
23 standards test, I don't think it does the
24 Plaintiffs here a lot of good as to method, because
25 evolution doesn't necessarily imply a one track

1 direction. It can go multiple ways.

2 THE COURT: Well, then that addresses the
3 facial challenge to the statute, but -- and I know
4 we are a little bit all over the place --

5 MR. LAMBERT: Sure.

6 THE COURT: -- but what about the as-applied
7 to these two inmates?

8 MR. LAMBERT: These two inmates were sentenced
9 to death for first degree murder. Mr. Owens, I
10 believe I'm keeping this straight, shot a
11 convenience store clerk in the head after she
12 couldn't open the safe; and Mr. Sigmon beat his
13 ex-girlfriend's parents to death with a baseball
14 bat. They were sentenced to death under 16-3-20,
15 and the sentence that will be carried out is death.
16 They were not sentenced to death by a particular
17 method. And whatever method the state uses in this
18 context, all three of them are constitutionally
19 permissible penalties. And the Plaintiffs are
20 unlikely to show that one is intended to add pain
21 or cause pain.

22 This concept of adding pain or intending to
23 harm the Defendants comes from medieval and then
24 slightly later England, when certain people were
25 sentenced to death by methods designed to make them

1 suffer. Traitors were disemboweled. They had
2 their intestines cut open and burned in front of
3 them. They were drawn and quartered and their
4 limbs sent across the country as a warning to
5 others. They were made an example of in a
6 particularly harsh and barbaric way.

7 That is not the case here. The state is
8 looking for efficient and as painless as possible
9 ways to carry out a death sentence. And all of the
10 methods the state has in the statute and the one
11 method that is available to the state now is a
12 method that the United States Supreme Court has
13 never held as unconstitutional and a method that
14 our State Supreme Court has never held as
15 unconstitutional.

16 So what this Court would be saying by entering
17 a preliminary injunction, beyond -- it has the
18 authority to effectively stay the Supreme Court
19 order is, the United States Supreme Court and State
20 Supreme Court's decision upholding sentences of
21 electrocution are wrong and are likely to be
22 overturned.

23 The Plaintiffs are simply not likely to make
24 such a showing, and therefore they have not met
25 that required element of a likelihood of success on

1 the merits.

2 THE COURT: Why are the other two methods
3 unavailable?

4 MR. LAMBERT: Your Honor, I will leave that to
5 my co-counsel who represents SCDC. He can answer
6 that better than I.

7 THE COURT: Understood.

8 MR. LAMBERT: Your Honor, if you don't have
9 any more questions, I will let Mr. Plyler take it
10 home.

11 THE COURT: Mr. Plyler?

12 MR. PLYLER: Your Honor, may it please the
13 Court?

14 THE COURT: Yes, sir.

15 MR. PLYLER: I am Daniel Plyler. I am here on
16 behalf of Director Stirling and the South Carolina
17 Department of Corrections.

18 With the Court's indulgence, and I know you
19 have already heard a lot, but I have, you know, got
20 a duty to do for my client here, so.

21 THE COURT: I've got plenty of time.

22 MR. PLYLER: Thank you. Me too.

23 So I would like to refocus this for a minute,
24 because I think we all jumped the shark, so to
25 speak. This is a motion for temporary restraining

1 order. It is consistently held to be a drastic
2 remedy that should only sparingly be issued by the
3 Court. That is the first thing I think we need to
4 remember.

5 In order to get a preliminary injunction like
6 they are requesting, Your Honor, they have got to
7 establish three things. One is irreparable harm.
8 Putting that aside for a minute, let's talk about
9 Element Number 2, which is likelihood of success on
10 the merits. The last one is no adequate remedy at
11 law. I will put that one aside for a moment as
12 well and focus on Number 2, which I think is where
13 Your Honor's focus has to be with this sort of
14 challenge, to just kind of cut it to the chase.

15 When we talk about the likelihood of success
16 on the merits, it is the likelihood of success on
17 the merits of the lawsuit they brought. It is not
18 of other litigations, which by the way they have
19 brought, for instance, I am supposed to be in front
20 of Judge Harwell on Wednesday to argue the
21 constitutionality of the method of execution where
22 now they are challenging the method of execution
23 there under these same inmates' names.

24 That is not what is before Your Honor. What
25 is before Your Honor was an amendment to a statute,

1 and that statute is the method of execution. It is
2 no secret to anybody in this room that the reason
3 the General Assembly took that up is a national
4 stalemate that was occurring. And that stalemate
5 was the unavailability or access to certain drugs
6 to carry out lethal injection, pentobarbital being
7 kind of the most relevant one.

8 The stalemate was happening all across the
9 country. I understand they talked about 13
10 jurisdictions that have been able to do this.
11 Well, the federal government has different
12 resources and different rules that they operate
13 under, and they carried out the vast majority of
14 the executions they mentioned to you, at least in
15 the most recent time.

16 Tennessee was facing a similar challenge.
17 They amended their statute in 2014 almost in the
18 same way we did.

19 Since 2018, we have carried out five
20 executions, all five by electrocutions. All
21 five -- in fact, there is a sixth man who has
22 selected execution, according to media articles.
23 They growingly cite to the science that says,
24 Lethal injection might be the most torturous of all
25 of these methods of execution.

1 There is a paralytic that we provide that just
2 keeps everybody else from seeing the agony of the
3 inmate as they are going through this process.
4 That is the cruel irony that Justice Sotomayor was
5 talking about.

6 This is a New York Times article that came out
7 in February of 2020 talking about Nicholas Sutton,
8 who is the most recent person to be executed by
9 electrocution by Tennessee.

10 Interestingly enough, if you look at the
11 amendment to the statute -- and it is not just
12 Tennessee, Your Honor. It is Tennessee, Utah,
13 Mississippi, Oklahoma, and Alabama that have all
14 recently -- and when I say recently, within the
15 last ten years -- updated their methods of
16 execution statutes. They use terms like *available*
17 and *unavailable*. I mean, this idea that *available*
18 is some sort of secret word that we don't
19 understand and we need the Courts to weigh in on,
20 I'm sorry, it is just -- it is incredible.

21 Your Honor, he mentioned -- Mr. -- Grayson
22 mentioned to you that we have to go back and look
23 at all sorts of statutes if the word *available*
24 becomes subject to interpretations.

25 The one that I think is incredibly relevant is

1 24-3-30, which has to do with the Department of
2 Corrections itself. I am reading from it. Under A
3 it says: The Department may designate as a place
4 of confinement an available, a suitable, and an
5 appropriate institution or facility, including but
6 not limited to...and it goes through a whole bunch
7 of different types. The word *available* is there.

8 If we take their argument to its logical
9 extent, Your Honor, let's say we build a brand new
10 prison tomorrow, the most up-to-date, high-tech
11 prison we have ever seen, with video conferencing
12 in the cells for them to talk to their loved ones,
13 the most comfortable beds, you know, access to all
14 the greatest medicine and mental health treatments,
15 and then I'm convicted the day after. Do I have a
16 constitutional challenge here to say, Wait a
17 minute, you have got to send me to the new fancy
18 prison, and the fact that the Director of the
19 Department of Corrections says that is not
20 available to me, and instead of sending me to Lee
21 Correctional where it is not as cushy, where it is
22 going to be more painful, where I might get
23 stabbed -- I'm sure Your Honor is well aware of all
24 the lawsuits going on about that -- does that all
25 of a sudden become an ex post facto challenge?

1 Because that is really what this case is about is,
2 was the change in the method of execution statute,
3 does that create an ex post facto violation?

4 With all due respect to opposing counsel, I
5 don't think their due process challenge carries any
6 water here. The due process right that he had was
7 to the protected interest in life, because that was
8 the penalty that was handed down by a jury and a
9 judge in the State of South Carolina. Okay? That
10 is the punishment. That is the penalty. And those
11 due process rights have been well vetted and well
12 explored over the course of approximately 20 years
13 for both of these individuals at multiple levels of
14 judicial review, and every time it has been found
15 that he got due process.

16 There is no due process right about this
17 choice between methods of execution. And I do
18 think it is incredibly telling in one of their
19 exhibits -- I believe it is Exhibit A to their
20 complaint, Judge -- they put in the jury
21 instructions for Mr. Sigmon, if I'm not mistaken,
22 as well as the sentencing sheet for Mr. Sigmon, and
23 then two sentencing sheets for Mr. Owens. In the
24 jury instructions that they provided, it says:
25 Death penalty shall be administered by

1 electrocution or lethal injection. *Or*. It doesn't
2 say, Hey, if y'all say he gets the death penalty,
3 this is the way it will be carried out. It is an
4 *or*. The sentencing sheet says, Lethal injection *or*
5 electrocution. The 1995 version of the statute
6 says, Electrocution *or* lethal injection.

7 In fact, if you look at the whole 1995 version
8 and go to Subpart C, the General Assembly was
9 cognizant of this idea that lethal injection was a
10 relatively new method of execution. And if you
11 want to get really deep into the Supreme Court
12 opinions on this, you know, they talk about you
13 didn't even have to adopt lethal injection as a
14 possible method because there is a legitimate
15 penological interest in not essentially being a
16 guinea pig and trying out these new methods which
17 we don't know how it is going to happen down the
18 road what we are going to learn and, again, going
19 back to cruel irony that Justice Sotomayor points
20 out. We may be learning that we thought this was
21 the best way to do it and it is not.

22 It is not like we haven't made similar
23 mistakes over the course of our history. I would
24 point you to asbestos as Exhibit A. Greatest
25 building material ever made, going to change the

1 world. Well, it sure did. A lot of people, a lot
2 of families destroyed over this great building
3 material that we just thought was so fantastic.
4 Sometimes science isn't the answer.

5 Getting back to the ex post facto challenge
6 here, where I have been building to with all this,
7 Your Honor, the ex post facto challenge to be
8 successful, essentially you have got to put it in
9 one of two categories. It would make something
10 criminal that wasn't previously criminal. And
11 after we changed the statute and made it a crime,
12 now we are going to punish you for something you
13 did before it was a crime. Well, that is obviously
14 not applicable here.

15 The other one is that it has increased the
16 punishment that you could have gotten for that
17 crime. That is the example Ms. Hannah -- is it
18 Freedman? I'm sorry, I don't want to say your last
19 name wrong.

20 MS. FREEDMAN: Freedman.

21 MR. PLYLER: Ms. Freedman says, which is this
22 idea that, Well, you were parole eligible at ten
23 years in when you were convicted, but we have
24 increased it now to 30 years in. Well, that is a
25 measurable increase in your punishment. You are

1 likely to serve more time in prison. I don't think
2 anybody is going to sit here and say that, If you
3 got a five year sentence but now we have changed
4 the statute and made it punishable by ten years and
5 we are going to increase your punishment to ten
6 years, that that wasn't increasing the punishment,
7 because the punishment is the length of time you
8 are going to be in prison.

9 The punishment here hasn't changed. The
10 punishment that has never been enacted yet, by the
11 way, is the death penalty. That is it. That is
12 the punishment. And it hasn't changed.

13 So now the question is, If you can't establish
14 a change in the punishment, then how do you get
15 likelihood of success on the merits with an ex post
16 facto challenge?

17 It doesn't fit, which also brings us to the
18 third element: No adequate remedy at law. Well,
19 their own pleadings belie that. They filed in
20 Federal Court in front of Judge Harwell challenging
21 the constitutionality of the method of execution,
22 which, really, if you think about everything that
23 has been argued in front of you until I stood up,
24 that is what everybody is arguing about. Is that
25 method constitutional? Is this method

1 constitutional? Firing squad goes into 15 seconds.
2 A lethal injection takes over 20 minutes. Which
3 one is more torturous? Those are the things they
4 have been arguing with you about. That is what we
5 are going to argue with Judge Harwell on Wednesday,
6 but that is not what has been pled in front of you.
7 What has been pled in front of you is the statute
8 itself, 1995 version versus the 2021 version of
9 that statute.

10 If you read that statute, you will see the
11 methods of executions were available to carry out
12 death sentences in 1995, lethal injections and
13 electrocution. The methods of executions available
14 in 2021 to carry out a death penalty are
15 electrocution, lethal injection, they added firing
16 squad. But you can only get firing squad if you
17 choose it.

18 THE COURT: Well, I've long thought that -- I
19 get that the reason that this has become a national
20 story is because of the firing squad, but I have
21 long thought that that is a bit of a red herring in
22 this case.

23 MR. PLYLER: Thank you.

24 THE COURT: You know, that is what has gotten
25 the national attention, but the real issue is

1 changing the default method.

2 MR. PLYLER: That is where I'm getting, Your
3 Honor. Thank you for speeding me along there. I
4 appreciate it.

5 So, under the original statute, the 1995
6 version, if you read the statute closely, it talks
7 about, Execution shall be carried out by
8 electrocution or, at the election of the condemned
9 person, lethal injection. Okay?

10 The loop -- and I have called it a bit of a
11 loophole in the statute because of what has
12 developed and it was not contemplated back in 1995,
13 but the legal loophole here is that is says, If you
14 waive that right -- which, by the way, that is what
15 Mr. Sigmon did -- if you waive that right, then it
16 must be carried out by lethal injection, because
17 the thought at the time was that is the most humane
18 way to carry it out, and if you would have elected,
19 we assume that is what you would have elected.

20 But if you fast-forward down to Subpart C of
21 the 1995 version, there is a savings clause that
22 was put in that shows the General Assembly
23 contemplated this idea that lethal injection might
24 not always be available. And, granted, the way
25 they worded it is, if it was ever found

1 unconstitutional, then it shall be carried out by
2 electrocution.

3 What they didn't -- what they never
4 contemplated is that in a free market economy,
5 after, according to the Plaintiff's counsel,
6 everyone agrees this is the most constitutional and
7 humane way to carry out a death penalty, that being
8 lethal injection, that in a free market economy
9 what we are trying to pursue -- everybody says this
10 is the most humane way to do this -- we would
11 somehow be shut down from ever getting access to
12 these drugs. That was never contemplated by the
13 General Assembly. And why would you not sell a
14 product that you continue to manufacture to someone
15 like South Carolina Department of Corrections?
16 Well, Your Honor knows the answer to that. And
17 that is, there were huge lobbying efforts against
18 these manufacturers. Ironically enough, I think
19 some of the same organizations that are now here in
20 front of you. There is records. When we talk
21 about the shield statutes that would have protected
22 the identity of the people manufacturing these
23 drugs, selling these drugs, compounding these
24 drugs, Justice 360 lobbied against those, did not
25 want those shield statutes. And that is one of the

1 reasons the Department of Corrections, despite
2 multiple efforts, can't get their hands on these
3 drugs. Okay?

4 So we never contemplated that in 1995. The
5 amendments to the statute, the clear legislative
6 intent here is, We are not going to allow that to
7 prevent us from carrying out the punishment. We
8 have got to get back to that, because we are
9 talking about punishment. The U.S. Supreme Court
10 has suggested the method of execution is not
11 punishment. That it is the way we carry out the
12 punishment, but it is not punishment.

13 In Baze, they even said, We have never found
14 as unconstitutional a method of execution, because
15 here is why, Your Honor. South Carolina is not
16 going back to a method of execution that is
17 intended to cause pain. This is -- I mean, we went
18 through the Spanish Inquisition, and all they did
19 was try to do figure out the most painful ways to
20 inflict punishment and death, because they wanted
21 to send a deterrent effect to everybody. The point
22 of it was pain. The result was death.

23 Now, under Kemmler, which has been around a
24 long time, Judge, I think 1912, if I'm not
25 mistaken, under Kemmler, it says, A pursuit of the

1 simple extinguishment of life. All three of these
2 methods, regardless of your personal views on them,
3 my personal views, or anybody else's personal views
4 on these three methods, all of them have been
5 designed. The idea was the pursuit of a simple
6 extinguishment of life instead of a painful buildup
7 to that, to do it as painless as possible. That is
8 the point.

9 To say barbaric would be if we were going back
10 to drawing and quartering people, if we were going
11 back to the rack, if we were going back to
12 pressing, if we were doing the things that they did
13 in England and Europe in the dark ages. That is
14 not happening. And by the way, according to the
15 growing body of science as referenced in this
16 Tennessee article, which we will submit, you know,
17 this idea that we didn't have -- we didn't put up
18 any experts yet. Well, we have had this for a
19 week. I know for a fact they have been building
20 this since at least October because I was handling
21 a case in Federal Court with Mr. Sigmon when they
22 were trying to get access to protocols so that they
23 could bring their method of execution challenge.
24 And they said things like, We need those protocols
25 to share with our experts. So, you know, they have

1 had that since October. We have had it a week.

2 But the inmates in Tennessee are choosing
3 electrocution. They are choosing electrocution,
4 because there is a growing body of science
5 suggesting lethal injection may be more painful and
6 they don't want to spend 20 minutes, the last 20
7 minutes of their life in agony.

8 That is all for the method of execution. The
9 only way it comes in here is if Your Honor were to
10 find that under the ex post facto challenge the
11 statute somehow increased the punishment, which it
12 clearly doesn't. It doesn't increase the
13 punishment. If it doesn't, they can't get an ex
14 post facto clause violation. They can't establish
15 that there is no likelihood of success on the
16 merits.

17 And then the second part -- well, excuse me,
18 the third part of the test, the second part of the
19 argument in front of you, Your Honor, is that they
20 don't have an adequate remedy at law. Well, then I
21 guess I don't need to show up on Wednesday in front
22 of Judge Harwell, because apparently they do have
23 an adequate remedy at law. Apparently I don't have
24 to file my response to their motion to stay
25 execution in the South Carolina Supreme Court, or

1 the second challenge that Mr. Sigmon has now made
2 in the original jurisdiction of the South Carolina
3 Supreme Court, regarding ineffective assistance of
4 counsel. I mean, all -- they can't establish two
5 of the three elements.

6 I am not going to stand in front of you and
7 say that they can't establish irreparable harm.
8 I'm not going to do that. But the other two they
9 can't establish. And that is if we focus on what
10 they actually pled, Your Honor, instead of the
11 veiled idea that this is really a challenge to the
12 constitutionality of various methods of execution.

13 And I got on a side street. I want to make
14 sure I answered your question, okay? The original
15 statute had two methods of execution available.
16 Both of those methods of execution are still
17 available in the 2021 version of the statute. They
18 are. The punishment hasn't changed. In fact, the
19 first -- I want to say the first 20 words of the
20 two statutes are exactly the same.

21 The 1995 version of the statute clearly
22 recognized that if lethal injection wasn't
23 available -- that is the Subpart C that I told you
24 about -- that it shall default to electrocution.
25 So this -- it is almost a misnomer to call Subpart

1 A the default clause because there was a C, which
2 the saving clause says, It defaults to
3 electrocution if lethal injection wasn't available
4 because it had found to be unconstitutional.

5 Adding, If it is otherwise unavailable, which
6 is essentially what our court -- what our General
7 Assembly did with the 2021 version of the statute,
8 it seems to fit with the same legislative intent
9 from the earlier version of the statute.

10 I don't think the due process clause warrants
11 much discussion on this, Your Honor. If Your Honor
12 has questions about it, I'm available to answer
13 those. I think Grayson adequately handled the
14 facial versus as-applied part of this argument.
15 But I do think it is important to refocus here and
16 remember what is pending. And what is pending in
17 front of you is they are asking you to issue an
18 injunction from us following the statute and
19 proceeding forward in carrying out the punishment,
20 which is death. They can't establish an ex post
21 facto clause in violation because it doesn't fit
22 one of the two.

23 So with all due respect to opposing counsel, I
24 understand, these are very solemn issues, but this
25 is not the right mechanism. If they want to

1 challenge the constitutionality of the method, they
2 should do that. In fact, have done that.

3 So I'll rest with that unless you have
4 questions, Your Honor.

5 THE COURT: Not at this point, no. Let's take
6 five minutes, and I'll come back. We will take a
7 five-minute break.

8 (WHEREUPON, a break was taken at 10:49
9 a.m.)

10 (WHEREUPON, the hearing resumed at 10:57
11 a.m.)

12 THE COURT: All right, folks. Ms. Freedman?

13 MS. FREEDMAN: Thank you, Your Honor. I
14 think -- I'd like to start by just pointing out
15 that we still haven't heard what they think
16 *available* means or why they think the electric
17 chair is the only method that is presently
18 available. We don't know the answer to that
19 question because the word in this context really is
20 not clear. And, you know, contrary to their
21 argument, they are saying, Okay, let's use the word
22 *available* as it was understood at the time the act
23 was passed.

24 Well, members of the legislature have said
25 publicly that this is not what they thought it

1 meant. So if that is the meaning we are going to
2 give it, then I think we have to take a different
3 meaning than the one they have adopted. They
4 haven't given any sort of definition for the word
5 *available* or haven't explained why lethal injection
6 or firing squad is unavailable presently.

7 We are the only ones here today not arguing
8 the Eighth Amendment. We have spent our argument
9 focused on the standards under *Kemmler*, under
10 *Calder*, under *Malloy*, the cases that actually
11 control the ex post facto analysis. They are the
12 ones that are focused on the much higher standards
13 that we would have to establish under the Eighth
14 Amendment. And that is because they can't respond
15 to our argument. They have conceded alternately or
16 said, We just don't know, alternately, whether
17 lethal injunction is the most humane version of
18 execution.

19 THE COURT: Don't you have to be arguing the
20 Eighth Amendment to some extent in connection with
21 your ex post facto argument?

22 MS. FREEDMAN: No, Your Honor.

23 THE COURT: Death is death is death, which is
24 what their argument is, and if that is the case,
25 isn't it ex post facto law?

1 MS. FREEDMAN: So I think really, to take a
2 slight step back, the short answer is no, we don't
3 have to prove any sort of Eighth Amendment standard
4 in order to win under the ex post facto clause, but
5 I think it is worth just bearing in mind that the
6 reason this law has developed the way it has under
7 the ex post facto clause is because South Carolina
8 is the first jurisdiction in the country to revert
9 to a prior method. And that is what they have
10 done. There has never been an execution by
11 electrocution in this country since lethal
12 injection was adopted on the books that has been
13 carried out by electrocution against the condemned
14 person's will. The only time that has happened,
15 for example, in Tennessee, was when those litigants
16 selected the electric chair. They opted in for it.

