

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.

RECORD ON APPEAL
VOLUME II

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TABLE OF CONTENTS

Volume I

Orders and Judgments

September 6, 2022 Order	1
June 11, 2021 Order	40
July 1, 2022 Order	49
July 5, 2022 Order	56

Pleadings

Complaint (May 17, 2021).....	59
Exhibit A to Complaint (filed Sept. 28, 2021)	92
Exhibit B to Complaint (filed Sept. 28, 2021).....	93
Third Amended Complaint & Exhibits (Apr. 11, 2022).....	94
Answer to Third Amended Complaint (Apr. 29, 2022).....	227

Transcripts and Motions

Transcript of Hearing on Motion for Preliminary Injunction (June 7, 2021)	246
Motion to Dismiss (Mar. 15, 2022).....	307
Response