17 Now, and so that is why the ex post facto
18 clause has developed the way it has, because in
19 every single prior case that involved the ex post
20 facto clause, we are talking about a situation
21 where there was a punishment that everyone came to
22 understand as inhumane and brutal. The relevant
23 jurisdiction adopted a new punishment, and there
24 was litigation about whether they could do that,
25 but based on the prevailing scientific knowledge at

1 the time, that is something that the Supreme Court
2 in Kemmler, our State Supreme Court in Malloy, both
3 of those bodies looked to the scientific opinion
4 about electrocution at the time states switched
5 from hanging to electrocution. And there was a
6 consensus that electrocution was more humane. And
7 so we know that the standard under the ex post
8 facto clause asked whether -- not whether we meet
9 the Eighth Amendment standard, but whether we can
10 show, as they have conceded, that lethal injection
11 is the more humane version of punishment than the
12 one punishment that they are offering our clients
13 now, which is electrocution.

14 I think it is also worth bearing in mind that,
15 you know, the cases that have interpreted the ex
16 post facto clause in South Carolina, there is
17 really a huge difference, like a massive gap
18 between the difference between bi-annual and annual
19 parole review and execution by lethal injection or
20 electrocution. And we are talking about a
21 difference in punishment that is different in time.
22 They are trying to electrocute our clients when
23 they were sentenced under a statute that made the
24 default lethal injection. So that is a much bigger
25 jump than the difference between annual and

1 bi-annual parole review in terms of the increase in
2 punishment.

3 South Carolina really is the only state in the
4 country that has a statute that looks like this.
5 All of the other states that have any kind of
6 availability language do it in a very different
7 way. Their statutes are clear that lethal
8 injection is the default method. The punishment
9 shall be by lethal injection. There are some, you
10 know, sort of clarifying clauses that follow in
11 other states, but if Your Honor would like, we have
12 copies of the statutes in all the other
13 jurisdictions that have electrocution and firing
14 squad on the books available, and we would be happy
15 to pass that up to Your Honor or we would ask the
16 Court to take judicial notice of those statutes.
17 They are unbelievably different from what South
18 Carolina is doing. And, as I said, this is the
19 first time any jurisdiction has tried to revert to
20 a prior method.

21 And I would also like to address their
22 argument that we have no adequate remedy at law or
23 that we do have an adequate remedy because there
24 are other forums where we are able to litigate
25 different issues. That is just not the standard.

1 The question really is whether pending this
2 litigation, if the Court does not enjoin them from
3 carrying out this execution, whether we would have
4 an adequate remedy if we end up prevailing on the
5 merits.

6 And so the question really is, they have
7 conceded that we would suffer an irreparable harm.
8 I think that that indicates that we would also not
9 have an adequate remedy at law. That sort of
10 element of the preliminary injunction analysis is
11 really aimed at thinking about situations where
12 money is involved, for example, and a party could
13 be remunerated after the fact of the litigation and
14 so there is no need to stay anything because you
15 could just pay for the damages. That is not the
16 situation. There really is no adequate remedy at
17 law. And this is the only forum where we could
18 raise the challenges that are before Your Honor.

19 And I would also like to address their
20 argument that the Court has no power to enjoin
21 them. That is just wrong. This Court has the
22 power under Article 5, Section 20 of the South
23 Carolina Constitution to enter an injunction. That
24 is all we have asked the Court to do.

25 If they had -- if the legislature had passed

1 this statute three years ago, we would have asked
2 for the exact same thing, a preliminarily
3 injunction pending resolution on the merits of the
4 claim. And that is all we have asked for here.

5 The simple fact that there are stay motions
6 pending in other courts has no impact on Your
7 Honor's ability to enter an injunction, regardless
8 of what the practical effects of the injunction
9 might be.

10 And I think just looking back to the language
11 of the statute makes clear that there has to be
12 some situations in which courts can enjoin
13 Defendants from carrying out executions pending
14 litigation.

15 Section 1A of the statute reads: If the
16 convicted person receives a stay of execution or
17 the execution date has passed for any reason, then
18 the election expires and must be renewed in
19 writing. And I think that clearly contemplates
20 that there would be something other than a stay.

21 Their argument is essentially once there is an
22 execution date, if the Supreme Court doesn't enter
23 a stay, there is no way to stop it; but that can't
24 be the case. The statute itself doesn't
25 contemplate that outcome.

1 And I guess I would just like to conclude
2 by -- unless Your Honor has questions -- by
3 highlighting the -- you know, they sort of made a
4 big deal about arguing that the statute really
5 isn't that different from what was happening in
6 1995, nothing has really changed, the language
7 isn't all that different, but right now our clients
8 are only being offered electrocution. Under the
9 prior statute, lethal injection was on the table.
10 Under this statute it is not. And our clients did
11 select lethal injection. Mr. Sigmon relied on the
12 statute that was in place at the time of his first
13 election. When he waived his choice, he understood
14 that the default would be to lethal injection. The
15 state, in other words, could not electrocute him
16 unless he selected that method. And this new
17 statute has changed the dynamic completely.

18 THE COURT: Well, how -- but, really, how
19 would that change anything if, let's say if at the
20 time of election -- at this time of election,
21 even -- the choices are different. Either way, he
22 would be sentenced -- he would be -- not sentenced,
23 he would be executed, right? So he at that time
24 chose from available methods presented to him,
25 multiple choice question, and this time the methods

1 are different. How does that change anything about
2 whether he is to be executed or not? I mean, in
3 other words, even then, had he chosen a different
4 method, the method is unavailable, he doesn't get
5 out of jail or anything like that, right? He is
6 choosing from the buffet before him, and the result
7 would be the same.

8 MS. FREEDMAN: Well, so following that
9 analogy, the buffet has now been reduced to a
10 single item. They are only offering electrocution.
11 He has no choice under the statute as they have
12 interpreted it. So I think that is, you know, the
13 biggest difference. But I think that Your Honor's
14 question has two parts to it. I think the first
15 response would be that he, when he made his first
16 selection prior to the stay being entered last
17 fall, he understood that by not -- you know, he
18 didn't have any information about what they were
19 going to do, and so he felt like he couldn't make a
20 the choice, so he waived. But he made that waiver
21 with the full understanding that the state could
22 not electrocute him at that point. So he had
23 relied on the prior version of the statute on the
24 default to lethal injection when he made that
25 decision.

1 But going back to Your Honor's other question,
2 which I think was about whether there is any
3 distinction between methods of punishment when the
4 sentence is death. The answer is yes. And we know
5 that because looking back to the cases under the ex
6 post facto clause, not under the Eighth Amendment,
7 the cases that address the question that is before
8 the Court, those cases contemplate that there are
9 punishments that are more and less humane. As long
10 as that is a question before the Court, that is a
11 basis for a hearing. There could be, you know, we
12 need a hearing to develop factual reference. They
13 say they have only had this case for a week. Well,
14 I think that is an argument to stay the litigation,
15 to enjoin the litigation, enjoin us from doing
16 anything while we resolve that underlying question,
17 while we get to the question of whether lethal
18 injection is, in fact, more humane than the other
19 method.

20 And I think Your Honor could look to the
21 language that is in Kemmler, that is in Calder,
22 that is in Malloy, both of the United States and
23 State Supreme Courts, and that language, you know,
24 the only reason there was no ex post facto clause
25 violation was precisely because the method that the

1 state had adopted was more humane under prevailing
2 scientific norms. And so I think, you know, Your
3 Honor just needs to look no further than the
4 language of those cases and the context which they
5 arose. The standards that they use are whether the
6 new punishment puts the party at a disadvantage,
7 whether the punishment is more onerous. And I
8 think under any objective reading of those
9 standards, we have satisfied that.

10 If your Honor has any questions, I would be
11 happy to answer them.

12 THE COURT: No, ma'am.

13 MS. FREEDMAN: Thank you very much.

14 THE COURT: Gentlemen?

15 MR. LAMBERT: Will you give us, Your Honor,
16 just a couple of minutes?

17 THE COURT: Absolutely.

18 MR. LAMBERT: Wonderful.

19 I want to make three general points here in
20 response, and I will try and keep this as concise
21 as possible.

22 First goes to the authority to enter an
23 injunction here in the first place. And the
24 Plaintiff said that you can't look at the practical
25 effect, you can just issue an injunction because

1 the constitution gives you that power.

2 Respectfully, Your Honor, the effect of the
3 injunction is what matters with the injunction. An
4 injunction here is staying a Supreme Court order
5 that Mr. Owens' own filing in the Supreme Court
6 said only that court can set. That is a threshold
7 problem due to whatever Your Honor thinks of the
8 merits, it is something they can overcome.

9 Second, as this non-delegation argument and
10 availability, you have to read the word *available*
11 in the context of the statute, and that is asking,
12 Is it available upon receiving this notice of
13 execution to carry out this particular execution?
14 Can at this time SCDC fulfill its obligation to
15 carry out a sentence of death by these particular
16 methods of lethal injunction or firing squad? In
17 that moment, it is a yes or a no answer.

18 In terms of what does it mean, Your Honor,
19 this idea of looking to our legislature's view,
20 that is exactly the way we do not interpret the
21 statutes. There are 170 members of the General
22 Assembly. There are 170 separate thought processes
23 that go into that. That is why courts look to
24 dictionaries, the common, prevailing understanding
25 of the term and not what any particular member of

1 the body may say.

2 And, third, the ex post facto clause. You
3 asked, Doesn't it require an Eighth Amendment
4 analysis at some level? Otherwise, the punishment
5 is death is death is death, as Your Honor put it.
6 And I think here is fundamentally where the
7 Plaintiffs are. Their view of the ex post facto
8 clause is that if the punishment may still be
9 death, but if the method is just even slightly more
10 painful, if they can show just any degree that it
11 is worse to be executed by one method or another,
12 if their scientists, their experts can show that,
13 they say Kemmler and Calder don't allow it.

14 The Supreme Court has never, ours or the
15 United States, embraced such a view, which is why
16 when the Defendants briefed this question to decide
17 is the punishment rare, we looked to the only place
18 we could, the Eighth Amendment. Is the punishment,
19 which is death, being carried out in a way that is
20 unconstitutional, or is it being carried out in a
21 constitutionally permissible way?

22 The Eighth Amendment cases, Baze, Glossip,
23 Bucklew, give Your Honor the framework to
24 determine, Is the method that is being used a
25 greater punishment because it intends to add pain

1 or it "super adds," to use the Court's other word,
2 pain beyond what is necessary to inflict death.

3 The other thing underlying their ex post facto
4 clause argument, Your Honor, is really a back-door
5 back into their due process vested statutory right
6 argument. You heard that, Well, that they had a
7 choice before and they didn't choose, this was the
8 default. And now the buffet has been limited
9 because there are no methods on the table. There
10 is no right under the ex post facto clause, under
11 the Eighth Amendment, under the due process laws,
12 anywhere else in our body of law that says you have
13 a right to choose the method of execution.

14 You have a right not to be executed in a cruel
15 and unusual way. Absolutely. And this statute
16 doesn't do that. But you don't have a right to
17 choose. And the standard is not, Is one slightly
18 more painful than another? The Supreme Court has
19 said, Courts don't have the expertise to decide
20 those questions. That is why the Eighth Amendment
21 guides the ex post facto analysis, and they are not
22 likely to be able to show that any of the methods
23 in the statute -- electrocution, firing squad, or
24 lethal injection -- are unconstitutional. Because
25 they can't do that, they are not likely to succeed

1 under an ex post facto clause to show that
2 punishment is greater, and they are not entitled to
3 a preliminary injunction.

4 THE COURT: Mr. Plyler?

5 MR. PLYLER: Yes, thank you, Judge.

6 All right, I am going to try to keep it even
7 shorter. I think Your Honor is starting to
8 recognize one of the flaws in their argument, and
9 it has to do with the fact that this is really a
10 statute that deals with procedure and not with
11 punishment.

12 The Supreme Court said in the *Dover v. Florida*
13 case, U.S. Supreme Court case in 1977, cited in our
14 brief, pointing to kind of the most important part
15 of it, in my opinion, on Page 11 of our brief it
16 talks about the holding. It says -- it was a
17 murder case involving a change to how the death
18 sentence would be imposed. There was no change in
19 the quantum of punishment attached to a crime after
20 the procedural change. This is a procedural
21 change. You can almost never establish an ex post
22 facto issue and ex post facto violation when the
23 statute is a procedural change.

24 They talked about that we haven't put any
25 evidence up or talked about *available* versus

1 *unavailable*. Well, first, that is just not true,
2 because I think I remember specifically saying that
3 despite the Department's best effort, we have been
4 unable to obtain these drugs. That is why the
5 General Assembly took this up in its last session.
6 But putting that aside for a second, I don't have a
7 burden of proof here. We are not the ones with the
8 burden. They filed a motion. They filed a
9 complaint. They are asking for this drastic remedy
10 from Your Honor. It is their burden, not mine.

11 And then lastly, I think it was very
12 instructional to look at the Glossip cases, and
13 some of these other cases, that they were dealing
14 with challenges to the use of midazolam versus
15 pentobarbital. See, pentobarbital had become
16 available to basically everybody. Shortage, this
17 crisis situation we talked about previously, it is
18 well documented in the Supreme Court cases. And
19 they were having to go with midazolam, which is a
20 similar drug, but it is not the same. The evidence
21 that was submitted in the challenge to that method
22 was about, Well, midazolam has a slightly greater
23 chance of not producing the inmate insensate, if I
24 am saying that correctly, meaning he could still
25 feel pain, versus pentobarbital, which has a much

1 more likelihood of making them not feel any pain,
2 and because of that, this is an unconstitutional
3 way to do lethal injection versus using
4 pentobarbital, because pentobarbital has been
5 proven to be more effective. The Courts did not
6 grant that challenge. And Oklahoma still uses
7 midazolam, if I'm not mistaken. So even though
8 there is apparently a drug out there that is more
9 effective that reduces in some modicum the
10 likelihood of pain being felt during this process,
11 the Courts didn't strike it down. They didn't find
12 that changing it to midazolam from pentobarbital
13 increased the punishment. Why? Because the
14 punishment is still death.

15 And they can sidestep that all they want in
16 these proceedings, but ultimately to have success
17 on the merits, they are going to have to do it
18 under the ex post facto laws. And the only way to
19 do that under ex post facto is if we make something
20 a crime that wasn't -- that doesn't apply here --
21 or there has been an increase in the punishment --
22 and that hasn't happened here.

23 The reason we have to default to the Eighth
24 Amendment is because the argument should stop
25 there, but we have to assume that Your Honor may be

1 considering this idea that, Well, if you increase
2 punishment slightly and they can show that, then
3 aren't you increasing the punishment, right? No,
4 we're not. Punishment is death. The only place we
5 can start litigating that issue where we start
6 going down that path is if it is an Eighth
7 Amendment challenge to the method. And at the end
8 of the day, is the state attempting to carry out
9 executions in a purposely painful way? Are we
10 seeking pain as deterrent versus just carrying out
11 the execution of a jury and judge? And the answer
12 to that, with all three of these methods, is no, we
13 are not trying to inflict any unnecessary pain. We
14 are not trying to torture anybody. We are not
15 trying to, you know, send a deterrent to everybody
16 that in South Carolina, if you, you know, if you
17 commit capital punishment, a crime that is
18 punishable by the death penalty, that we are going
19 to make an example out of you, or something. That
20 is not what is happening here. This statute
21 doesn't do that.

22 As a result, they cannot show likelihood of
23 success on the merits on their ex post facto
24 challenge.

25 You know, we could get down in the muck again.

1 I think that addresses the key points in the reply.
2 I am happy to answer any questions Your Honor has,
3 but I know Your Honor has probably also heard
4 enough or at least enough at this time. But,
5 again, I stand ready to answer any questions you
6 have that is relevant to this, and I appreciate you
7 setting up this hearing, if nothing else, so we
8 could get these things heard.

9 Thank you, Your Honor.

10 THE COURT: I don't have questions. Do you
11 have something else, Ms. Freedman?

12 MS. FREEDMAN: Nothing else, Your Honor.
13 Thank you.

14 THE COURT: I would love to be able to rule on
15 this motion right this second, but I would like to
16 do so in a very thoughtful, meticulous way. And I
17 think I am almost there, but I don't want to botch
18 it in this moment. But I do recognize the
19 time-sensitive nature of this with executions
20 scheduled for June 18th and June 25th. So, that
21 said, I will rule on this matter within the next
22 few days. I may not have a lengthy formal written
23 order in that time, but at minimum you will get a
24 few sentences that will be followed up by a more
25 formal order.

1 I would ask that both parties send me your
2 memoranda in Word format to help me get there.
3 That is Defendant's joint response to the motion
4 for preliminary injunction, and really Plaintiff's
5 motion for preliminary injunction. I don't know
6 that I need either reply necessarily, although it
7 couldn't hurt to have that in Word as well so that
8 I can cobble together my order. It will save me
9 some time in doing so.

10 So if you would send those to me by the end of
11 the day. Then I would like to have at least a
12 short form order for you if not today, tomorrow. I
13 just need to step back and process everything I
14 have heard, and then a more lengthy formal order
15 will come after that in the following days.

16 So thank you all.

17 MR. LAMBERT: Thank you, Your Honor.

18 MR. PLYLER: Thank you, Judge.

19 MS. FREEDMAN: Thank you.

20 THE COURT: Thank you all.

21 (WHEREUPON, the hearing adjourned at
22 11:19 a.m.)
23
24

25 (END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Certified Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 7th day of June, 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 21, 2022

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Certified Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-40-02306

FREDDIE EUGENE OWENS; BRAD KEITH
SIGMON, and GARY DUBOSE TERRY,

Plaintiffs,

v.

BRYAN P. STIRLING, in his official capacity
as the Director of the South Carolina
Department of Corrections, and SOUTH
CAROLINA DEPARTMENT OF
CORRECTIONS,

Defendants,

HENRY MCMASTER, in his official capacity
as Governor of the State of South Carolina,

Intervenor–Defendant.

Defendants’ Motion to Dismiss

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Defendants Bryan P. Stirling, in his official capacity as Director of the South Carolina Department of Corrections (“Director Stirling”), and the South Carolina Department of Corrections (“SCDC”), and Intervenor-Defendant Henry McMaster, in his official capacity as Governor of the State of South Carolina (“Governor McMaster”) (collectively, “Defendants”), move to dismiss the Second Amended Complaint under Rule 12(b)(6), SCRCP.

INTRODUCTION

Plaintiffs Brad Sigmon, Freddie Owens, and Gary Terry (collectively, “Death Row Inmates”) were each convicted of brutal murders. Sigmon beat his ex-girlfriend’s parents to death with a baseball bat. Owens shot a single mother of three in the head at point-blank range while she was working at a convenience store in the middle of the night. And Terry raped a woman and then killed her by cracking her skull. All three men were sentenced to death for their heinous crimes.

But until last year, the State was unable to carry out these sentences, even after Death Row Inmates had exhausted all of their direct and collateral appeals in both state and federal court. Before the General Assembly passed 2021 S.C. Acts No. 43 (“Act”) to change the default method of execution to electrocution and to add the firing squad as an alternative method, lethal injection was the required method of execution unless a condemned inmate chose electrocution. Despite repeated efforts, SCDC has been unable to procure the necessary drugs for lethal injection, meaning that condemned inmates could self-impose a *de facto* moratorium on their executions. This left the State unable to carry out lawfully imposed death sentences. Of course, the “power of a State to pass laws [to punish murder] means little if the State cannot enforce them.” *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion).

None of Death Row Inmates contends he is actually innocent. They do not challenge *that* they will be executed. Instead, they challenge only *how* they will be executed. They assert eight

different claims, but all of these claims rest on some combination of three ideas: (1) electrocution and the firing squad are unconstitutional under state law, (2) the method of execution cannot change, and (3) the Act is too vague.

None of these ideas, however, withstands scrutiny. First, based on the original understanding of the South Carolina Constitution, both electrocution and the firing squad are constitutional methods of execution because they are well-established methods to terminate life without superadding terror, pain, or disgrace. Second, changing the method of execution does not change the punishment Death Row Inmates lawfully received: death. And third, as this Court has already held, the Act “on its face can be clearly understood.” June 11, 2021 Order 7. All of Death Row Inmates’ claims therefore fail as a matter of law.

Death-penalty litigation has for too long been “characterized” by “seemingly endless proceedings.” *Baze*, 553 U.S. at 69 (Alito, J., concurring). Sigmon, Owens, and Terry were all convicted “decades ago.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019). “The people of [South Carolina], the surviving victims of [Death Row Inmates’] crimes, and others like them deserve better” than more delays. *Id.* at 1134. The Court should therefore grant Defendants’ Motion to Dismiss.

BACKGROUND

A. Sigmon, Owens, and Terry are convicted of brutal murders.

Brad Sigmon’s girlfriend of three years ended their relationship in 2001. Upset, Sigmon plotted his revenge. On April 27, 2001, he went to the house of his ex-girlfriend’s parents and beat her parents to death with a baseball bat, hitting them multiple times because they were “still moving.” *State v. Sigmon*, 403 S.C. 120, 125, 742 S.E.2d 394, 397 (2013). He then stole a gun from the house and waited for his ex-girlfriend to return. When she did, Sigmon kidnapped her at

gunpoint and forced her into his car. She was ultimately able to jump out of the car. As she fled, Sigmon shot her. She nevertheless survived and managed to escape. A jury convicted Sigmon of two counts of murder, and he was sentenced to death. The South Carolina Supreme Court affirmed the convictions and sentence. *See State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). It affirmed the conviction and sentence again on Sigmon's application for postconviction relief. *See Sigmon*, 403 S.C. 120, 742 S.E.2d 394. And the federal courts have rejected his habeas claims. *See Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021).

Freddie Owens robbed a convenience store in Greenville around 4:00 AM on November 1, 1997. The clerk (a single mother of three children who worked multiple jobs) had only \$37 in the register. When she could not open the safe, Owens shot her in the head. Owens was convicted of murder and sentenced to death. Between his conviction and the sentencing phase of his trial, Owens killed another inmate, beating the inmate's head against the wall, choking him, and stabbing him in the eye with a pen. Owens's conviction and ultimately his sentence were affirmed on direct appeal. *See State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001) (conviction); *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008) (sentence). Like Sigmon, Owens has exhausted his collateral appeals. *See Owens v. Stirling*, 967 F.3d 396 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2513 (2021).

Gary Terry disconnected the telephone line to Urai Jackson's home on May 24, 1994, and then broke into Jackson's home through a carport door. Terry raped Jackson and then killed her by cracking her skull before leaving her "mostly nude" body in her living room. *State v. Terry*, 339 S.C. 352, 354, 529 S.E.2d 274, 275 (2000). He was convicted of murder (as well as first-degree burglary, first-degree criminal sexual conduct, and malicious injury to a telephone system) and was sentenced to death. The South Carolina Supreme Court affirmed his conviction and

sentence. *See id.* Terry has also exhausted all of his collateral appeals. *See Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011); *Terry v. Stirling*, 854 F. App'x 475, 476 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 745 (2022).

B. South Carolina adopts the Act.

From 1995 until May 2021, South Carolina law provided for execution by both electrocution and lethal injection. *See* 1995 S.C. Acts No. 108, § 1 (codified at S.C. Code Ann. § 24-3-530(A) (2007)). Under the statutory process enacted in 1995, an inmate had to elect one of those methods 14 days before his execution; if he made no election, lethal injection was the default method. *See id.*

For about a decade, SCDC has been unable to obtain or compound the drugs necessary for lethal injection, despite its repeated efforts to do so. *See, e.g.*, Second Am. Compl. Ex. G (letter from pharmaceutical company to Governor McMaster, Attorney General Wilson, and Director Stirling refusing to have the company's products used for lethal injection). This meant that SCDC had no way to execute an inmate who did not affirmatively elect electrocution. As a result, the State was unable to carry out duly imposed death sentences upheld on direct appeal and in habeas challenges.

In 2021, the General Assembly specifically addressed and legislatively fixed this conundrum. It passed and Governor McMaster signed into law the Act, which changed the default method of execution to electrocution and added the firing squad as an option, if it is available. *See* 2021 S.C. Acts No. 43, § 1 (amending S.C. Code Ann. § 24-3-530). Under the Act, a “person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election.” *Id.* SCDC must notify an inmate of his

opportunity to elect a method and which methods are available. *Id.* If the inmate does not make an election or if lethal injection and the firing squad are not available, electrocution is the default method. *Id.* Finally, the Act makes clear that it “applies to persons sentenced to death as provided by law prior to and after [its] effective date.” *Id.* § 3.

C. Death Row Inmates file this lawsuit (and many others) in the weeks before their scheduled executions.

Death Row Inmates¹ sued four days after the Act was signed into law. *See* Compl. They sought a preliminary injunction to avoid the Act’s provisions being used to allow the State to carry out their executions. *See* Mot. for Prelim. Inj. This Court denied that Motion because Death Row Inmates failed to show that they were likely to succeed on the merits. *See* June 11, 2021 Order. Death Row Inmates immediately appealed, *see* Notice of Appeal, but they abandoned that appeal after the South Carolina Supreme Court stayed their executions, *see* Order, *State v. Sigmon*, No. 2002-024388 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (S.C. June 16, 2021). Instead, they amended their complaint on July 2, 2021, and after sending one set of discovery requests to SCDC, they did nothing more for months to pursue their claims.

In addition to this case, at least six other actions have been filed to challenge Death Row Inmates’ executions:

- Sigmon filed a stay petition in the South Carolina Supreme Court’s original jurisdiction, alleging ineffective assistance of counsel during his sentencing. *See Sigmon v. State*, App. Case No. 2021-000584 (S.C.). (It’s worth noting that the federal courts have already considered and rejected that argument in Sigmon’s federal habeas proceeding. *See Sigmon*, 956 F.3d at 193.)
- Sigmon sued Director Stirling and SCDC demanding information about the protocols for lethal injection, contending that SCDC’s method could cause a painful and tortuous death. *See Sigmon v. Stirling*, No. 3:21-cv-278 (D.S.C.). That case

¹ Because Terry’s collateral appeals were not exhausted until January 2022, he was not a litigant in this litigation’s earlier stages. He joined as a plaintiff with the filing of the Second Amended Complaint.

ultimately settled when Sigmon received certain information about SCDC's protocols.

- Some of Death Row Inmates' lawyers have sued Director Stirling and SCDC over access to lethal-injection protocols, claiming that they needed those protocols to decide whether to assert an Eighth Amendment challenge to them. The District of South Carolina rejected their claims, and the case is now on appeal in the Fourth Circuit. *See Justice 360 v. Stirling*, No. 21-2205 (4th Cir.).
- These same lawyers filed a FOIA-based lawsuit in state court seeking information about execution protocols. The state court rejected those claims, and the lawyers ultimately dismissed the case with prejudice. *See Justice 360 v. S.C. Dep't of Corr.*, No. 2020-CP-40-5306 (S.C. Comm. Pls.).
- Sigmon and Owens brought a federal lawsuit challenging electrocution under the Eighth Amendment. The District of South Carolina denied their motion for a preliminary injunction, *see Sigmon v. Stirling*, No. 3:21-CV-01651-RBH, 2021 WL 2402279 (D.S.C. June 11, 2021), and they abandoned their appeal and dismissed that case after the South Carolina Supreme Court stayed their executions.
- Sigmon and Owens filed a separate state court action asserting both state and federal claims against electrocution and the firing squad as methods of execution and state statutory claims based on the Act. *See Owens v. Stirling*, No. 2021-CP-40-4851. After that case was consolidated with this case, Defendants removed the litigation to federal court, which kept jurisdiction over the new federal claims but remanded the remaining claims. *See Owens v. Stirling*, No. 3:21-cv-3564 (D.S.C.).

Ultimately, to streamline Death Row Inmates' legal challenges, the state court litigation involving the Act was consolidated into a single complaint, and Terry was added as a plaintiff. Now, in their Second Amended Complaint, Death Row Inmates assert eight claims: (1) a due process violation because of retroactive legislation, *see* Second Am. Compl. ¶¶ 71–77; (2) an *ex post facto* violation, *see id.* ¶¶ 78–93; (3) a due process violation because of vagueness, *see id.* ¶¶ 94–99; (4) a statutory violation based on what methods are available, *see id.* ¶¶ 100–04; (5) a nondelegation violation, *see id.* ¶¶ 105–13; (6) a state constitutional challenge to electrocution and the firing squad as cruel or unusual punishment, *see id.* ¶¶ 114–23; (7) a statutory claim based on allegedly having to choose between a constitutional and unconstitutional method of execution, *see*

id. ¶¶ 124–26, and (8) an as-applied challenge for Terry against electrocution and the firing squad, *see id.* ¶¶ 127–33.

LEGAL STANDARD

A motion to dismiss should be granted whenever a complaint “fail[s] to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRCP. Thus, even taking the allegations in the light most favorable to the plaintiffs, if the plaintiffs are not entitled to relief under any theory, the complaint should be dismissed. *See Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007). When “the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss.” *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

ARGUMENT

Death Row Inmates assert eight claims. None has any merit, and therefore the Second Amended Complaint should be dismissed.

I. Electrocution and the firing squad are constitutional under state law.

Underlying all of Death Row Inmates’ eight claims is the contention that they cannot be executed by electrocution or the firing squad. They assert a state constitutional challenge to both methods of execution as their sixth claim. *See* Second Am. Compl. ¶¶ 114–23. Because their assertion that these longstanding methods cannot be constitutionally imposed on them is the cornerstone of their entire case, it makes sense to start with this claim.

The South Carolina Constitution provides that “cruel, nor corporal, nor unusual punishment” shall be inflicted. S.C. Const. art. I, § 15. This clause does not prohibit electrocution or the firing squad.

A. The original understanding of article I, section 15.

The South Carolina “Constitution is construed in light of the intent of its framers and the people who adopted it.”² *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014). Although the current Cruel or Unusual Punishments Clause was enacted in 1973, its origins are almost 200 years older than that, so a historical review provides useful context.

South Carolina first introduced a clause like the Cruel or Unusual Punishments Clause in the 1790 Constitution. There, the Constitution prohibited infliction of “cruel punishments.” S.C. Const. art. IX, § 4 (1790). This same language was used in the 1861 Constitution, *see* S.C. Const. art. IX, § 4 (1861), and the 1865 Constitution, *see* S.C. Const. art. IX, § 5 (1865). The 1868 Constitution brought the language of “cruel” and “unusual” punishment into South Carolina’s constitutional lexicon. S.C. Const. art. I, § 38 (1868). This same terminology was used in the 1895 Constitution, which also added the ban on corporal punishment. *See* S.C. Const. art. I, § 19 (1895).

When the West Committee undertook its work to revise the South Carolina Constitution, the Committee called this protection “essential” and explained that its amendment merely “modernized the language.” *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895* 19 (1969) (“*West Report*”). The revision therefore kept the same operative words with the same meaning. *See* S.C. Const. art. I, § 15.

² For much of the twentieth century, the United States Supreme Court analyzed Eighth Amendment claims under an “evolving standards of decency test.” *E.g., Roper v. Simmons*, 543 U.S. 551, 561 (2005). Notably, that Court has not applied that test in its most recent death-penalty cases, thereby calling into question the vitality of that doctrine in death-penalty cases raising federal claims. *See Bucklew*, 139 S. Ct. 1112; *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze*, 553 U.S. 35. But whatever that answer, the South Carolina Supreme Court has not expressly adopted the “evolving standards of decency” test for the State Constitution, instead applying that test only to federal Eighth Amendment claims. *See, e.g., State v. Pittman*, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007). Thus, the analysis here is controlled by article I, section 15’s original understanding.

Given the historical roots of the Cruel or Unusual Punishments Clause, we must look back to see how the original framers of our Constitution (as well as of the Eighth Amendment, which was enacted just a year before the 1790 Constitution) understood this provision. In 1689, when William and Mary forced James II off the throne in the Glorious Revolution, England enacted its bill of rights, which prohibited “cruel and unusual punishments.” English Bill of Rights, cl. 10 (1689), <https://tinyurl.com/5rce8xre>. Various States later enacted similar prohibitions as the Revolution began. *See, e.g.*, Virginia Declaration of Rights, § 9 (June 12, 1776) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”), <https://tinyurl.com/ert444zc>. Congress did the same in the Northwest Ordinance. *See* Northwest Ordinance of 1787, § 14, art. 2 (1787) (“no cruel or unusual punishments shall be inflicted”); *see also* 32 *Journals of the Continental Congress* 318 (July 11, 1787) (including this prohibition in the first draft of the ordinance). When the States ratified the Eighth Amendment’s Cruel and Unusual Punishments Clause, its “text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689.” *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). Thus, at the same time South Carolina was prohibiting “cruel” punishments, the federal government and other States were too.

In the late eighteenth century, “cruel” was defined as “pleased with hurting others, inhuman, hard-hearted, void of pity, wanting compassion, savage, barbarous, unrelenting.” 1 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785), <https://tinyurl.com/2p9dz5x6>; *see also* *Bucklew*, 139 S. Ct. at 1123. By that time, English law had, “by tacit consent,” stopped using methods of execution that were considered “torture or cruelty.” 4 William Blackstone, *Commentaries on the Laws of England* 370 (1769). Thus, methods like the rack, the stake, the wheel, disemboweling, quartering, and public dissection were prohibited.

Bucklew, 139 S. Ct. at 1123. So too were methods in which “the prisoner was drawn or dragged to the place of execution, in treason; or burn[ed] alive in treason committed by a female.” *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878). These banned methods were ones that were “designed to inflict pain and suffering beyond that necessary to cause death.” *Baze*, 553 U.S. at 96 (Thomas, J., concurring); *see also* Stuart Banner, *The Death Penalty: An American History* 54 (2002) (describing “burning at the stake, public display of the corpse, dismemberment, and dissection” as “a set of tools capably of *intensifying* a death sentence”). The prohibition on such cruelty was known by “every schoolboy in America” during this time, Akhil Reed Amar, *The Bill of Rights* 87 (1998), and it was a point raised repeatedly by Antifederalists during the ratification debates as they criticized the lack of a bill of rights, *see, e.g.*, Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, *Pennsylvania Packet and Daily Advertiser* (Dec. 18, 1787), reprinted in *The Anti-Federalist* 207 (Murray Dry & Herbert J. Storing eds., 1985).

The dictionary definition of “unusual” in the late eighteenth century was “not common, not frequent, rare.” 2 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785), <https://tinyurl.com/vfe83u6f>. But in a legal context, this word “was a term of art that referred to government practices that are contrary to ‘long usage’ or ‘immemorial usage.’” John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment As A Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745 (2008). For example, the term was used this way in the Declaration of Independence to describe the way George III had wrongly “called together legislative bodies at places *unusual*, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.” Decl. of

Independence para. 6 (1776) (emphasis added); *see also* Stinneford, *supra*, at 1793–97 (discussing colonial usage of “unusual”).

About four decades after both the Eighth Amendment and the South Carolina Constitution’s first ban on cruel punishments were enacted, Justice Joseph Story discussed the Eighth Amendment’s Cruel and Unusual Punishments Clause in detail. Such a prohibition, he observed, “would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct.” 3 Joseph Story, *Commentaries on the Constitution of the United States* 750 (§ 1896) (1833). Nevertheless, the Eighth Amendment was included in the Bill of Rights “as an admonition to all departments of the national government, to warn them against such violent proceedings, *as had taken place in the England in the arbitrary reigns of some of the Stuarts.*” *Id.* (emphasis added). Those monarchs (including James II, who reigned during the Bloody Assizes in the 1680s just a few years before the Glorious Revolution) imposed “vindictive punishments,” *id.* at 751, which inspired the English Bill of Rights in 1689, which in turn inspired the American prohibitions on such punishments.

In light of this history, there can be no serious suggestion that the original understanding of “cruel” or “unusual” prohibits capital punishment. Indeed, the death penalty enjoyed “widespread support in the seventeenth and eighteenth centuries as a punishment for all serious crimes.” Banner, *supra*, at 23. Consistent with many other jurisdictions during this time, South Carolina imposed the death penalty for far more than murder during the colonial era. *See, e.g.*, Act No. 331 (1712) (adopting various laws of England, including, for instance, the capital offenses of buggery and robbery on the sea), reprinted in *Public Laws of South Carolina* 49, 50 (1790). Though there was a push to limit the number of capital crimes during the Revolution, *see* S.C. Const. art.

XL (1778) (“That the penal laws, as heretofore used, shall be reformed, and punishments made *in some cases* less sanguinary, and in general more proportionate to the crime.” (emphasis added)), the State still had 165 capital crimes in 1813, *see* Jack Kenny Williams, *Vogues in Villainy* 100 (1959). Moreover, executions in this era were public, and they provoked only “rare” criticism. *Id.* at 101–03. For whatever reform efforts took place regarding the number of capital crimes, the State never abolished the death penalty for murder (nor does there appear to have been any credible push to do so in the years following the Revolution).

Ultimately, state and federal bans on cruel or unusual punishments “were intended as precautions, just in case a future legislature should perceive a need to adopt barbarous European punishments, or perhaps even familiar serious punishments for trifling crimes, or perhaps in case a future court or executive should attempt to inflict a punishment greater than that provided by law.” Banner, *supra*, at 234. These bans do not, however, “guarantee a prisoner a painless death—something that, of course, isn’t guaranteed to many people, including most victims of capital crimes.” *Bucklew*, 139 S. Ct. at 1123–24. These bans simply ensure that capital punishment does not include the “superaddition of terror, pain, or disgrace.” *Id.* at 1124 (cleaned up).

B. Electrocution is constitutional.

Concluding that electrocution does not violate article I, section 15 is straightforward. In the late 1960s and early 1970s when the West Committee was at work and its proposed amendments were put to the voters, electrocution was the only method of execution the State used. *See* S.C. Code § 55-373 (1962). Moreover, just a few years after this amendment, the South Carolina Supreme Court upheld the constitutionality of the death penalty—which was (again) then only by electrocution—when challenged under the newly revised Constitution. *See State v. Allen*, 266 S.C. 175, 187, 222 S.E.2d 287, 292 (1976), *overruled on other grounds by* 432 U.S. 902

(1977). In fact, the South Carolina Supreme Court relied on its pre-West Amendment decisions in reaching this conclusion, which demonstrates the continuity of meaning in this constitutional provision. *See id.* (citing *State v. Crowe*, 258 S.C. 258, 271, 188 S.E.2d 379, 385 (1972)). Finally, given that the People who ratified the amendment to the Cruel or Unusual Punishments Clause were the same People who approved of electrocution as a method of execution, the People could not have thought that electrocution violated that Clause. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1903 (2021) (Alito, J., concurring in the judgment) (“Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect.”).

Ultimately, “the wisdom of this policy [to allow the death penalty] is a legislative question, not a judicial one.” *Crowe*, 258 S.C. at 271, 188 S.E.2d at 385; *see also Bucklew*, 139 S. Ct. at 1134 (“Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously.”). The People of South Carolina have consistently spoken on this issue, and they did so again last year. *See* 2021 S.C. Acts No. 43. And when they did so, they continued to approve of a method that has been used in this State for more than a century. *See* 1912 S.C. Acts No. 402, § 1 (adopting electrocution as the State’s method of execution). The People are free to keep electrocution or abandon it. But that is a decision for the People, not the courts, and Death Row Inmates’ arguments against this method are more properly directed toward the legislative, rather than the judicial, branch.³ All that matters in this litigation is that electrocution does not violate article I, section 15.

³ Indeed, many questions about capital punishment were intensely debated by the General Assembly when it adopted the Act, which shows the democratic process in action. The firing squad was added by an amendment proposed by Senators Harpootlian and Hembree on the floor. *See* S.

Nothing Death Row Inmates offer in their Second Amended Complaint can avoid the conclusion that this claim fails. *First*, they cannot fall back on the Eighth Amendment’s Cruel and Unusual Punishments Clause. In the first place, the United States Supreme Court has consistently rejected challenges to electrocution. *See In re Kemmler*, 136 U.S. 436 (1890) (rejecting a cruel and unusual-based claim from the first inmate set for execution by electrocution); *Louisiana v. Resweber*, 329 U.S. 459 (1947) (conducting a second execution by electrocution after first electrocution failed to kill the inmate is constitutional); *see also Sigmon*, 2021 WL 2402279 (district court’s determination that Death Row Inmates were unlikely to succeed on their Eighth Amendment challenge to electrocution). In the second, Death Row Inmates are asserting federal constitutional claims in parallel litigation in federal court, not in this Court. *See Owens v. Stirling*, No. 3:21-cv-3564 (D.S.C.); *see also* Mot. to Designate Case Complex 3 (Feb. 7, 2022) (explaining that Eighth Amendment claim will remain in federal court).

Second, the mere fact that electrocution is no longer the dominant method of execution across the country is irrelevant for at least two reasons. *See* Second Am. Compl. ¶ 122(a). For one, it has no bearing on the original understanding of the South Carolina Constitution. For another, a comparison like this allows other States to commandeer South Carolina’s penal code to force this State to change its law. (After all, the logic of this argument isn’t limited to methods of execution.) Other States may choose to employ different methods of execution for various reasons, ranging from experimenting with potentially less painful methods to comporting with administrative

Journal No. 30 (124th Gen. Assemb. Mar. 2, 2021). Meanwhile, the House debated but rejected other proposals, including livestreaming executions over the Internet (Amendment No. 3) and banning all executions as “horrific and inhumane” (Amendment No. 12). H. Journal No. 59 (124th Gen. Assemb. May 5, 2021). And the Senate later did not see the need to specifically ban other methods of execution (such as disembowelment, boiling to death, crucifixion, impalement, and stoning), when Senator Malloy sought to amend the bill to do so. *See* S. Journal No. 71 (124th Gen. Assemb. May 12, 2021).

capabilities to following different historical practices. What those States choose to do cannot dictate the original understanding of the South Carolina Constitution.

Third, Death Row Inmates can fare no better by pointing out how frequently electrocution may be “used in practice” today, again for multiple reasons. Second Am. Compl. ¶ 122(c). One reason is that executions across the country have generally been slowed because of “seemingly endless proceedings.” *Baze*, 553 U.S. at 69 (Alito, J., concurring). Another reason is that Death Row Inmates ignore that condemned inmates in other States have, in fact, recently chosen electrocution over lethal injection. For instance, Tennessee has carried out at least five executions by electrocution in the past few years, all after the condemned inmates chose electrocution over lethal injection. *See* Travis Loller, *Tennessee Man Gets Electric Chair for Killing Fellow Inmate*, Associated Press (Feb. 21, 2021), <https://tinyurl.com/kc74jsfs>; *see also* *Miller v. Parker*, 909 F.3d 827 (6th Cir. 2018) (discussing an inmate who chose electrocution over lethal injection).

Fourth, Death Row Inmates can gain no traction by invoking article I, section 15’s prohibition on “corporal” punishment. The word’s meaning of “pertaining or relating to the body,” *2 Century Dictionary* 1275 (1906), must, of course, be understood in context. In the nineteenth century and before, “corporal punishment” didn’t include a death sentence; it was instead understood to include punishments such as whipping, branding, and the like. *See, e.g., State v. Hamblin*, 4 S.C. 1, 3 (1872) (citing being “publicly whipped” as an example of “corporal punishment”); *see also Anderson v. Dunn*, 19 U.S. 204, 232 (1821) (treating imprisonment, corporal punishment, and death as different types of punishment); *North Carolina v. Nipper*, 81 S.E. 164, 165 (N.C. 1914) (examples of corporal punishment included “branding for manslaughter, cropping the ears for perjury, sitting in the stocks, and flogging”); *Cornell v. Tennessee*, 74 Tenn. 624, 629 (1881) (“The common law undoubtedly considered corporal chastisement by the

infliction of blows on the bare back as one of the ordinary modes of punishment”). That an execution causes some harm to the body has never been thought of as “corporal punishment” as originally understood. Because this prohibition applies to things such as whipping and branding, it is irrelevant here.

C. The firing squad is constitutional.

Just because South Carolina has not used the firing squad before does not mean that the firing squad violates article I, section 15. We must instead look to history and the goal of this method to determine if it satisfies constitutional standards. This historical inquiry makes clear that the firing squad passes constitutional muster.

This country’s “first documented firing squad execution occurred in Virginia in 1608.” Deborah W. Denno, *The Firing Squad As “A Known and Available Alternative Method of Execution”* *Post-Glossip*, 49 U. Mich. J.L. Reform 749, 778 (2016). That makes the firing squad one of “this country’s oldest methods of execution.” *Id.* The method continued to be used in the next century, as, for example, the Continental Army executed soldiers guilty of mutiny by firing squad. *See* Robert A. Mayers, *Hub of the Revolution* 6 (2012), <https://tinyurl.com/9n5xpcm6> (discussing the Pompton Mutiny in New Jersey); *see also Baze*, 553 U.S. at 48 (plurality opinion) (“the firing squad was routinely used as a method of execution for military officers”); Banner, *supra*, at 46 (discussing the use of the firing squad by the military in seventeenth and eighteenth centuries). In fact, there do not appear to be any Founding-era sources indicating that the firing squad was considered cruel or unusual.

When the firing squad was challenged under the Eighth Amendment about a century later, the United States Supreme Court rejected the argument that this method of execution violated the Constitution. *See Wilkerson*, 99 U.S. 130. “Cruel and unusual punishments are forbidden by the

Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.” *Id.* at 134–35.

More recent United States Supreme Court concurrences and dissents have continued to speak favorably of the firing squad as a method of execution. This method “has a long track record of successful use.” *Johnson v. Precythe*, 141 S. Ct. 1622, 1626 (2021) (Sotomayor, J., dissenting from denial of certiorari). In fact, “there is evidence to suggest that the firing squad is significantly more reliable than other methods.” *Glossip*, 576 U.S. at 976 (Sotomayor, J., dissenting). Looking back to *Wilkerson*, Justice Thomas observed that the “unanimous Court had no difficulty concluding that death by firing squad did not fall within that category” of prohibited cruel and unusual punishments. *Baze*, 553 U.S. at 100 (Thomas, J., concurring) (cleaned up).

Supporting this longstanding precedent is the growing commentary and literature around the firing squad. The Death Penalty Information Center, in its description of methods of execution, notes that with the firing squad, the “person shot loses consciousness when shock causes a fall in the supply of blood to the brain” and then “dies as a result of blood loss caused by rupture of the heart or a large blood vessel, or tearing of the lungs.” *Description of Each Method of Execution*, Death Penalty Information Center, <https://tinyurl.com/cdus52yp> (last visited Mar. 15, 2022). This death is quick, as “a competently performed shooting may lead to nearly instant death.” Denno, *supra*, at 785. It is also “comparatively painless.” *Arthur v. Dunn*, 137 S. Ct. 725, 34 (2017) (Sotomayor, J., dissenting from denial of certiorari) (citing Banner, *supra*, at 203); *see also Glossip*, 135 S. Ct. at 880 (majority opinion) (agreeing with the principal dissent that “there is some reason to think that [the firing squad] is relatively quick and painless”). The only potential complication is if all of the shooters miss the heart, but complications are rare. In the 144 civilian-

firing-squad executions in American history, only two reported “any” problems. Denno, *supra*, at 787; *see also Arthur*, 137 S. Ct. at 34 (“historically, the firing squad has yielded significantly fewer botched executions” than other methods). A judge on the Eleventh Circuit recognized that the firing squad may be less painful than other methods, given “judicial experience and common sense.” *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 882 (11th Cir. 2017) (Wilson, J. concurring in the judgment). And Judge Kozinski on the Ninth Circuit explained, “The firing squad strikes me as the most promising [method of execution].” *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir.) (Kozinski, C.J., dissenting from denial of rehearing en banc), *vacated*, 573 U.S. 976 (2014).

“Certainly, use of the firing squad could be seen as a devolution to a more primitive era,” but “[t]hat is not to say, of course, that it would therefore be unconstitutional.” *Glossip*, 576 U.S. at 977 (Sotomayor, J., dissenting). “[T]raditionally accepted methods of execution” (including both “the firing squad[and] electrocution”) are not “necessarily rendered unconstitutional as soon as an arguably more humane method . . . becomes available.” *Bucklew*, 139 S. Ct. at 1125; *cf. id.* (“This Court has yet to hold that a State’s method of execution qualifies as cruel and unusual, and perhaps understandably so. Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite, exactly as Justice Story predicted.”).

There’s no need to rehash the points already discussed in the previous section. *See supra* Part I.B. The number of States that use a method or the number of times a method has been used in the past five decades is not dispositive. What matters is the historical analysis (the firing squad has long been a part of American life) and the goal of the method (the firing squad is considered to cause nearly instant death, without superadding terror, pain, or disgrace). The firing squad therefore does not violate article I, section 15.

II. The Act is not unconstitutional retroactive legislation.

Death Row Inmates' due process claim based on retroactivity hinges on their contention that they have a vested statutory right to be executed by lethal injection. *See* Second Am. Compl. ¶ 76. That contention is incorrect, and the idea that they “have a vested statutory right to elect lethal injection as their manner of execution” is itself (to use this Court’s words) “somewhat arbitrary and capricious.” June 11, 2021 Order 6–7. In fact, when it comes to “any legal precedent which would buttress” this claim, “there is none.” *Id.* at 7.

Under South Carolina law, a defendant convicted of “murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life.” S.C. Code Ann. § 16-3-20(A). The statute does not say *death by lethal injection*. It simply says *death*. *Id.* In this way, our criminal law is different from the criminal law centuries ago in England. At that time, a crime would carry a punishment of death by a particular method. *Compare* 4 Blackstone, *supra*, at 88 (punishment for treason is to be burned alive), *with id.* at 179 (punishment for murder is death by hanging).

Despite the plain language of section 16-3-20(A), Death Row Inmates suggest they were sentenced to death by a certain method. They were not. They were, instead, sentenced to death “in the manner provided by law.” Am. Compl. Exs. A & B (filed July 2, 2021). If the “manner provided by law” changes, then necessarily the method by which Death Row Inmates will be executed changes. Their sentence (death), however, has not changed. Only the “manner provided by law” has changed. The “manner” is provided by section 24-3-530, which is the section of the South Carolina Code that the Act amended.

Death Row Inmates invoke the United States Supreme Court’s decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), in support of this claim. *See* Second Am. Compl. ¶¶ 74, 77.

A close reading of that case, however, proves that Death Row Inmates' claim lacks merit. In *Landgraf*, the Court distinguished between procedural and substantive rules. It explained that "rules of procedure regulate secondary rather than primary conduct," which creates "diminished reliance interests in matters of procedure." 511 U.S. at 275. Applying procedural rules retroactively therefore does not raise the same constitutional concerns as applying substantive rules retroactively. *See id.* In short, what Death Row Inmates' argument here amounts to is "I wasn't deterred from committing murder by facing the possibility of death by lethal injection, but had I known I would have faced electrocution or the firing squad, I wouldn't have beaten two people to death with a baseball bat / shot a single mother in the head / cracked a woman's skull open after raping her." That is not a credible contention.

Throughout this litigation, Death Row Inmates have offered four things in support of their supposed vested-right claim, but none is compelling. *First*, Death Row Inmates contend they have been expecting to die by lethal injection, so they have been preparing for that death for two decades. *See* Second Am. Compl. ¶ 76. Yet again, their own exhibits to the First Amended Complaint belie this claim. For example, Sigmon's election form from January 2021 has a handwritten note from a witness that Sigmon claimed he "doesn't have enough information about the process" to make an election. Am. Compl. Ex. C (filed July 2, 2021). Indeed, at the time of his election, Sigmon was arguing in federal court litigation that he needed the execution protocols for both electrocution and lethal injection to allow him to make the election between the two methods. *See Sigmon v. Stirling*, 3:21-cv-278 (D.S.C.). That certainly does not sound like someone who has been preparing to die by lethal injection for two decades.

Second, Death Row Inmates say the Act's purpose was to "strip[]" them of their "right" to be executed by lethal injection. Second Am. Compl. ¶ 77. Not at all. Aside from the fact that no

such “right” exists, the purpose of the Act is to allow the State to carry out lawfully imposed death sentences in a statutorily approved manner. Death Row Inmates have been convicted of capital crimes (particularly heinous ones, no doubt), yet even after all of their direct and collateral appeals have been exhausted, the State has been unable to carry out their decades’ old sentences. As even Death Row Inmates acknowledge, no one on South Carolina’s death row has been executed in more than a decade. *See id.* ¶ 29. The Act gives the State the ability to carry out sentences in these cases after receiving an execution notice from the South Carolina Supreme Court. After all, the “power of a State to pass laws [to punish murder] means little if the State cannot enforce them.” *Baze*, 553 U.S. at 61 (plurality opinion).

Third, Death Row Inmates point to the South Carolina Supreme Court’s orders vacating the execution notices for Owens and Sigmon, citing the Supreme Court’s language that they have a “statutory right . . . to elect the manner of their execution.” Second Am. Compl. ¶ 738. Death Row Inmates overread the orders. The orders refer only to a “statutory right.” Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). Nothing more. No vested right. No absolute right. No due process right. At most, the South Carolina Supreme Court’s orders can be read to be interpreting the Act and the current execution procedure set forth in section 24-3-530, as amended by the Act. The single sentence in the orders that discussed the Act cannot plausibly be read to touch on the substance of this vested-right claim, which was not even before the court there.

Fourth, Death Row Inmates note that the 1995 version of section 24-3-530 has the “same language” as the Act “regarding the right to elect.” Second Am. Compl. ¶ 73. To be sure, “election” appears in both the 1995 and the 2021 acts. But critically (and omitted by Death Row Inmates in their Second Amended Complaint), the Act’s language “if it is available at the time of election” is

new. *Compare* 2021 S.C. Acts No. 43, § 1 (“A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, *if it is available at the time of election*, under the direction of the Director of the Department of Corrections.” (emphasis added)), *with* S.C. Code Ann. § 24-3-530(A) (2007) (“A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the person, lethal injection under the direction of the Director of the Department of Corrections.”).

The General Assembly must have intended this new phrase to work some change in the existing law. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (“The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.”). Its intent was to avoid condemned inmates using the opportunity to choose between two execution methods to effectively prevent their execution. That’s what was happening under the old version of section 24-3-530 (which did give an unrestricted choice to a condemned inmate): If a condemned inmate did not elect electrocution, the State could not carry out a death sentence because SCDC, despite its diligent efforts, has been unable to obtain the drugs necessary for lethal injection. It was this precise issue that the General Assembly addressed and resolved in passing the Act. *See Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956) (a statute must be interpreted “in the light of the circumstances and conditions existing at the time of its enactment”). By requiring an alternative method to be “available at the time of election,” the Act allows an execution to move forward and prevents a condemned person from electing a method (or even defaulting to a method) that is not available.

Two final points on Death Row Inmates’ vested-right claim: One, no court in the country appears to have accepted it. Tellingly, Death Row Inmates—while having incentive to do so—

have not yet in this litigation cited a single case on point, despite filing multiple complaints full of legal citations and multiple briefs on the merits of their claims. This omission is understandable. Courts have repeatedly rejected this claim. The Ninth Circuit, for example, held that a man on Montana's death row did not have a "vested right in his claim that hanging was unconstitutional." *Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir. 1998). While that inmate was on death row, Montana changed its method of execution from hanging to lethal injection, and the Ninth Circuit rejected the inmate's claim that the method of execution in effect at the time of his sentence could not be changed by the legislature. A federal district court in Oklahoma put it even more succinctly: "Plaintiff has not identified any case or other applicable authority clearly establishing that an inmate has a vested right in the particular execution procedure in force at the time of his sentencing." *Est. of Clayton Lockett ex rel. Lockett v. Fallin*, No. CIV-14-1119-HE, 2015 WL 3874883, at *8 (W.D. Okla. June 23, 2015), *aff'd sub nom. Est. of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098 (10th Cir. 2016). To this end, not even this Court could find any decision that accepted Death Row Inmates' theory on this claim. *See* June 11, 2021 Order 7.

Two, Death Row Inmates' own lawyers have been working for years to thwart efforts in the General Assembly to adopt a shield statute that SCDC has told the General Assembly is necessary for it to obtain the drugs required for lethal injection. *See, e.g.*, Sen. Greg Hembree, *Anti-Death Penalty Group Opposed SC Drug Company Shield Law It Now Wants*, The State (June 24, 2021), <https://tinyurl.com/2p8spmnr> (detailing efforts by Justice 360 to defeat a proposed shield statute). This push against a shield law appears to be a backdoor attempt, combined with litigation like this, to impose a *de facto* ban on capital punishment. Such a result, however, is inconsistent with both the state and federal constitutions, neither of which prohibits capital punishment.

III. The Act is not an *ex post facto* violation.

Death Row Inmates allege that the Act violates the *Ex Post Facto* Clauses of both the federal and state constitutions. *See* U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4; *see also* Second Am. Compl. ¶¶ 78–93. An *ex post facto* law retroactively either (1) “alters the definition of a crime” or (2) “increases the punishment for a crime.” *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.). Here, it is undisputed that the Act does not alter the definition of murder, so it is only necessary to address the second prong.

A. Death Row Inmates’ punishment has not changed.

Start with the obvious: Death Row Inmates still face the same punishment. Death Row Inmates were sentenced to death, just as South Carolina law provides. *See* S.C. Code Ann. § 16-3-20(A). Their punishment remains just that. Or, as this Court put it in denying Death Row Inmates’ Motion for a Preliminary Injunction, “[n]othing has changed about” the fact that Death Row Inmates “have known for many years that they were to be punished for their crimes by the loss of their own lives.” June 11, 2021 Order 5.

Courts (including the United States Supreme Court) have, in fact, consistently rejected the argument that changing methods of execution presents a constitutional problem. In *Malloy v. South Carolina*, 237 U.S. 180 (1915), Joe Malloy was charged with the 1910 murder of Prentiss Moore, *see State v. Malloy*, 95 S.C. 441, 445, 78 S.E. 995, 996 (1913). A jury convicted Malloy, and the trial court sentenced Malloy to death in 1912. *Id.* Malloy was to be executed by electrocution, under the procedures the General Assembly had adopted earlier in 1912 to replace hanging as the method of execution. *Id.* After the South Carolina Supreme Court rejected Malloy’s *ex post facto* argument, *id.* at 448, 78 S.E. at 997, Malloy pursued that argument “most earnestly” in the United

States Supreme Court, 237 U.S. at 183. The United States Supreme Court likewise rejected this argument, explaining, “The [South Carolina] statute under consideration did not change the penalty—death—for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some odious features incident to the old method were abated.” *Id.* at 185.

When faced with similar challenges, other courts have acknowledged this precedent and embraced its logic. For instance, the Montana Supreme Court held, “Death by lethal injection is not a legislatively created punishment. The punishment is the sentence of death.” *Montana v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984). In a case out of Arizona, the Ninth Circuit likewise opined, “[T]he sentence was death, and that sentence remains in place. The change in method does not make the sentence more burdensome and so does not violate the Ex Post Facto Clause.” *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997).

And so here. Death Row Inmates’ punishment is—and remains—death. As this Court has already observed, “[t]here is a distinct difference between a punishment itself and the manner in which a sentence is effected.” June 11, 2021 Order 5. Ultimately, the Act is a procedural change to how a death sentence is carried out, and it is well established that a procedural change does not create an *ex post facto* problem. See *Dobbert v. Florida*, 432 U.S. 282, 294 (1977) (holding in a murder case involving a change to how a death sentence could be imposed, “there was no change in the quantum of punishment attached to the crime” after the procedural change).

Taking Death Row Inmates’ argument to its logical extreme, there is theoretically no limit to what could amount to a change in punishment and violate their proffered interpretation of the *Ex Post Facto* Clauses. For example, an inmate could be moved to a smaller cell or a more secure facility. He could be moved to a prison with different recreational or educational facilities. The

menu for dinner could be changed. To avoid opening the floodgates of litigation, the simple rule that courts have already recognized should be maintained: A death sentence is a death sentence, no matter what constitutionally acceptable “mode of producing this” is used to carry it out. *Malloy*, 237 U.S. at 185.

B. Changing the default method of execution to another constitutional method of execution does not violate the *Ex Post Facto* Clauses.

Ex post facto is a “technical” legal term. *Calder*, 3 U.S. (3 Dall.) at 396 (Patterson, J.). James Madison called *ex post facto* laws “contrary to the first principles of the social contract” and the prohibition on them necessary to “personal security and private rights.” *The Federalist No. 44*, p. 279 (J. Madison) (C. Rossiter & C. Kelser eds. 2003). Although Blackstone limited this concept to laws that made something illegal after it was done, see 1 William Blackstone, *Commentaries on the Laws of England* 46 (1765), other leading authorities soon embraced a broader definition of the doctrine. For example, in discussing the provision in the United States Constitution, Justice Samuel Chase gave what is considered still the leading definition of *ex post facto* laws, writing that (among other things irrelevant to this case) an *ex post facto* law “inflicts a greater punishment[] than the law annexed to the crime[] when committed.” *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.). Justice Story similarly defined an *ex post facto* law to include one that “aggravate[s] . . . punishment” for an act after the act was committed. 3 Story, *supra*, at 212 (§ 1339).

In South Carolina, an *ex post facto* prohibition was included in the 1790 Constitution, about the same time the federal clause was ratified. See S.C. Const. art. IX, § 2 (1790). That prohibition remained in the 1861 Constitution, see S.C. Const. art. IX, § 2 (1861), the 1865 Constitution, see S.C. Const. art. IX, § 2 (1865), the 1868 Constitution, see S.C. Const. art. I, § 21 (1868), and the 1895 Constitution, see S.C. Const. art. I, § 8 (1895). The West Committee “retained [this clause] as basic to a state constitution.” *West Report* 13; see also S.C. Const. art. I, § 4. South Carolina’s

early opinions on *ex post facto* issues reflect a similar view of its meaning as the United States Supreme Court held. *See, e.g., State v. Branham*, 13 S.C. 389, 393 (1880) (an *ex post facto* law “increases the punishment”); *Byrne’s Adm’rs v. Stewart’s Adm’rs*, 3 S.C. Eq. 466, 477 (S.C. App. Eq. 1812) (citing Blackstone). It is a view to which the South Carolina Supreme Court still holds.⁴ *See, e.g., Robinson v. State*, 422 S.C. 78, 86, 810 S.E.2d 32, 37 (2018).

At this point, it important to recognize exactly what Death Row Inmates want this Court to do: wade into medical and scientific debates to resolve whether one method of execution may be more painful than another. It is hard to overstate how audacious this demand is. Courts are not well equipped to grapple with such a task. Thus, the United States Supreme Court has refused “to transform courts into boards of inquiry charged with determining ‘best practices’ for executions” and has sought to avoid “embroil[ing] the courts in ongoing scientific controversies beyond their expertise.” *Baze*, 553 U.S. at 51. To avoid forcing courts to delve into this quagmire, the United States Supreme Court has wisely required that a plaintiff challenging a method of execution “show a feasible and readily implemented alternative method of execution that would *significantly* reduce a *substantial* risk of *severe* pain and that the State has refused to adopt without a legitimate penological reason.” *Bucklew*, 139 S. Ct. at 1125 (emphases added).

⁴ Death Row Inmates contend the South Carolina Supreme Court has interpreted the South Carolina Constitution more broadly when it comes to *ex post facto* laws than the United States Supreme Court has interpreted the United States Constitution. *See* Second Am. Compl. ¶ 83. They rely on *Jernigan* for that proposition. *Jernigan* involved extending the timing of parole review. *See* 340 S.C. at 259, 531 S.E.2d at 508. Thus, the statutory amendment resulted in inmates potentially being in prison longer while waiting for a parole hearing. That issue has nothing to do with this case. Moreover, the South Carolina Supreme Court has—since *Jernigan*—looked to United States Supreme Court decisions in *ex post facto* challenges, indicating Death Row Inmates are wrong that the state and federal standards are generally different. *See, e.g., Barton v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 403, 745 S.E.2d 110, 114 (2013) (citing *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995)); *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 526 (2002) (citing *Flemming v. Nestor*, 363 U.S. 603 (1960)).

This high bar makes sense and should apply to state-law claims as well. For one, “some risk of pain is inherent in any method of execution.” *Glossip*, 576 U.S. at 869 (majority opinion). Therefore, “the Constitution does not require the avoidance of all risk of pain.” *Id.*; see also *Bucklew*, 139 S. Ct. at 1124 (“the Eighth Amendment does not guarantee a prisoner a painless death”). Any form of execution (indeed, any form of death) may involve some degree of pain. For another, this rule avoids constant litigation over whether traditional methods of execution have “become” unconstitutional (if something “becoming” unconstitutional is even logically possible) if newer, arguably less painful methods are developed. Such questions are, as just discussed, difficult for courts to resolve. Unsurprisingly then, the United States Supreme Court “has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.” *Glossip*, 576 U.S. at 869. Nor has the South Carolina Supreme Court.

At least two corollaries go along with the *Bucklew* standard. First, the “Constitution affords a measure of deference to a State’s choice of execution procedures.” *Bucklew*, 139 S. Ct. at 11245 (cleaned up). Second, “traditionally accepted methods of execution,” including both “the firing squad[and] electrocution” are not “necessarily rendered unconstitutional as soon as an arguably more humane method . . . becomes available.” *Id.* That means that even if one method of execution may be considered more humane than another, the supposedly less humane method does not automatically become unconstitutional.

Death Row Inmates cannot plausibly allege anything to meet this high threshold. Begin with the growing criticism of lethal injection. Attacks on lethal injection come from myriad sources, including from Justices on the United States Supreme Court. Justice Sotomayor has repeatedly questioned the use of lethal injection. She has observed that lethal injection was adopted as “a more humane and palatable method of execution,” but that in “cruel irony,” lethal injection

“may turn out to be our most cruel experiment yet.” *Arthur*, 137 S. Ct. at 732–33. In her dissent from the denial of certiorari in *Arthur*, Justice Sotomayor catalogued claims of lethal injections that supposedly caused pain. *See id.* at 733. She wanted the Supreme Court to take up the petitioner’s claim that the firing squad would substantially reduce the risk of pain. *See id.* at 733–34. Just last year, Justice Sotomayor reiterated the same point. *See Johnson*, 141 S. Ct. at 1623 (arguing that the Court should have grant certiorari in a case alleging that the firing squad was less painful than lethal injection). Justice Breyer has also insisted that “there are significant questions regarding the constitutionality of” lethal injection. *Barr v. Lee*, 140 S. Ct. 2590, 1592 (2020) (Breyer, J., dissenting). Other Eighth Amendment challenges to lethal injection abound in lower federal courts. *See, e.g., Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (per curiam); *Gissendaner v. Comm’r, Ga. Dep’t of Corr.*, 779 F.3d 1275 (11th Cir. 2015); *Raby v. Livingston*, 600 F.3d 552 (5th Cir. 2010); *Cooey v. Strickland*, (6th Cir. 2009); *Emmett v. Johnson*, 532 F.3d 291 (4th Cir. 2008); *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006).

And it is not just jurists or other condemned inmates challenging lethal injection. Death Row Inmates themselves have done so. Sigmon previously sued Director Stirling and SCDC, demanding information about the protocols for lethal injection, alleging that SCDC’s method could cause a “painful and tortuous death.” Compl. ¶ 37, *Sigmon v. Stirling*, No. 3:21-cv-278 (D.S.C. Jan. 28, 2021), ECF No. 1. Some of Death Row Inmates’ lawyers have likewise sued Director Stirling and SCDC over access to lethal injection protocols so they can “consider an Eighth Amendment challenge” to those protocols. Compl. Introduction, *Justice 360 v. Stirling*, No. 3:20-cv-3671 (D.S.C. Oct. 19, 2020), ECF No. 1; *see also id.* ¶ 2 (“There are a variety of drugs that have been or could be used to carry out an execution by lethal injection, and each has specific risks and associated problems—risks that can be exacerbated when assessed in the context of a particular

inmate’s health and medical history.”); *id.* ¶¶ 9, 11–13 (asserting that condemned inmates in other states “suffered a torturous death” or were subjected to a “botched execution” due to alleged issues with lethal injections); *id.* ¶ 26 (“Electrocution is making a comeback in several other states due to the persisting issues with lethal injection as a method of execution.”).

There have even been legal challenges to pentobarbital, which Death Row Inmates call “the most reliable and humane way” to carry out an execution. Second Am. Compl. ¶ 65. In *Barr v. Lee*, the inmates brought an Eighth Amendment challenge to using a single dose of pentobarbital for lethal injection. The inmates in *Lee* claimed a single dose of pentobarbital would create “respiratory distress that temporarily produces the sensation of drowning or asphyxiation.” *Lee*, 140 S. Ct. at 2591 (per curiam). The district court issued a preliminary injunction because, in its mind, the “scientific evidence before the court overwhelmingly indicates that [a single dose of pentobarbital] is very likely to cause Plaintiffs extreme pain and needless suffering during their executions.” *Matter of Fed. Bureau of Prisons’ Execution Protocol Cases*, 471 F. Supp. 3d 209, 218 (D.D.C. 2020), *vacated sub nom. Barr v. Lee*, 140 S. Ct. 2590. The Supreme Court quickly vacated that injunction, but the fact that a federal district judge could enter the injunction at all demonstrates how difficult and debatable questions about degree of pain are.

Compare these attacks on lethal injection with recent discussions of and choices about the firing squad and electrocution. As discussed already, a growing chorus of judges has indicated the firing squad is a constitutional alternative to lethal injection. *See supra* Part I.C. (collecting cases). And condemned inmates are now pressing the “firing squad is less painful” argument in challenging death-penalty procedures across the country. For example, on remand in the *Glossip* litigation after the United States Supreme Court’s 2015 decision, the plaintiffs have an expert who explains that “the firing squad causes death with minimal pain” akin to a “severe blunt blow.” Rule

26 Report of Dr. James S. Williams 3, 5, *Glossip v. Chandler*, No. 5:14-cv-665 (W.D. Okla. Dec. 17, 2021), ECF No. 564-2; *see also* Report of Dr. James S. Williams, *Floyd v. Daniels*, No. 3:21-cv-176 (D. Nev. Aug. 26, 2021), ECF No. 173-3 (making the same claims about the firing squad); *accord* *McGehee v. Hutchinson*, 463 F. Supp. 3d 870, 915 (E.D. Ark. 2020); *Swearingen v. Collier*, No. 4:19-CV-3079, 2019 WL 3935285, at *3 (S.D. Tex. Aug. 20, 2019); *Gray v. McAuliffe*, No. 3:16CV982-HEH, 2017 WL 102970, at *10 (E.D. Va. Jan. 10, 2017). And the United States Supreme Court recently granted certiorari in a case out of Georgia to address procedural questions about an inmate’s “the firing squad is a better alternative” argument. *See Nance v. Ward*, 142 S. Ct. 858 (2022).

As for electrocution, recent executions in Tennessee have seen inmates *choose* electrocution over lethal injection. *See* Loller, *supra*. Importantly, none of those executions involved any of the horror stories Death Row Inmates say might happen with electrocution. For instance, in one of those most recent executions in Tennessee, the inmate’s body stiffened and partially lifted out of the chair before he died less than a minute after the first jolt of electricity. *See id.*

IV. The Act is not unconstitutionally vague.

Death Row Inmates claim that the Act’s use of the term “available” is unconstitutionally vague because (1) the Act does not define what it means for a method of execution to be available and (2) the Act does not explicitly provide for when the Director must certify what methods are available. *See* Second Am. Compl. ¶¶ 94–99. Both arguments strain credulity, and neither theory survives scrutiny.

Due process “requires fair notice.” *State v. Green*, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012). A law is unconstitutionally vague only if it “requires the doing of an act in terms so vague

that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” *Id.*

Starting with the meaning of “available,” the “cardinal rule” in interpreting a statute is to give effect to the General Assembly’s intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Discerning that intent begins with the language of the statute. *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). Words in a statute must be read “in context,” *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013), and given their “usual and customary meaning,” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011).

To determine what “available” means in the Act, it is helpful to step back and recall why the General Assembly passed the Act in the first place. *See Abell*, 229 S.C. at 5, 91 S.E.2d at 550 (a statute must be interpreted “in the light of the circumstances and conditions existing at the time of its enactment”). The unrestricted choice between lethal injection and electrocution in the 1995 version of section 24-3-530 had effectively created an inmate-driven moratorium on executions. The General Assembly wanted to change that. To do so, it did two things: (1) it switched the default method from lethal injection to electrocution, and (2) it made a condemned inmate’s choice subject to there being multiple ways to carry out a scheduled execution. *Cf. Denene, Inc.*, 352 S.C. at 212, 574 S.E.2d at 198 (when the General Assembly acts, it intends to accomplish something).

In light of the General Assembly’s intent, the meaning of “available” is apparent: “present or ready for immediate use.” Merriam-Webster Dictionary (2022), <https://tinyurl.com/e7fshz4>; *see also* American Heritage Dictionary (2021), <https://tinyurl.com/b3eddwf4> (“present and ready for use”); 1 *Compact Edition of the Oxford English Dictionary* 145 (1971) (“capable of being made use of”). Whatever other definitions of “available” may exist, none of them makes sense in context

here. The only meaning of the word that fits is the one that asks whether SCDC is capable of using a particular method for an execution on a specific date.

This is particularly clear when considering the timing for when the SCDC Director must certify what methods are available. The only logical reading of section 24-3-530 is that the Director must submit his certification *before* a condemned inmate's deadline for election. The amended statute provides that the Director "shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available." 2021 S.C. Acts No. 43, § 1 (codified at S.C. Code Ann. § 24-3-530(B)). To be sure, there is no express timeframe established by the amended statute for this certification, but one is implied when reading the Act as a whole: The certification must be submitted in time for the condemned inmate to elect a method (if multiple methods are available) "fourteen days before" the execution date established by the South Carolina Supreme Court's execution notice. *Id.* (codified at S.C. Code Ann. § 24-3-530(A)); see *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."). By submitting the certification before this deadline, the condemned inmate actually knows what methods he may elect, thereby giving him a choice (assuming more than one method is available) ahead of that deadline. Additionally, this ensures SCDC has sufficient time to prepare for the execution and is not rushed in the last day or hours by having to switch methods at the condemned inmate's demand. Any other interpretation "would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature." *Hodges*, 341 S.C. at 91, 533 S.E.2d at 584.

In their response to Defendants' now-moot Motion to Dismiss the Amended Complaint, Death Row Inmates contended that "available" is vague because the Director could make no effort

to have methods other than electrocution be an option. This strawman argument falls flat. It wrongly assumes that the Director would not seek to employ methods the General Assembly has clearly directed should, if possible, be made an option for condemned inmates. The law has long rejected arguments that do not presume the good faith of public officials. *See, e.g., S.C. Nat'l Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115–16, 127 S.E.2d 199, 202 (1962) (“In the absence of any proof to the contrary, public officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged.”); *Howell v. Littlefield*, 211 S.C. 462, 468, 46 S.E.2d 47, 49 (1947) (“The presumption is always in favor of the correct performance of his duty by an officer.”).

In denying Death Row Inmates’ Motion for a Preliminary Injunction, this Court observed that “the law on its face can be clearly understood.” June 11, 2021 Order, at 7. That is still true. And it is why this claim should be dismissed.

V. There is no statutory violation of “available.”

Death Row Inmates assert a “statutory violation based on the meaning of ‘available.’” Second Am. Compl. Count IV. This claim is premised on the idea that the Act gives an inmate the *right* to choose between multiple methods of execution. For support, they rely exclusively on the Supreme Court’s orders staying the executions of Sigmon and Owens while SCDC finalized the firing squad protocols. *See* Second Am. Compl. ¶¶ 100–04; *see also* Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021).

This claim has multiple problems. *First*, it treats a single sentence in a stay order as the definitive word on the meaning of the Act. That sentence cannot bear the weight Death Row Inmates place on it. The parties did not fully brief this issue in the Supreme Court, and the Supreme Court did not engage in its usual statutory analysis of employing the usual tools of statutory

construction. *Cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (“The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not binding precedent on this point.”).

That said, to the extent Death Row Inmates want to treat the Supreme Court’s stay orders as controlling, those orders ultimately undermine their claims in this case. Those stay orders prohibit the Clerk of the Supreme Court from issuing an execution notice only until the State notifies the Supreme Court that, “in addition to maintaining the availability of electrocution,” SCDC “has developed and implemented appropriate protocols and policies to carry out executions by firing squad.” Order, *State v. Sigmon*, No. 2002-024388 (June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). That indicates the Supreme Court sees no constitutional or statutory problem with inmates having to make a choice between electrocution and the firing squad.

Second, this claim is inconsistent with the plain language of the Act. *See Smith*, 419 S.C. at 555, 799 S.E.2d at 483 (“It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.”). The Act provides, “A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, *if it is available at the time of election*, under the direction of the Director of the Department of Corrections.” 2021 S.C. Acts No. 43, § 1 (emphasis added). “If” is a conditional word. *See, e.g., Merriam-Webster* (2022), <https://tinyurl.com/4tb2e5nx> (defining “if” to mean “on the condition that”). The condition is that, for a condemned inmate to have a right to elect a method of execution, the firing squad or lethal injection must be available at the time of election. *Cf. S.C. Code Ann. § 17-25-370* (execution date is the fourth Friday after receipt by SCDC of notice of execution from the Supreme Court); 2021

S.C. Acts No. 43, § 1 (an election must be made 14 days before the execution date (codified at S.C. Code Ann. § 24-3-530(C))).

Moreover, this is the only interpretation of the Act that does not lead to an absurd result. The General Assembly passed the Act because the prior version of section 24-3-530 effectively allowed condemned inmates to choose a method of execution, even if unavailable, which (as already discussed), resulted in put an inmate-imposed moratorium on executions. Treating the Act as maintaining this functional veto makes no sense.

Third, even if Death Row Inmates are correct that the Act gives them an absolute right to elect a method, this claim is not ripe. A case is not ripe whenever it raises an issue “that is contingent, hypothetical, or abstract is not ripe for judicial review.” *Jowers v. S.C. Dep’t of Health & Env’t Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018). But this claim is just that: hypothetical. An execution can proceed only after the South Carolina Supreme Court issues a notice of execution. *See* S.C. Code Ann. § 17-25-370. In other words, our Supreme Court will decide when an execution can proceed. An injunction from this Court will do nothing to speed up, slow down, require, or prohibit the Supreme Court’s decision to have its Clerk issue a notice of execution. *Cf. Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 61, 398 S.E.2d 500, 505 (Ct. App. 1990) (“a decision of the Supreme Court[] must prevail”). Thus, any decision from this Court on this claim would be nothing more than an improper “advisory opinion on a hypothetical situation.” *Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm’n*, 280 S.C. 48, 56, 310 S.E.2d 655, 659 (1983).

VI. The Act does not unconstitutionally delegate legislative power.

Death Row Inmates contend that the Act unconstitutionally delegates legislative power to the Director to determine whether a method of execution is “available.” Second Am. Compl.

¶¶ 105–13. At its core, this claim rests on Death Row Inmates’ contention that “available” is unconstitutionally vague. But as already discussed, “available” has a readily discernable meaning. *See supra* Part IV. There is accordingly no nondelegation problem with the Act. In fact, this Court has already said that this claim “is lacking in support.” June 11, 2021 Order 7.

The nondelegation doctrine “is a component of the separation of powers doctrine and prohibits the delegation of one branch’s authority to another branch.” *Hampton v. Haley*, 403 S.C. 395, 407, 743 S.E.2d 258, 264 (2013). Under the doctrine, the General Assembly must “enact[] a law complete in itself,” *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978), but the General Assembly may allow a State agency to “fill up the details” of how the General Assembly’s expressed purpose will be carried out, *Hampton*, 403 S.C. at 407, 743 S.E.2d at 264; *see also Wayman v. Southard*, 23 U.S. 1, 43 (1825) (Marshall, C.J.) (contrasting “important subjects, which must be entirely regulated by the legislature itself” with “those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details”).

When it comes to the death penalty, “capital punishment as such and the method of execution are matters of legislative determination.” *State v. Woomer*, 278 S.C. 468, 473, 299 S.E.2d 317, 320 (1982). And that is exactly what the General Assembly has decided: South Carolina will retain capital punishment, *see* S.C. Code Ann. § 16-3-20(A), and the method of execution will be electrocution, unless lethal injection or the firing squad are available at the time an inmate will be executed, in which case the inmate may elect one of those alternatives, *see* 2021 S.C. Acts No. 43, § 1 (amending S.C. Code Ann. § 24-3-530).

What the General Assembly has left up to SCDC is the details of whether those methods can be used at a particular time and, if they can, the particular procedures for carrying them out.

See id. (“Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.” (codified at S.C. Code Ann. § 24-3-530(B))); *id.* (“The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.” (codified at S.C. Code Ann. § 24-3-530(F))). Nothing about this delegation is unconstitutional. Other courts have rejected similar nondelegation arguments when state corrections officials have been tasked with determining the protocols for legislatively established methods of execution. *See, e.g., Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978) (a statute making lethal injection the method of execution but leaving to corrections officials the responsibility to determine the specific procedures “is sufficiently complete to accomplish the regulation of the particular matters falling within the Legislature’s jurisdiction”); *cf. United States v. Brandon Michael Council*, No. 4:17-CR-00866-RBH, 2019 WL 6873810, at *4 (D.S.C. Dec. 17, 2019) (rejecting a nondelegation argument regarding federal methods of execution). All Death Row Inmates point to in their Second Amended Complaint (which, again, is replete with legal citations) is a single Arkansas case. *See* Second Am. Compl. ¶ 108 (citing *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012)). That case is irrelevant here, as even the Arkansas Supreme Court recognized that Arkansas’s nondelegation doctrine was different from other States’ doctrines. *See Hobbs*, 412 S.W.3d at 854.

Death Row Inmates fare no better by alleging that the Director can decide whether a method is available “for any reason, or for no reason.” Second Am. Compl. ¶ 112. The Act mandates the Director create protocols for firing squad and lethal injection and then swear to the Supreme Court whether SCDC is able to use those methods at any given time. To accept Death Row Inmates’ argument would require a court to assume that the Director would not act in good

faith in complying with the Act. The law, as already noted, *see supra* Part IV, requires a court to assume the opposite. *See, e.g., S.C. Nat'l Bank*, 241 S.C. at 115–16, 127 S.E.2d at 202; *Howell*, 211 S.C. at 468, 46 S.E.2d at 49. Death Row Inmates have alleged nothing to suggest that the Director will not fulfill his duty exactly as the law requires, which is to certify the statutorily approved methods available to SCDC for a particular execution.

Nor can Death Row Inmates gain any traction by pointing to the Act's lack of a procedure for judicial review of the Director's determination of what methods are available for an execution. The General Assembly presumably made the (very reasonable) choice not to prolong the already "seemingly endless proceedings" that keep the State from carrying out a death sentence. *Baze*, 553 U.S. at 69 (Alito, J., concurring). And in any event, Death Row Inmates have overlooked the South Carolina Supreme Court's power to issue extraordinary writs in its original jurisdiction. *See* S.C. Code Ann. § 14-3-310; Rule 245(b), SCACR. Thus, there is always an avenue for judicial review (though that does not mean our Supreme Court has to grant a petition for an extraordinary writ). And in any event, it's hard to take seriously a claim about a lack of judicial review when Death Row Inmates have asserted eight claims in this litigation.

VII. The Act does not require that a condemned inmate have a choice.

Death Row Inmates assert a short claim that their supposed "statutory right" to elect a method of execution is violated if they are forced to choose between one constitutional and one unconstitutional method. *See* Second Am. Compl. ¶¶ 124–26. This claim can be rejected for two reasons already discussed. First, this argument assumes there is a statutory right to elect a method. There is not. *See supra* Part IV (discussing the plain meaning of the Act). Second, it assumes that electrocution and the firing squad are unconstitutional. They are not. *See supra* Parts I.B. and I.C.

(explaining the constitutionality of both methods). The Court should therefore dismiss this abstract claim.

VIII. Terry's as-applied claim fails.

The final claim is Terry's as-applied challenge, based on particular medical conditions that he claims would make both electrocution and the firing squad unconstitutionally painful. *See* Second Am. Compl. ¶¶ 127–33. As with the previous seven claims, this one also fails.

Starting with electrocution, in light of the South Carolina Supreme Court's stay orders, Terry will not have to elect electrocution. And in any event, Terry's conclusory allegations about the metal near his hip and ankle creating an "electrical diversion" that keep him from being executed or increasing the "risk of fire" fall short of a viable claim. *Id.* ¶ 133.

As for the firing squad, Terry's claim also fails. His entire claim hinges on the assumption that there will be a "misfire" that causes him "to slowly and painfully bleed to death." Second Am. Compl. ¶ 132. But mishaps with the firing squad are extremely rare. *See Arthur*, 137 S. Ct. at 34; Denno, *supra*, at 787. Such speculation about a miniscule possibility cannot give rise to a viable claim. If it could, every condemned inmate would be searching for a diagnosis of something to delay his execution, thereby further dragging out the "seemingly endless proceedings" in capital cases. *Baze*, 553 U.S. at 69.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Second Amended Complaint with prejudice.

Respectfully submitted,

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March 15, 2022
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT**

FREDDIE EUGENE OWENS,

BRAD KEITH SIGMON,

and

GARY DUBOSE TERRY,

Plaintiffs,

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 D. MCMASTER, in his official
capacity as the Governor of South
Carolina,

Defendants.

Civil Action No. 2021-CP-40-02306

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Plaintiffs, through undersigned counsel, submit the following response in opposition to Defendants' motion to dismiss. Defendants' arguments in support of dismissal are based on misinterpretations of Plaintiffs' claims and the relevant legal standards, misrepresentations of Defendants' own efforts (or lack thereof) to make statutory methods of execution available, and a failure to acknowledge the novelty of a recently amended law that makes South Carolina an outlier in reverting to less humane methods of execution. Defendants also incorrectly assert the claims

raised by Plaintiffs can be decided without factual development and determinations by this Court. To adequately assess the legality of the legislature's amendments to South Carolina's execution statute, S.C. Code Ann. § 24-3-530 (2021), and to prevent the unconstitutionally tortuous executions of Plaintiffs, this Court should deny the motion to dismiss, order discovery, and ultimately rule on the merits of the claims presented in the Second Amended Complaint.

I. INTRODUCTION.

This case stems from South Carolina's adoption of S.C. Code Ann. § 24-3-530 (2021) ("execution statute"), making it the only jurisdiction in the nation to replace lethal injection as its default method of execution, forcing a prisoner to choose the electric chair or the firing squad—two antiquated methods that are less humane than lethal injection.¹ Though the amended statute purports to provide Plaintiffs' with a selection between three methods of execution, including the more humane method of lethal injection, Defendants' actions and assertions make it clear they do not intend to present lethal injection as an option for Plaintiffs to elect from, so they will be forced to elect between electrocution and the firing squad.

Defendants assert the amended execution statute was necessary because they cannot obtain drugs to carry out executions by lethal injection, and the old law prohibited executions by a method other than lethal injection unless the inmate elected electrocution. *Compare* S.C. Code Ann. § 24-3-530 (1995), *with* S.C. Code Ann. § 24-3-530 (2021). However, Defendants have steadfastly refused to produce any evidence that they have even attempted to purchase lethal injection drugs

¹ American jurisdictions have spent the last 150 years implementing more humane methods of execution, culminating with every death penalty jurisdiction in the country using lethal injection as its only or default method of execution. They did so because, as the Supreme Court of the United States has recognized, lethal injection is the most humane method available. *Baze v. Rees*, 553 U.S. 35, 62 (2008). Indeed, in 1995, South Carolina made lethal injection its default method of execution because it is "more humane than dying in the electric chair." *Legislative Watch: Death Penalty*, THE TIMES & DEMOCRAT (Orangeburg, S.C.), Mar. 2, 1995, at 2B.

since Defendant Stirling became the Director of SCDC in 2013. Stirling told the press that when he began his term, he “was told that our drugs had expired, and we were going to have a hard time obtaining the drug [pentobarbital].” John Monk, *Controversial Bill Proposed to Get Stalled SC Executions Back on Track*, THE STATE (Mar. 6, 2016), <https://www.thestate.com/news/local/article64471007.html>. But there is no indication that SCDC has made any effort to get drugs since that time.

Meanwhile, other jurisdictions continued to carry out executions by lethal injection. For example, since October 2013, the same month Stirling took over at SCDC, Texas has carried out 72 executions by lethal injection. *Execution Database*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executions/execution-database> (last visited March 20, 2022). In addition to Texas, the federal government and at least seven other states—Georgia, Oklahoma, Virginia, Ohio, Mississippi, Louisiana, and Pennsylvania—have purchased lethal injection drugs from compounding or importing pharmacies. Across the country, 13 states and the federal government carried out 223 lethal injection executions since 2013, including thirteen by the federal government.² *Id.*

In addition, when the South Carolina Supreme Court asked Defendant Stirling to explain why lethal injection was not available in June of 2021, he provided a letter from Hikma Pharmaceuticals, a New Jersey pharmaceutical company, which simply reminded Defendants of Hikma’s public opposition to its products being used for lethal injection.³ Second Amended

² Arizona also recently announced that it was able to secure lethal injection drugs after an extended period with no executions in that state. Jacques Billeaud, *Arizona Finds Death Penalty Drug After Hiatus in Executions*, AP NEWS (Mar. 5, 2021), <https://apnews.com/article/arizona-phoenix-executions-6f0ce846e174119635509e0c16b9ac1d>.

³ This policy is clearly stated on Hikma’s website, which includes a public statement that it “object[s] in the strongest possible terms to use of any of our products for the purpose of capital

Comp., Ex. G. Nothing in the letter indicates that it was in response to a specific request from SCDC for lethal injection drugs. Hikma has a practice of sending similar letters to departments of corrections across the country. *E.g.*, David Ferrara, *Company Demands Return of Drug Planned for Zane Floyd Execution*, LAS VEGAS REV.-J. (June 25, 2021), <https://perma.cc/F9HK-U25Z>. More significantly, Hikma does not sell *any* of the drugs listed by SCDC as potential drugs for its lethal injection protocols.⁴ Its letter therefore provides no support for SCDC’s claim that it has made affirmative efforts to obtain lethal injections drugs and does not demonstrate that lethal injection drugs are unavailable from manufacturers.

SCDC’s description of its efforts to identify a compounding pharmacy to supply the drugs proves even less informative. In the same June 8, 2021 letter to the South Carolina Supreme Court, Stirling asserted that “SCDC has also explored having a licensed pharmacy and pharmacist compound the drugs,” and “[t]hose efforts have also been unsuccessful.” Second Amended Comp., Ex. F. This provides no explanation of the extent of SCDC’s efforts or why those efforts failed, and in other settings Stirling has stated that SCDC declined to ask the legislature for funding to construct a compounding pharmacy because they could purchase drugs more cheaply on the open market. *See Monk, supra* (“[I]t just didn’t make a lot of sense to use tax dollars to buy something we could get for a lot less on the open market.”).

When Defendants repeated their claim that they had made a good faith effort to acquire

punishment.” *Use of Products in Capital Punishment*, Hikma, <https://www.hikma.com/about/our-policies-and-positions/use-of-products-in-capital-punishment/>.

⁴ SCDC has indicated that it has a three-drug protocol involving Pentobarbital, Pancuronium Bromide and Potassium Chloride. *See* Letter from Daniel Plyer regarding SCDC’s lethal injection protocol dated November 20, 2020, attached as Ex. 1. SCDC has further stated that if sufficient quantities of these three drugs cannot be obtained, it intends to use a single dose of Pentobarbital Sodium. *Id.* None of these drugs is listed among Hikma’s products. *See* <https://www.hikma.com/products/us-products/>.

lethal injection drugs in front of the District Court of South Carolina (and relied on the same basis they offered to the state Supreme Court), Judge Bryan Harwell asked if Defendants wished to supplement the record with further detail about their efforts. Tellingly, Defendants twice declined this suggestion—first asserting that the district court could simply take judicial notice of Defendants’ submission to the South Carolina Supreme Court (District Court Hearing Excerpt, attached as Ex. 2 at 34–35); and second, claiming “[n]o matter what we put in there, it’s never going to be enough.” (*Id.* at 42). Defendants have declined to answer Plaintiffs’ requests for discovery about what, if any, efforts they have made to obtain lethal injection drugs.⁵ Instead, they filed a motion asking this Court to stay discovery and/or issue a protective order, seeking to have the case dismissed before any discovery can take place. *See* Defendants’ Motion to Stay Discovery and/or Motion for Protective Order, filed August 26, 2021.

Defendants should not be permitted to force Plaintiffs to die in the electric chair or by firing squad without, at a minimum, making a reasonable showing that they are unable to obtain lethal injection drugs despite a good faith effort. In addition, this case raises multiple novel legal questions that can only be resolved after factual development through discovery and, ultimately, a

⁵ Defendants further attempt to blame their failure to obtain lethal injection drugs on Plaintiff’s “own lawyers” who they say thwarted efforts to adopt a shield statute that SCDC says would allow it to obtain lethal injection drugs. Defendants’ Motion to Dismiss, filed March 15, 2022 (“MTD”) at 23. Defendants overstate Plaintiffs’ attorneys sway over the General Assembly. The proposed shield law has been opposed by many organizations and legislators because it would eliminate transparency in carrying out executions, and Defendant Stirling publicly testified he did not know if he would be able to obtain lethal injection drugs even with a shield statute. Plaintiffs’ lawyers’ primary opposition to the proposed legislation was based on Defendants’ efforts to make everything about the lethal injection process a state secret—even withholding information from the inmate to be executed, his counsel, and the courts. Defendants were unwilling to make an exception that would at least allow that information to be provided confidentially to Plaintiffs. That level of secrecy would mean that Defendants could use experimental drugs that could be torturous, but any legal challenge would be barred because no one would know about it. Thus, if Defendants cannot have complete secrecy surrounding lethal injection, they would prefer to use electrocution or firing squad as the methods of execution.

trial. This Court should deny defendants' motion to dismiss, allow discovery to proceed, and schedule this case for trial.

II. PROCEDURAL HISTORY.

From 1995 until 2021, lethal injection was the primary method of execution in South Carolina. Death-sentenced inmates were given a right to elect between electrocution and lethal injection; if an inmate made no election, the default method was lethal injection. S.C. Code Ann. § 24-3-530 (1995). During this time period, South Carolina executed thirty-six men by lethal injection.⁶ *Execution Database*, supra.

On May 14, 2021, Governor Henry McMaster signed into law Senate Bill 200, amending the execution statute to make electrocution the default method of execution in South Carolina. The Bill also added firing squad as a potential option, in addition to lethal injection, and gave SCDC's Director, Defendant Stirling, the power to certify which of the three methods is "available" for use. S.C. Code Ann. § 24-3-530 (2021). The new statutory language does not define the word "available," nor does it provide any guidance on what efforts the defendants must undertake to make one of the execution methods available. In an attempt to expediently determine how the amended statute would affect their election of execution method, Plaintiffs Sigmon and Owens filed suit in this Court the week after the Governor signed the bill into law and sought expedited discovery and a hearing.

⁶ Though no execution (by lethal injection or electrocution) was carried out between 2011 and 2021, the hiatus was not due to a lack of lethal injection drugs as Defendants assert. *See* MTD at 21. From 2011 until November 2020, no death-sentenced inmate's regular appellate process concluded to make them eligible for execution. Thus, the only delay resulting from the asserted lack of lethal injection drugs was a six-month period between November 2020 and May 2021, when the legislature amended the execution statute.

Relying on the newly adopted statute, Defendants attempted to execute Plaintiffs Sigmon and Owens by certifying they could carry out executions by electrocution. Defendants asserted that “available” has a plain and ordinary meaning, which is “present and ready for immediate use.” MTD at 32. Defendants argued, “[t]he only meaning of the word that fits is the one that asks whether SCDC is capable of using a particular method for an execution on a specific date.” *Id.* at 33. Defendant Stirling certified that, at that time, the only statutorily authorized method of execution available was the electric chair. Stirling informed the South Carolina Supreme Court that firing squad was not available because “SCDC does not currently have the necessary policies and protocols . . . for an execution by firing squad.” Second Amended Comp., Ex. F.

Although the South Carolina Supreme Court issued execution orders for both Plaintiffs, it later stayed both executions, stating:

Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice.

Order, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021) (hereinafter “June Orders”). The Supreme Court directed its clerk not to issue another execution notice “until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.” *Id.* Plaintiff Terry is now similarly situated to Plaintiffs Owens and Sigmon. On March 18, 2022, Defendants notified the Supreme Court of South Carolina that they have finished developing their firing squad protocol. Firing Squad Notification Letter dated March 18, 2022, attached as Ex. 3.

The Second Amended Complaint, filed on February 7, 2022, contains claims previously raised in two separate actions: (1) *Owens v. Stirling (Owens I)*, No. 2021-CP-40-2306, filed on May 17, 2021, challenging various procedural aspects of S.C. Code Ann. § 24-3-530 (2021); and, (2) *Owens v. Stirling (Owens II)*, No. 2021-CP-40-04851, filed on September 27, 2021, raising substantive challenges to the proposed methods of punishment.⁷ These have been merged into one

⁷ Defendants fault Plaintiffs for pursuing other litigation and, in doing so, misrepresent the nature of the other actions and ignore the extreme secrecy under which they have attempted to carry out Plaintiffs' executions. Counsel correct the record below:

- *Sigmon v. State*, App. Case No. 2021-000584 (S.C.): Plaintiff Sigmon requested South Carolina Supreme Court review of his trial attorneys' effectiveness under the Sixth Amendment through an original habeas petition. This case challenged the validity of Sigmon's death sentence, not the method of execution.
- *Sigmon v. Stirling*, No. 3:21-cv-278 (D.S.C.): Plaintiff Sigmon sought information about how SCDC planned to carry out executions by lethal injection and electrocution when SCDC refused to provide any information about how they planned to carry out either method.

Defendants incorrectly assert this litigation undermines the notion that lethal injection is the most humane of the three now-authorized methods of execution. Lethal injection is not carried out uniformly across the country, and the statute does not establish the types or sources of drugs to be used. The type and sources of drugs matter. Plaintiffs have consistently asserted a single dose of pentobarbital is the most humane method of execution. *See Barr v. Lee*, 140 S. Ct. 2590 (2020). Because SCDC has no statutory obligation to use the most humane drugs, Sigmon requested the protocols to learn what drugs (or combination thereof) SCDC intended to use for lethal injection.

- *Justice 360 v. Stirling*, No. 21-2205 (4th Cir.): Justice 360 represents death-sentenced inmates and serves as a resource center for training and education on the death penalty in South Carolina. To fulfill their mission, Justice 360 sought access to execution protocols. For the reasons above, this does not undermine lethal injection as the most humane method of execution.
- *Justice 360 v. S.C. Dep't of Corrections*, No. 2020-CP-40-5306 (S.C. Ct. Comm. Pls.): Justice 360 sought a ruling that execution protocols should be public information under FOIA. Justice 360 did not appeal following the denial of their claim in the circuit court, which did not dismiss the case with prejudice as Defendants assert.
- *Sigmon v. Stirling*, No. 3:21-CV-01651-RBH (D.S.C.): Prior to the June Orders, when SCDC attempted to carry out executions only by electrocution, Sigmon challenged electrocution as unconstitutional under the Eighth Amendment. Sigmon dismissed this suit once the June Orders ruled SCDC must make more than just electrocution available.

complaint (along with an additional claim raised by Plaintiff Terry [Count VIII]) by agreement of the parties in an effort to streamline resolution of the issues.

III. STANDARD OF REVIEW.

Plaintiffs seek a declaratory judgement. “To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985)). “A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.” *Id.* (citing *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)). The Declaratory Judgment Act “should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method for deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423–24, 593 S.E.2d 462, 466 (2004).⁸

In considering a Rule 12(b)(6) motion, the circuit court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deduced therefrom, viewed in the light most

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- *Owens v. Stirling*, No. 2021-CP-40-4851 (S.C. Ct. Comm. Pls.): This suit (*Owens II*) was filed in September 2021 challenging electrocution and the firing squad under the state and federal constitutions. Defendants removed the suit and untimely removed the consolidated *Owens I* suit. The federal court remanded to this Court all claims except the Eighth Amendment challenge.

⁸ “As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCp, motion to dismiss. Instead, a novel issue is best decided in light of the testimony adduced at trial.” *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (citing *Tyler*, 275 S.C. 456, 272 S.E.2d 633); *see also Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 586, 819 S.E.2d 142, 146 (Ct. App. 2018) (“Motions to dismiss are no place for novelty.”).

favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

A Rule 12(b)(6) motion converts to a Rule 56, SCRCP motion for summary judgment if the court considers matters outside the pleadings. See Rule 12(d), SCRCP (“If, on a motion under 12(b)(6) [failure to state a claim upon which relief can be granted] or 12(c) [judgment on the pleadings], matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.”). A trial court may treat a 12(b)(6) motion as a motion for summary judgment if the parties have notice and “are afforded a reasonable opportunity to respond” to matters presented outside the pleadings. *Brown v. Leverette*, 291 S.C. 364, 367, 353 S.E.2d 697, 698–99 (1987). Summary judgment is only appropriate if “it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001). “In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party.” *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014).

III. ARGUMENT

By asserting that the constitutionality of electrocution and the firing squad “is the cornerstone of [Plaintiffs’] entire case,” MTD at 7, Defendants confuse the standards applicable to

each individual claim. Plaintiffs address the proper legal standards, or the open questions regarding the appropriate standard, for addressing each claim in the sections that follow.

a. Count I: The 2021 Amendments Violate Due Process as Retroactive Legislation.

In its June Orders, issued after this Court ruled on Plaintiffs' motion for preliminary injunction, the South Carolina Supreme Court recognized that the unchanged language of execution statute, S.C. Code Ann. § 24-3-530 (2021), created a "statutory right of inmates to elect the manner of their execution." Second Amended Comp., Ex. H. At the time of the Plaintiffs' offenses and sentencing, that right allowed them to elect execution by lethal injection and avoid execution by electrocution unless they affirmatively elected it as the method of execution. S.C. Code Ann. § 24-3-530 (1995). As Defendants acknowledge, the amendments to the execution statute were adopted specifically to strip Plaintiffs of the right to be executed by lethal injection (unless they chose otherwise) by changing the default method of execution to electrocution and allowing SCDC to eliminate lethal injection as an execution method altogether by certifying it as not available. MTD at 22. The stripping of this right to elect between lethal injection and electrocution is exactly what makes the 2021 Amendments unconstitutionally retroactive.

It is axiomatic that the state cannot revoke a vested statutory right without violating due process. A statutory right vests when it creates "legitimate expectations" or establishes legal consequences that invite reliance. *See Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 32, 736 S.E.2d 651, 660 (2012) (Beatty, J., concurring in part and dissenting in part) (quoting Barbara J. Van Arsdale *et al.*, 16B Am. Jur. 2d Constitutional Law § 735); *see also Martin v. Hadix*, 527 U.S. 343, 358 (1999) (the question of retroactivity "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations'" (quoting *Landgraf v. USI Film Products*, 511 U.S. 224, 270 (1994))).

Plaintiffs’ rights under the statute have vested. At the time Plaintiffs were sentenced, the law gave them the option to choose lethal injection and reject electrocution. As a result, since the Legislature authorized lethal injection in 1995, no person has been executed by electrocution when they expressed a preference to die by lethal injection in South Carolina. So, for over two decades, Plaintiffs have had a legitimate expectation that they would die by lethal injection, and the judges and juries that sentenced Plaintiffs to death did so with the understanding that they could die by what is “believed to be the most humane [execution method] available.” *See Baze v. Rees*, 553 U.S. 35, 62 (2008) (plurality opinion).

Defendants fundamentally misconstrue Plaintiffs’ claim when protesting that, under the criminal statute establishing the punishment for murder, S.C. Code Ann. § 16-3-20(A), Plaintiffs were sentenced to death, not death by a certain method. Plaintiffs’ claim, however, is that the execution statute itself, S.C. Code Ann. § 24-3-530 (1995), created a vested right to execution by lethal injection unless they elect otherwise. By amending the statute so that Plaintiffs might be forced to elect between methods that do not even include lethal injection, the Legislature has unlawfully deprived Plaintiffs “of legitimate expectations.” *Harleysville Mut. Ins. Co.*, 401 S.C. at 33, 736 S.E.2d at 660.

Defendants’ focus on the sentencing statute ignores that—separate from the Ex Post Facto Clause “flatly prohibit[ing] retroactive application of penal legislation”—the “Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation.” *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).⁹ Thus, Due Process

⁹ Defendants’ assertion that *Landgraf* stands for the proposition that a change to the right to elect lethal injection as a method of execution is merely procedural, which “does not raise the same constitutional concerns,” is incorrect. The 2021 Amendments substantively change the punishment to which Plaintiffs are exposed. If the amended law is not a retroactive change in criminal sanctions (see Section III.b – ex post facto violation), it is at least like the one disapproved of in *Landgraf*

protects against the Legislature’s power “to sweep away settled expectations suddenly and without individualized consideration.” *Id.* The Legislature’s action to remove lethal injection as the default or even optional method of execution to carry out death sentences, *see* MTD at 22, is exactly the concern with retroactive legislation: that the Legislature’s “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.” *Landgraf*, 511 U.S. at 266.

For over two decades, Plaintiffs had a legitimate expectation that they could not be executed by a method other than lethal injection unless they affirmatively chose electrocution. As Defendants acknowledge, they had an “unrestricted choice”—termed by Defendants in their initial motion to dismiss as an “absolute choice”—of execution method under the prior statute. MTD at 32, Mot. To Dismiss, dated July 16, 2021 at 8. That legitimate expectation was retroactively removed by the Legislature. To the extent Defendants argue that Plaintiffs have not, in fact, had the settled expectation of lethal injection as the default method of execution, that should be determined at a trial, not at the motion to dismiss stage. *See Brown v. Theos*, 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999), *aff’d*, 345 S.C. 626, 550 S.E.2d 304 (2001) (“The motion [to dismiss for failure to state a claim] may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.”).

(punitive damages) in that it “share[s] key characteristics of criminal sanctions” and “raise[s] a serious constitutional question.” *Id.* at 281. Defendants similarly misinterpret *Langford v. Day*, 134 F.3d 1381 (9th Cir. 1998), asserting it held there was no vested right to a particular method of execution. *Langford*, on the contrary, merely ruled that the inmate did not have a vested right to continue his litigation over hanging’s constitutionality after it was replaced with lethal injection and that the bill abolishing hanging was not a bill of attainder because it was not directed at him specifically. *Id.*

b. Count II: The 2021 Amendments Violate the Federal and State Ex Post Facto Clauses.

A law is unconstitutionally ex post facto when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or “alters the situation of the party to his disadvantage,” *State v. Malloy (Malloy I)*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). Put another way, a change that makes a criminal law “more onerous” violates the Ex Post Facto Clause. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). The 2021 amendments are ex post facto because eliminating the more humane method of lethal injection as the default method of execution and replacing it with a default of electrocution (or a possible choice of the firing squad) inflicts an “increasing measure of punishment” compared to the law in place when Plaintiffs’ crimes were committed and sentences were imposed.

1. *Changes to the method of execution can violate the ex post facto prohibition while procedures for carrying out executions cannot.*

Contrary to Defendants’ arguments, a change in the method of execution is not merely a procedural change that cannot violate the ex post facto prohibition. In the *Malloy* cases, both the United States and South Carolina Supreme Courts reviewed changes to South Carolina’s execution laws and distinguished changes in the *method* of execution (which could violate the Ex Post Facto Clause) from *procedures* for carrying out an execution (which do not violate ex post facto). See *Malloy v. South Carolina (Malloy II)*, 237 U.S. 180 (1915); *Malloy I*, 95 S.C. 441, 78 S.E. 995. According to the *Malloy* courts, statutory changes to execution procedures, such as the number of witnesses who could attend an execution and the place of the execution (the state penitentiary versus the county jails), did not violate ex post facto because “the constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the

orderly infliction of humane punishment.” *Malloy II*, 237 U.S. at 183; *see also Malloy I*, 95 S.C. at 441, 78 S.E. at 997.

A change to the method of execution, however, can violate the Ex Post Facto Clause if it “inflicts a greater punishment than the law annexed to the crime when committed.” *Malloy II*, 237 U.S. at 184; *see also Malloy I*, 95 S.C. at 441, 78 S.E. at 997 (“[T]he punishment prescribed by law for an offense at the time it was committed cannot be changed by subsequent legislation, unless the change is advantageous to the prisoner.”). Reviewing the legislative change of method of execution from hanging to electrocution, both courts compared how the methods of execution operated to cause the prisoner’s death to determine if electrocution increased the punishment. *Malloy II*, 237 U.S. at 184–85 (recognizing the then-commonly held “belief that electrocution is less painful and more humane than hanging”). *Compare Malloy I*, 95 S.C. at 441, 78 S.E. at 998 (describing “the manner in which an execution by hanging is conducted,” including the adjustments made to ensure “when [the prisoner] drops from the scaffold his neck will be broken, thus destroying the structural formation of the body” and instances “where the head is completely severed from the body” and “numerous instances where the neck is not broken, and the convict died of strangulation”), *with id.* (finding the decision in *In re Kemmler*, 136 U.S. 436 (1890) “clearly shows that the [Supreme C]ourt regarded electrocution as a more humane method of punishment than that by hanging”). Both Courts found that electrocution’s “tendency is to ameliorate the punishment by hanging” and, therefore was not ex post facto. *Malloy I*, 95 S.C. at 441, 78 S.E. at 998; *Malloy II*, 237 U.S. at 185 (“The punishment was not increased, and some of the odious features incident to the old method were abated.”).

Accordingly, the question before this Court is whether execution by electrocution and firing squad increases the punishment as compared to execution by lethal injection. Plaintiffs’

expert declarations demonstrate that removal of lethal injection—the least severe of the three punishments—increases their punishment.¹⁰ See Second Amended Comp., Ex. I (Sworn Statement of John P. Wiskwo, Jr., Ph.D); Ex. J (Affidavit of Jonathan L. Arden, MD).

2. *Defendants incorrectly import Eighth Amendment standards into their ex post facto arguments.*

Defendants argue (incorrectly) there can be no ex post facto violation unless the newly enacted method of execution is itself a violation of the Eighth Amendment.¹¹ But surviving Eighth Amendment scrutiny does not insulate a retroactive punishment from violating state or federal prohibitions on ex post facto laws. Defendants cite no cases to support their argument that a punishment must violate the Eighth Amendment in order to be impermissibly ex post facto, for there is no such case. Rather, courts have reviewed changes in punishment where both punishments are clearly constitutional under the Eighth Amendment and found the change nevertheless violates the Ex Post Facto Clause by increasing the punishment. See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000) (holding the change from annual to biannual parole review could not be applied retroactively

¹⁰ The fact that electrocution was an option under the 1995 statute does not preclude the 2021 statute from violating the prohibitions on ex post facto laws. Under the old law, Plaintiffs could only be electrocuted if they selected the punishment or if lethal injection was held unconstitutional by a court of competent jurisdiction. Neither has happened. Yet Defendants have withdrawn the indisputably more humane method of execution of lethal injection and intend to execute Plaintiffs in the electric chair or by firing squad. Defendants cannot retroactively remove a more humane method of execution that Plaintiffs had a right to elect at the time of their crimes and sentencing, and now force Plaintiffs to select between two more onerous methods of execution. See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding that a retroactive law was ex post facto because it withdrew the lesser punishments and made mandatory the maximum punishment).

¹¹ Plaintiffs assert that both alternative methods do violate the Eighth Amendment and Article I Section 15 of the South Carolina Constitution. However, it is not necessary to establish that in order to demonstrate the new law's ex post facto nature.

without violating South Carolina's prohibition on ex post facto punishment). Similarly, the change from lethal injection or electrocution to only electrocution or firing squad is an unconstitutional ex post facto law, even if electrocution and the firing squad are constitutional under Eighth Amendment jurisprudence.

3. *The South Carolina Ex Post Facto Clause creates a broader prohibition than the federal clause.*

This Court must consider not only whether the 2021 amendments violate the federal Ex Post Facto Clause but also whether they violate the broader South Carolina ex post facto standard. The United States Supreme Court opinions applying the clause “set[] the floor for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. 637, 643–44, 541 S.E.2d 837, 840 (2001). South Carolina “is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee.” *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). And it has here. The Supreme Court of South Carolina reads the state Ex Post Facto Clause more broadly than the federal Ex Post Facto Clause. *See Jernigan*, 340 S.C. at 263–65.

Defendants misread *Jernigan*, asserting it does not have any application here because it addressed parole, MTD at 27, n.4, but *Jernigan* demonstrates that the Supreme Court of South Carolina has more broadly interpreted the South Carolina Constitution than the federal Constitution's Ex Post Facto Clause. That it addressed parole, as opposed to some other punishment issue, is of no consequence. The same principles apply here. In *Jernigan*, the South Carolina Supreme Court explicitly departed from the Fourth Circuit's application of the federal Ex Post Facto Clause. *Id.* at 263–64. The Fourth Circuit held that a South Carolina statute was not ex post facto when it changed parole review from annual to biannual for offenders convicted of

violent crimes. *Roller v. Gunn*, 107 F.3d 227, 235–36 (4th Cir. 1997). Three years later, the South Carolina Supreme Court struck down the same statute as an ex post facto law. *Jernigan*, 340 S.C. at 263–65. The Court explicitly said, “[w]e find the analysis of the dissent in *Roller II* more compelling than that of the *Roller II* majority.” *Id.* at 263. In doing so, the South Carolina Supreme Court interpreted the state prohibition on ex post facto laws more broadly than the federal counterpart. That cases since *Jernigan* have looked to Supreme Court of the United States decisions to address ex post facto claims, MTD at 27, n.4, does not demonstrate that the federal and state standards are co-extensive. None of the cases cited by Defendants overrule *Jernigan* or address how the standards differ.

The South Carolina Supreme Court has not expressly delineated the test for an ex post facto violation under the South Carolina Constitution or how much broader it should be read than the federal Ex Post Facto Clause. Therefore, even if this Court finds Plaintiffs do not satisfy the federal test for demonstrating an ex post facto violation, the Court should address the question of what the state standard is and whether the 2021 amendments are an ex post facto violation under that standard.

4. *Consideration of the ex post facto claim requires factual development and determinations.*

Regardless of what test this Court applies for reviewing a punishment under the Ex Post Facto Clause, the analysis necessarily requires factual development to compare the execution methods and determine if electrocution and firing squad increase Plaintiffs’ punishment over lethal injection. *See Malloy*, 95 S.C. at 441, 78 S.E. at 998 (comparing hanging to electrocution in addressing ex post facto claim); *Baze v. Rees*, 553 U.S. 35, 61 (2008) (requiring a petitioner to show that an execution method challenged under the Eighth Amendment “must show that the risk is substantial when compared to a known and available alternative”).

The Court is certainly capable of reviewing the evidence to compare methods of execution, contrary to Defendants' assertion that it is an "audacious . . . demand" to ask the Court to compare methods of execution. MTD at 27. Here, Plaintiffs have submitted uncontroverted evidence of the tortures associated with execution by electrocution and firing squad. The Court is aptly able to review the evidence and compare those methods to lethal injection, recognized by the Supreme Court to be the "the most humane [execution method] available." *Baze*, 553 U.S. at 62. Because Defendants' motion to dismiss disputes the underlying facts related to the risks associated with each of the three methods of execution listed in the amended statute, discovery and trial are the appropriate mechanism for making factual and legal determinations. *See* MTD 28–31. Dismissal is inappropriate.

c. Count III: The 2021 Amendments Violate Due Process Because the Resulting Statute is Unconstitutionally Vague.

The amended execution statute is unconstitutionally vague in two ways: (1) it lacks any standards or guidelines for determining when an execution method is "available" or what efforts SCDC must undertake to make a method of execution available, and (2) it does not specify the timing for the Director's certification of availability. *See* S.C. Code Ann. § 24-3-530 (2021). Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). "[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies." *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006). Specifically, a statute is unconstitutionally vague "if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

1. *The term “available” is subject to multiple interpretations and provides no standards for determining whether SCDC made appropriate efforts to make an execution method available.*

Defendants assert the legislative intent in amending the execution method statute—to change the default method of execution to electrocution and make “a condemned inmate’s choice subject to there being multiple ways to carry out a scheduled execution”—provides a basis for defining “available.” MTD at 32. On the contrary, nothing in that stated intent elevates Defendants’ definition of available—“present or ready for immediate use”—over another definition such as “accessible, obtainable.” The crux of the issue is what efforts the statute requires of Defendants to make the authorized methods available for the inmate’s election.

The “present or ready for immediate use” definition favored by Defendants seems to put no onus on them to make an execution method available. Rather, regardless of their ability to access or obtain the means to implement a method, if they do not happen to have the means (i.e. guns, lethal injection drugs, electric chair, etc.) and do not attempt to make the means available, Defendants could simply certify the methods’ unavailability. This definition is contrary to the Legislature providing multiple ways to carry out the execution following the inmate’s election. S.C. Code Ann. § 24-3-530 (2021). Defendants assert the Director’s “good faith” to “seek to employ the methods the General Assembly has clearly directed” must be assumed. MTD at 34. However, without knowing what the statute requires in terms of effort to make the methods available, it is impossible for even the Director to know what good faith compliance with the statute requires. Accordingly, the statute is impermissibly vague.

Further, the South Carolina Supreme Court rejected Defendants’ definition of availability by granting stays of execution after Defendant Stirling certified that only electrocution was available for Plaintiff Owens’s and Sigmon’s scheduled executions in June of 2021. Applying the “present and ready for immediate use” definition, Defendant Stirling informed the South Carolina

Supreme Court that the firing squad was unavailable because “SCDC does not currently have the necessary policies and protocols . . . for an execution by firing squad.” Second Amended Comp., Ex. F. The Supreme Court found that did not satisfy the amended statute that required Defendants make more than one method of execution available for an inmate’s election. Second Amended Comp., Ex. H.

The Legislative intent and the South Carolina Supreme Court’s June Orders readily demonstrate that some effort must be expended to make the methods of execution available, but nothing provides “fair notice and proper standards for adjudication” of what that effort entails, and therefore, what available means in this context. *In re Amir X.S.*, 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006). The dispute between the parties and the South Carolina Supreme Court’s rejection of Defendants’ interpretation of “available” demonstrates that “person[s] of common intelligence must necessarily guess as to [available’s] meaning and differ as to its application,” making the amended statute unconstitutionally vague. *Curtis v. State*, 345 S.C. at 572, 549 S.E.2d at 599.

2. *The statute is silent regarding the timing of the Director’s certification of the availability of execution methods.*

The timing question is similarly not resolved by Defendants’ assertion that though the statute’s timing requirement is unclear, it must mean certification is to take place “*before* a condemned inmate’s deadline for election.” MTD at 33. While the statute seems to indicate the certification should be made at the time the notice of execution is sent to SCDC, S.C. Code Ann. § 24-3-530(B) (2021), Defendants have interpreted it to mean the night before or the morning of Plaintiffs’ elections—fourteen days before the scheduled execution. *See* Second Amended Comp., Exs. B–C. Further, nothing in the plain language of the statute prevents Defendant Stirling or a successor from completing the certification after the election deadline, which could serve to

eliminate the inmate's election by a certification that the chosen method of execution is unavailable.

The uncertainty surrounding the timing of the certification renders meaningless the statutory right to elect a method of execution because Plaintiffs and their legal counsel cannot make a comparison between execution methods without knowing which methods are available. The uncertainty allows Defendants (as they have done) to arbitrarily reduce or eliminate the time in which Plaintiffs and their legal teams can review the available methods, consult with experts, and weigh their options prior to election of an execution method. This deprives Plaintiffs of a meaningful or informed choice between methods of execution and risks a default to the electric chair if Plaintiffs are unable to make an informed decision on the day of the election. This is especially problematic because the default method of execution is the least humane method, thereby subjecting an incompetent inmate or an inmate unable to make a meaningful choice to the most cruel method of execution (as opposed to the prior default to the most humane method of lethal injection). This Court should, therefore, find the statute void for vagueness or provide its judicial interpretation of the statute to define availability and the certification timing requirements.

d. Court IV: Defendants' Interpretation of "Available" Violates the Amended Execution Statute.

Even if the amended execution statute is not impermissibly vague, whatever the meaning of "available," the South Carolina Supreme Court's June Orders make clear that "available" means something broader than the meaning Defendants have given it. *See* Second Amended Comp., Ex. H. Defendants misinterpret Plaintiffs' statutory claim, asserting it is "premised on the idea that the Act gives an inmate the *right* to choose between multiple methods of execution." MTD at 34. This claim, however, is not about which methods are available; rather, it is about what level of effort Defendants must undertake to make the statutory methods available. Based on the June Orders,

“available” places at least some onus on Defendants to make the methods available, but Defendants have put forth no evidence to demonstrate they have made any efforts to make lethal injection available. *See* Second Amended Comp., Ex. H; *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Glossip v. Gross*, 576 U.S. 863, 878–79 (2015)) (recognizing states should not be faulted for failing to make an execution method available only if they were unable to “procure [it] through *good-faith efforts*”) (emphasis added).

Defendants ask this Court to ignore the South Carolina Supreme Court’s June Orders despite their clear indication that “available” must mean something other than how Defendants have defined it. Defendants’ current position that the Court cannot rely on the Supreme Court’s orders is directly contrary to their previous position that the Supreme Court’s execution notices were binding on this Court, rendering it unable to rule on Plaintiffs’ claims. Indeed, interpreting the Supreme Court’s orders and opinions falls squarely within this Court’s authority as it would in any other case. Despite being unpublished, the stay orders issued in Plaintiff Owens’s and Sigmon’s cases directly address the issues raised here and are clearly relevant to this Court’s consideration. Rule 268(d)(2), SCACR (allowing for citation of unpublished orders in “proceedings in which they are directly involved”).

The orders plainly address the availability question by laying out the reasons Defendant Stirling asserted lethal injection and the firing squad were unavailable:

According to the Director’s response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies.

Second Amended Comp., Ex. H. The orders went on to stay the executions until SCDC was able to make at least firing squad (in addition to electrocution) available by “develop[ing] and implement[ing] appropriate protocols and policies to carry out executions by firing squad.” *Id.*

This clearly places some onus on SCDC to make the statutorily authorized methods available and indicates that it is not sufficient for Defendants to assert a given method is not available on a particular day regardless of its accessibility with some additional efforts.

Thus, if this Court does not find that the statute is unconstitutionally vague in failing to define “available,” the Court should allow this case to proceed to trial, issue a judicial determination of the definition of “available,” and determine whether Defendants have complied with those requirements under the statute.

e. Count V: The Amended Execution Statute Violates the South Carolina Constitution’s Non-Delegation Doctrine.

By allowing the Director of SCDC the unbridled power to select which methods of execution are available for an inmate’s execution, the legislature created a judicially unreviewable executive action in violation of the non-delegation doctrine of the South Carolina Constitution. Article I, Section 8 of the South Carolina Constitution recognizes as much, providing that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other.” Thus, “the Legislature may not delegate its powers to make laws.” *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978). Specifically, although the Legislature “may authorize an administrative agency or board ‘to fill in up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose,” the Legislature may not vest “unbridled, uncontrolled, or arbitrary power” in another branch of government. *Id.* at 232–33, 246 S.E.2d at 876 (quoting *S.C. State Highway Dep’t v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)). Although “there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated,” the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876–77.

Thus, “a statutory delegation is constitutional as long as [the Legislature] ‘lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.’” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (cleaned up) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

Subsection (B) of the amended execution statute gives the SCDC Director the power to decide not only how to carry the law out, but to decide what law applies. If Defendant Stirling wanted to carry out Plaintiffs’ executions by the more barbarous electric chair or firing squad rather than attempt to obtain lethal injection drugs, all he need do is certify that lethal injection is unavailable and Plaintiffs will be forced to select electrocution or firing squad or to waive their choice and be subjected to electrocution anyway. “The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if [the Legislature] gave the same power [to determine availability] . . . to members of its staff.” *Mistretta v. United States*, 488 U.S. at 421 (Scalia, J., dissenting).

The practical consequences of the legislative delegation here are substantial. Under the statute as written, the Director’s determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where “the courts, when presented with a challenge of the agency’s actions, would, there being no limitations on the agency’s authority, be unable to judicially review its actions”). For example, if a condemned person elects death by lethal injection and the Director certifies that lethal injection is unavailable, the statute provides no mechanism or standards by which the condemned person can challenge that assessment. Because the statute is silent as to the meaning of “available,” “there is an absence of standards for guidance of the [Director’s] action,” making it “impossible in a proper proceeding to ascertain whether the will of [the Legislature] has

been obeyed.” *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the Legislature effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority “to suspend or revoke a license for any cause which it deems satisfactory”).

Defendant Stirling might determine that a specific method is not “available” for any reason, or for no reason. If Defendant SCDC does not obtain the necessary equipment for the selected method in time to meet the date on the execution warrant—e.g., humane lethal injection drugs or appropriate weapons for the firing squad—he could deem it unavailable with no scrutiny or review of what steps he had taken, or foresworn, along the way. A method not being “available” or being “unavailable” could be based on any number of undefined, undisclosed reasons, such as SCDC employees unwillingness to partake in the execution; temporary conditions, such as the COVID-19 pandemic, rendering the method unsafe, expensive, or impractical for SCDC staff; the method’s use exceeding Defendant SCDC’s annual budget for carrying out executions, or simply that SCDC does not desire to present the condemned inmate with that option. If Defendant Stirling made such a determination, Plaintiffs would be powerless under the statute to challenge it. Defendants offer that Plaintiffs could file a claim via an extraordinary writ in the South Carolina Supreme Court to review Defendant Stirling’s certification, MTD at 39, but that is insufficient. The issue is not a forum for bringing a claim, but rather that there is no standard by which to review such a claim. *See Mistretta*, 488 U.S. at 379.

Defendants further assert that it is enough to rely on an assumption that Director Stirling will “act in good faith in complying with the Act.” MTD at 38–39. The idea that the Court and Plaintiffs should just simply blindly trust Defendant Stirling is exactly what the non-delegation clause prevents. *Harbin*, 226 S.C. at 596, 86 S.E.2d at 471 (“The presumption that an officer will

not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.”). The assurance of good faith means little so long as Director Stirling is the sole authority on the meaning of “available” and given Defendants’ steadfast refusal to provide any evidence that they have made a good faith effort to obtain lethal injection drugs. Even though that information is within their exclusive possession and control, Defendants insist that this lawsuit should be dismissed without any opportunity to conduct discovery.

Ultimately, declaring what the law means is “an inherently judicial function,” and under Defendants’ reading of the Act, the executive branch has usurped that power. *See Langford*, 400 S.C. at 435, 735 S.E.2d at 478. Because the amended law grants unbridled discretion to Defendant Stirling to determine what the law is, and because it “sets up no standard to guide the Department and contains no limitations” on what constitutes “available” under the statute, it violates the non-delegation doctrine, *Harbin*, 226 S.C. at 595, 86 S.E.2d at 471, and dismissal is inappropriate.

f. Count VI: Electrocution and the Firing Squad are Prohibited by the South Carolina Constitution.

At the outset, it is essential to recognize that the questions of what methods of execution are permissible in South Carolina and whether the state constitutional standard is different from the federal constitutional floor are open. This is because the Supreme Court of South Carolina has never been asked to resolve a methods-of-execution challenge. Accordingly, Defendants’ speculation about the importance of how the founders would have understood modern methods of execution is just that—speculation. This case asks the state judiciary to answer, for the first time, two open questions: as a matter of state constitutional law, what is the standard for assessing a methods-of-execution challenge; and under that standard, do firing squad and electrocution violate the state constitution?

On the first question, Defendants offer an implausible answer. According to them, a punishment is constitutional today so long as it was not expressly prohibited by the English Bill of Rights (or perhaps at the time of the founding or at ratification or when the constitution was amended in 1861 or 1865 or perhaps at the time the West Committee revised the constitution—Defendants’ argument changes, depending on which time period fits their argument most conveniently). MTD at 8–11. Defendants go so far as to suggest that, as a matter of South Carolina law, the death penalty may be constitutional “for far more than murder” because that was permissible “during the colonial era.” MTD at 11. *Cf. Reese v. Talbert*, 237 S.C. 356, 358, 117 S.E.2d 375, 376 (1960) (“When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of *its framers* [i.e., the framers of the amendment] and of the people who adopted it. And in attempting to attain that object, the courts may consider the history of the times *in which the amendment was framed*.” (emphases added)).¹²

Of course, that cannot be correct. Many punishments that were in wide use in South Carolina at least through the mid- to late-1800s are now, under any reasonable reading of modern Eighth Amendment jurisprudence, unconstitutional,¹³ and the federal constitution “sets the floor

¹² The only case Defendants cite for the proposition that this Court must interpret the state constitution “in light of the intent of its framers and the people who adopted it,” *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014), involved an amendment to the South Carolina Constitution. But in that case, the Court interpreted the text of the amendment based on how the drafters of the *amendment* would have understood it—not based on how people living in Stuart England or colonial South Carolina would have understood it. *Id.*; see also *Miller v. Farr*, 243 S.C. 342, 346–47, 133 S.E.2d 838, 841 (1963); *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963) (recognizing that constitutional provisions are “not to be viewed solely in light of conditions existing at time of [their] adoption,” as they are “intended not to obstruct progress of state but rather to meet and be applied to new conditions and circumstances as they may arise”).

¹³ For example, South Carolina continued to burn people at the stake at least through the 1820s. The last execution by burning was in 1830, when an enslaved person named Jerry was burned to death in Abbeville for allegedly raping a white female (the wife of a man his owner subcontracted

for individual rights while the state constitution establishes the ceiling.” *State v. Forrester*, 343 S.C. at 643–44, 541 S.E.2d at 840. Defendants do not attempt to grapple with this fact, nor do they offer any textual basis for their position beyond the blanket assertion that “[i]n the nineteenth century and before, ‘corporal punishment’ didn’t include a death sentence.” MTD at 15. Thus, whatever standard does apply in South Carolina, it cannot be the unconstitutional pre-Civil War standard Defendants advocate.

The Supreme Court of South Carolina has an established interpretive framework for determining whether the South Carolina Constitution “provide[s] greater protection than the federal Constitution,” and this Court should apply that framework here. *See Forrester*, 343 S.C. at 644, 541 S.E.2d at 840. First and most importantly, the Court considers any textual differences between the two constitutions, taking account of any clues in state legislative history. Second, the Court surveys language in other states’ constitutions and any relevant judicial opinions interpreting those constitutions. *Id.* Finally, the Court should consider whether any newly proposed interpretation of the state constitution is consistent with past precedent. *Id.* at 645–48, 541 S.E.2d at 841–42. Applying that framework here makes clear that the language of Article I, Section 15 of the South Carolina Constitution is more protective than the federal constitution.

The drafters of the South Carolina Constitution elected to use a disjunctive framing, while the federal constitution is conjunctive.¹⁴ In standard English usage, a disjunctive indicates

him out to work for. Lowry Ware, *The Burning of Jerry: The Last Slave Execution by Fire in South Carolina?*, 91 S.C. HIST. MAG. 100 (1990). The Slave Codes, which were in place in South Carolina until the end of the Civil War, authorized punishments ranging from the removal of an ear, branding, flogging, and, of course, death. *See* DONALD R. WRIGHT, *AFRICAN AMERICANS IN THE COLONIAL ERA: FROM AFRICAN ORIGINS THROUGH THE AMERICAN REVOLUTION* 173 (Wiley-Blackwell 2017).

¹⁴ Article I, Section 15 provides, in relevant part: “Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.” S.C. Const. art. I § 15; *cf.* U.S. Const. amend. VIII

alternatives. *E.g. Disjunctive condition*, Black’s Law Dictionary (11th ed. 2019); *Nor*, Merriam-Webster (“used as a function word to introduce the second or last member or the second and each following member of a series of items each of which is negated”). This difference suggests that the South Carolina Constitution provides more protection than its federal counterpart: a punishment need only be cruel *or* unusual, not both, to violate the state constitution.¹⁵

The conclusion that Article I, Section 15 sweeps more broadly than the Eighth Amendment is reinforced by the fact that the South Carolina Constitution includes three distinct categories of punishment that the drafters understood to be unconstitutional: cruel punishment; corporal punishment; and unusual punishment. This drafting form is unique among the constitutions in all American jurisdictions, including those that prohibit cruel or unusual punishments.¹⁶ The choice

(“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹⁵ See *Jennings v. Jennings*, 401 S.C. 1, 11–12, 736 S.E.2d 242, 247 (2012) (Toal, C.J., concurring); see also Commentary to 1998 Amend., Fla. Const. art. 1 § 17 (explaining that the Florida legislature amended the state constitution by substituting the word “and” for “or” because the “change conforms the prohibition with the parallel statement in the federal constitution” and “also raises the bar on the part of a defendant by requiring proof of both prohibitions rather than one or the other”); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992); *People v. Anderson*, 493 P.2d 880, 885 (Cal. 1972) (en banc), *superseded by* Cal. Const. art. I § 27.

¹⁶ Compare S.C. Const. art. I § 15 (“nor shall cruel, nor corporal, nor unusual punishment be inflicted”) with, *e.g.*, Ala. Const. art. I § 15 (“excessive fines shall not be imposed nor cruel or unusual punishment inflicted”); Ark. Const. art. II § 9 (“nor shall cruel or unusual punishments be inflicted”); Cal. Const. art. I § 6 (“nor shall cruel or unusual punishments be inflicted”); Haw. Const. art. I § 12 (“nor cruel or unusual punishment [shall be] inflicted”); Kan. Const. Bill of Rights § 9 (“nor cruel or unusual punishment [shall be] inflicted”); La. Const. art. 1 § 20 (“No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment.”); Me. Const. art. I § 9 (“nor [shall] cruel nor unusual punishments [be] inflicted”); Md. Const. art. 9002 § 25 (“nor [shall] cruel nor unusual punishment [be] inflicted”); Mass. Const. Pt. 1, art. 26 (“No magistrate or court of law shall . . . inflict cruel or unusual punishments.”); Mich. Const. art. I § 16 (“cruel or unusual punishment shall not be inflicted”); Minn. Const. art. I § 5 (“nor [shall] cruel or unusual punishments [be] inflicted”); Miss. Const. art. III § 28 (“Cruel or unusual punishment shall not be inflicted.”); Nev. Const. art. I § 6 (“nor shall cruel or unusual punishments be inflicted”); N.H. Const. art. I § 33 (“No magistrate or court of law shall . . . inflict cruel or unusual punishments.”); N.C. Const. art. I § 27 (“nor [shall] cruel or unusual punishments [be]

to list punishments, one more specific and two more general, all separated by disjunctives, is a textual indication that the drafters contemplated the prohibition of three distinct categories and that the prohibitions should therefore be read broadly. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008).

The limited legislative history that is available confirms this reading of the constitution. The amendments that gave rise to the current form of Article I, Section 15 were part of a sweeping set of reforms intended to liberalize the 1895 Constitution and expand protections for criminal defendants. The drafters of the 1895 constitution adopted the following language in Article I, Section 19: “Excessive fines shall not be imposed, nor cruel and unusual punishments inflicted, nor shall witnesses be unreasonably detained. Corporal punishment shall not be inflicted.” *Journal of Proceedings, South Carolina Constitutional Convention*, at 136 (first reading); *id.* at 277 (final reading).

In the late 1960s, the General Assembly formed the Committee to Make a Study of the South Carolina Constitution of 1895. *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895*, at 10 (June 1969) [hereinafter *Final Report*]. The purpose of the Committee was to “strengthen the [constitution] and render it capable of meeting modern needs and future expectations.” *Id.* at 8. On September 15, 1967, the members of the Committee assigned

inflicted”); N.D. Const. art. I § 11 (“nor shall cruel or unusual punishments be inflicted”); Okla. Const. art. II § 9 (“nor [shall] cruel or unusual punishments [be] inflicted”); Tex. Const. art. I § 13 (“nor [shall] cruel or unusual punishment [be] inflicted”); Wyo. Const. art. 1 § 14 (“nor shall cruel or unusual punishment be inflicted”). Grammatically, then, as a matter of state law “[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition.” *Bullock*, 485 N.W.2d at 872; *see also Anderson*, 493 P.2d at 885 (“[T]he delegates modified the California provision before adoption to substitute the disjunctive ‘or’ for the conjunctive ‘and’ in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state.” (footnotes omitted)).

to the Declaration of Rights met to discuss what became Article I, Section 15 (former Sections 19 and 20) and decided to substitute the disjunctive “nor” for the conjunctive “and.” They compared the South Carolina Constitution to the Model Constitution¹⁷ and although “[t]he committee fully agreed that the protections provided in these sections should remain,” they settled on combining the sections and rewording the language.¹⁸ The drafters explicitly decided “to accept the recommendation of the Model, but to make two additions: retain the restriction on using corporal punishment and retain the protection for witnesses.” Book I, Proceedings of the Committee to Make a Study of the Constitution of South Carolina, 1895, at 11.

The Committee’s decisions to adopt the Model Constitution and to include a separate prohibition on corporal punishment are significant. The Model Constitution and the 1969 amendments were drafted against the backdrop of the Eighth Amendment and the United States Supreme Court cases interpreting it. *See* MODEL STATE CONSTITUTION at 35. From the early 1960s, when the Model Constitution was drafted, to the late 1960s, when the South Carolina amendments were drafted, there was a nationwide expansion of rights for criminal defendants, and especially criminal defendants in state court proceedings. *E.g.*, *Ker v. California*, 374 U.S. 23 (1963) (incorporating the Fourth Amendment); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment). The fact that the South Carolina drafters looked to the

¹⁷ The Model Constitution was an effort to offer states a plan of government premised on civic responsibility and based on a review of the language in state constitutions in effect at the time of its drafting. *See* Introduction *in* MODEL STATE CONSTITUTION (6th ed. 1963). The cruel and unusual prohibition in the Model provided: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.” *Id.* at 33, section 1.06(b). At the time the Model Constitution was drafted in 1963, all states other than Illinois and Connecticut had prohibitions on cruel or unusual punishment in their constitutions. *Id.* at 34.

¹⁸ Book I, Proceedings of the Committee to Make a Study of the Constitution of South Carolina, 1895, at 11 (Aug. 25, 1966–Dec. 29, 1967); *see also* Final Report at 19 (noting the Committee’s intent to “modernize the language “in Article I § 15).

Model Constitution is an indication, then, that the drafters in 1969 and the voters in 1971 were intentionally adopting a constitution with more robust protections for criminal defendants. The drafters' decision to retain the specific prohibition against corporal punishment, which goes further than the Eighth Amendment and the Model Constitution, is another indication of the same legislative intent. Moreover, this inference is reinforced by other amendments the Committee undertook at the same time, which the Supreme Court of South Carolina has interpreted as "offering a higher level of . . . protection" than the federal constitution. *See Forrester*, 343 S.C. at 647, 541 S.E.2d at 842.

On the second question—whether the firing squad and the electric chair violate the South Carolina Constitution—Defendants' argument boils down to a blanket assertion that because neither the Supreme Court of South Carolina nor the Supreme Court of the United States have struck down those methods, they are constitutional. MTD 16–23. But this argument ignores the simple fact that the constitutionality of the firing squad and the electric chair are open questions. That the Supreme Court of South Carolina has upheld a statute governing death sentencing procedures says nothing about the Court's view on the entirely distinct question of how those punishments might be carried out. And because the Court has never considered a methods-of-execution challenge, it is unsurprising that cases answering different questions about the death penalty are silent on the constitutionality of the methods the state will use to accomplish an execution. *E.g.*, *State v. Allen*, 266 S.C. 175, 187, 222 S.E.2d 287, 292 (1976), *overruled on other grounds by* 432 U.S. 902 (1977).

With respect to the firing squad, the constitutionality of that method has never been considered in South Carolina (because it has never been an authorized method of execution), and it was last addressed by the United States Supreme Court in 1878—nearly 100 years before the

Eighth Amendment was incorporated and applied to the states in *Robinson v. California*, 370 U.S. 662 (1962). See *Wilkerson v. Utah*, 99 U.S. 130 (1878). And with respect to electrocution, the constitutionality of that method has also never been considered in South Carolina, and the Supreme Court of the United States has never ruled on whether it violates the Eighth Amendment. The last time the constitutionality of the electric chair reached the Supreme Court of the United States in 2000, after a series of spectacular botched executions in the electric chair, Florida—seeing the writing on the wall—elected to moot the case by changing its method from electrocution to lethal injection, and the Court dismissed the case as improvidently granted. See *Bryan v. Moore*, 528 U.S. 960 (Oct. 26, 1999) (granting a stay of execution and a petition for writ of certiorari to the Supreme Court of Florida to decide whether execution by electrocution violates the Eighth Amendment), *dismissed by* 528 U.S. 1133 (Jan. 24, 2000) (“In light of the representation by the State of Florida, through its Attorney General, that petitioner’s ‘death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution’ pursuant to the recent amendments to Section 922.10 of the Florida Statutes, the writ of certiorari is dismissed [sic] as improvidently granted.”).

Moreover, the electric chair has been overwhelmingly rejected by the majority of state legislatures, and the last two states to consider it have held that use of the electric chair is unconstitutional under their respective state constitutions. *Dawson v. State*, 554 S.E.2d 137, 143 (Ga. 2001) (holding electrocution “inflicts purposeless physical violence and needless mutilation that makes no measurably contribution to accepted goals of punishment”); *State v. Mata*, 745 N.W.2d 229, 277–78 (Neb. 2008) (finding electrocution “will result in unnecessary pain and agonizing suffering” and “has proven itself to be a dinosaur more benefitting the laboratory of Baren Frankenstein than the death chamber of state prisons”).

Defendants have offered no factual basis for their position that executing Plaintiffs by firing squad or electrocution will not cause excessive pain or suffering and will not mutilate the bodies of the deceased. Plaintiffs, however, have alleged the following facts which, if true, entitle them to relief:

1. Electrocution and the firing squad are “cruel” because they both “involve torture or a lingering death” beyond “the mere extinguishment of life.” *In re Kemmler*, 136 U.S. at 447;
2. Both methods are corporal. Electrocution mutilates the body by charring the flesh, cooking and destroying the internal organs, and leaving the shaven corpse marred with burns and bruises—regardless “whether or not the electrocution protocols are correctly followed and the electrocution equipment functions properly.” See *Dawson v. State*, 554 S.E.2d 137, 143 (Ga. 2001). Firing squad mutilates the body by exploding the chest with high-powered rifles, leaving holes in the corpse, exposing internal tissue, destroying internal organs, and soaking the prisoner’s clothing, the sand bags that surround it, and the ground with blood; and,
3. Both are unusual. Only seven states even authorize execution by electrocution, and all except South Carolina reserve it solely as a backup method of execution. Only four other states authorize execution by firing squad, where it is an alternate method only. Both methods are used rarely in practice, and their usage has declined since the introduction of lethal injection. Since 2010, only two percent of executions in the United States have been by electrocution. Since 1976, only three executions have been carried out in this country by firing squad.

Simply put, there are factual questions at issue in this case that go to the core of the parties' dispute and that will undoubtedly bear on the constitutionality of firing squad and electrocution. On the record before the Court, dismissal is not warranted.

g. Count VII: Requiring a Choice in Which a Prisoner Must "Select" Between One Constitutional and One Unconstitutional Method of Execution Violates the Prisoner's Statutory Right to Elect the Manner of His Execution.

The statutory language of S.C. Code Ann. § 24-3-530 (2021), and the South Carolina Supreme Court's interpretation of it also suggest that a broader state constitutional analysis is appropriate. The Supreme Court of South Carolina has concluded that, under the current statute, death-sentenced inmates have a right "to elect the manner of their execution." Order, *Sigmon*, No. 2002-024388; Order, *Owens*, No. 2006-038802. According to the Supreme Court, SCDC violates this right under circumstances "in which only a single method of execution is available." *Id.*

To satisfy the statute, Defendants must present a death-sentenced inmate with at least two methods of execution on which he can exercise his statutory right of election. In order for that right to be meaningful, both of the methods presented to him must be independently constitutional. A choice between one constitutional and one unconstitutional method of execution is no choice at all. If either of the two options presented to an inmate is unconstitutional, the statutory right of election is rendered meaningless in violation of the statute.

h. Count VII: Electrocution and Firing Squad, as Applied to Plaintiff Terry, Violate the South Carolina Constitution.

Under the Eighth Amendment to the United States Constitution, the Supreme Court has concluded that a plaintiff bringing an as-applied challenge to a particular method of execution must satisfy the same two-part test used for facial challenges. *Bucklew v. Precythe*, 130 S. Ct. 1112, 1129 (2019). But the South Carolina Supreme Court has never addressed this question under the state constitution. Once again, resolution of this claim requires this Court to determine what the

law is in South Carolina. Plaintiff Terry has a unique set of medical conditions that put him at an increased risk for a torturous execution by either electrocution or firing squad. The medication he takes for various illnesses will increase the likelihood of complications and severe pain from an execution by firing squad. The metal in Terry's hip and ankle would create a dramatically increased risk of a torturous execution by electrocution.

CONCLUSION

For the reasons stated above, this Court should deny Defendants' Motion to Dismiss, reject Defendants' request for a stay of discovery, and allow this case to proceed to trial.

Respectfully submitted,

Dated: March 22, 2022

s/ Lindsey S. Vann

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Counsel for Plaintiffs

Exhibit 1

SMITH ROBINSON

Forward thinking. Results driven.

Smith Robinson Holler DuBose and Morgan, LLC

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CAMDEN 935 Broad Street, Camden, SC 29020
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Reply To: Daniel C. Plyler
Columbia Office
November 20, 2020

Via Email: lindsey@justice360sc.org

Lindsey S. Vann, Esquire
Executive Director, Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

RE: Richard Bernard Moore, SK # 6003

Dear Lindsey:

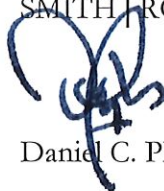
I have been informed by the South Carolina Department of Corrections (SCDC) that your client, Richard Bernard Moore, has refused to sign a Notice of Election form, and has affirmatively stated, in writing, that said refusal is not a waiver, in his opinion, under S.C. Code Ann. § 24-30-530. Additionally, on that same form, Mr. Moore states "I cannot make a selection at this time to method because my attorney and I do not have information for the protocols [sic]." As you know, SCDC made the execution protocols available for your review on November 19, 2020, but you refused to accept that offer and did not review the protocols at that time.

SCDC has authorized me to provide you the following information. SCDC's current lethal injection protocol is a three-drug protocol, which begins with an injection of Pentobarbital, followed at an appropriate time interval by Pavulon (Pancuronium Bromide), and then followed at an appropriate time interval by Potassium Chloride. A similar three-drug protocol utilized by the State of Kentucky, was found to be constitutional by the Supreme Court of the United States. *See Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008).

SCDC reserves the right to amend its lethal injection protocol, and if it is unable to secure sufficient quantities of each of the three drugs listed above, it is prepared to enact a one-drug protocol, which would consist of the use of Pentobarbital Sodium. As you know, a recent challenge to the constitutionality of the Pentobarbital Sodium single-drug protocol as utilized by the Federal Bureau of Prisons, was unsuccessful before the Supreme Court of the United States. *See Barr v. Lee*, 140 S.Ct. 2590 (2020).

Please advise Mr. Moore of this information.

Very truly yours,
SMITH ROBINSON



Daniel C. Plyler

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

BRAD SIGMON AND
FREDDIE OWENS,
Plaintiffs,

3:31-cv-01651-RBH

June 9, 2021

vs.

Florence, SC

BRYAN STIRLING, SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS, AND
HENRY MCMASTER,
Defendants.

BEFORE THE HONORABLE R. BRYAN HARWELL
UNITED STATES DISTRICT JUDGE
TRANSCRIPT OF MOTION FOR TRO PRELIMINARY INJUNCTION

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Robin L. Herrera, RMR, CRR, CRC

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1 that, and it's been unsuccessful.

2 Under South Carolina's licensing rules, I'm not
3 even sure if we'd ever be able to do it because my
4 understanding is a compounding pharmacist can't sell a drug
5 to an individual without a prescription. And I'm not aware
6 of any doctor, without violating the Hippocratic Oath, that
7 could write a prescription for this. It's not available.

8 Ironically, it's not available because we don't
9 have a shield statute, which we tried to get passed, and
10 entities like Justice 360 actually went to the general
11 assembly when that bill was going through the process and
12 stumped against it, specifically said we shouldn't have it.

13 Some of these states that have been able to obtain
14 the drugs have shield statutes. It's part of the reason
15 they're able to get it and we can't. Part of the reason
16 they can't tell us who the suppliers that these people are
17 getting it from are so that we can go get it as well. It's
18 because of the shield statute, which South Carolina doesn't
19 have, despite the fact we tried to get it passed.

20 THE COURT: Let me ask you a couple questions with
21 regard to that.

22 MR. PLYLER: And I'll do my best to answer them.

23 THE COURT: I know all of you have a lot on you.
24 Are you asking to supplement the record with an affidavit
25 from Mr. Stirling or the --

1 MR. PLYLER: Well, Your Honor -- I'm sorry.

2 THE COURT: Or the -- I assume the letter,
3 reference to the letter?

4 MR. PLYLER: Your Honor, the affidavit I think you
5 can take judicial notice of because it's been filed with the
6 South Carolina Supreme Court.

7 THE COURT: Right. The one that says it's
8 unavailable, that's right.

9 MR. PLYLER: Right. The letter providing more
10 detail about why it's unavailable as requested by the South
11 Carolina Supreme Court was emailed to the South Carolina
12 Supreme Court because that was our understanding of their
13 request.

14 what I'm building towards is I don't believe it's
15 ever been filed. I don't know if the South Carolina Supreme
16 Court chose to file it or not. I can have it filed, you
17 know, before we leave here today. I mean, I've got it here
18 and it's available to be filed.

19 I know that -- that -- I'll have to pull up the
20 email to see everybody that was copied, but my understanding
21 is Ms. Barnes and Mr. Kendrick were both copied on that
22 letter when it was sent to the South Carolina Supreme Court;
23 so they would have a copy of it as well.

24 You do have a copy of it?

25 MR. KING: Your Honor, we actually have copies of

1 in the Supreme Court of the United States."

2 You said that if you couldn't get the three drugs
3 you were prepared to enact the one-drug protocol. So what
4 you're telling me, you can't get the three drugs or the
5 single pentobarbital sodium; is that right?

6 MR. PLYLER: That is my understanding, Your Honor.
7 And I believe that they've even tried contacting the Federal
8 Government to say, "Y'all obviously have it. You've been
9 doing executions. Would you be willing to sell it to us?"
10 And the answer is, "No."

11 THE COURT: Do you want to put all this in more
12 detailed affidavit form by Mr. Stirling?

13 MR. PLYLER: Here's -- as a litigator, of course.
14 But here's the -- here's the problem. I've done -- I've
15 gone down the route through discovery and 16 years of
16 litigation, and I know what the response is going to be. No
17 matter what we put in there, it's never going to be enough.
18 There's always going to be, "Well, why didn't you try this,
19 and why didn't you try that, and why didn't you do this, and
20 why didn't you do that?"

21 And that's why the language is a good-faith
22 effort, not exhausting all possible avenues of, you know,
23 going and visiting every single state that apparently is
24 able to carry it out this way and grilling them until they
25 finally tell you how they're getting it, and then you going

Exhibit 3



ALAN WILSON
ATTORNEY GENERAL

March 18, 2022
(via e-filing and hand delivery)

The Honorable Patricia A. Howard
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: *State v. Owens*, Appellate Case No. 2006-038802;
State v. Sigmon, Appellate Case No. 2002-024388;
Sigmon v. State, Appellate Case No. 2021-000584.

Dear Ms. Howard:

The referenced appellate matters relate to capital cases in which execution notices had previously been issued but later stayed by this Court. In stay orders issued on June 16, 2021, this Court directed the State to notify the Court when:

... the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

Today, the Department of Corrections has advised me that they have met these conditions. (See Letter of Bryan P. Stirling, dated March 18, 2022, copy attached). Consequently, I am providing a copy of Mr. Stirling's letter to this Court to comply with the direction in the Court's June 16, 2021 orders.

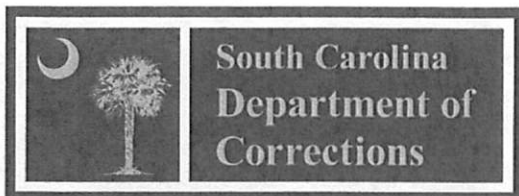
Sincerely,


Alan Wilson
Attorney General

cc: Bryan P. Stirling, Esquire. (via email only) (stirling.bryan@doc.sc.gov)
Barton J. Vincent, General Counsel, SCDC (via email only) (Vincent.Barton@doc.sc.gov)
Daniel C. Plyler, Esquire (via email only) (Daniel.plyler@smithrobinsonlaw.com)
Emily C. Paavola, Esquire (via email only) (Emily@justice360.org)
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(continued on next page)

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Robert E. Lee, Esquire (via email only) (roblee@vcrrc.org)



HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

March 18, 2022

VIA E-mail and U.S. Postal Service
The Honorable Alan Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, S.C. 29211

RE: *State v. Owens*, App. Case No. 2006-038802
State v. Sigmon, App. Case No. 2002-024388
Sigmon v. State, App. Case No. 2021-000584

Dear Attorney General Wilson:

This letter is in reference to the above cases and the Department of Corrections' ability to carry out its statutory duty pursuant to S.C. Code Section 24-3-530. On June 16, 2021, the Court issued two Orders in the above-referenced matters, which vacated previous execution notices and "direct[ed] the Clerk of the Supreme Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad." *State v. Sigmon*, App. Case No. 2002-024388 & *Sigmon v. State*, App. Case No. 2021-000584 (S.C. Sup. Ct. June 16, 2021); *State v. Owens*, App. Case No. 2006-038802 (S.C. Sup. Ct. Order dated June 16, 2021). In compliance with these Orders, the Department of Corrections has maintained the availability of electrocution and has developed and implemented the appropriate protocols and policies to carry out executions by firing squad. The Department of Corrections therefore is prepared to carry out any future order of execution by firing squad or electrocution. In accordance with section 24-3-530(B), upon receipt of a notice of execution from this Court, the Director of the Department of Corrections will determine and certify by affidavit whether the statutorily approved methods of execution are available. In compliance with the above Orders that direct the State to notify the Clerk of the Department's ability to carry out executions, I am so advising in order that you may notify the Clerk.

Should you have any questions or require additional information, please do not hesitate to contact me at 803.896.2967. Thank you.

Sincerely,

Bryan P. Stirling

BPS/ndh

cc: The Honorable Henry McMaster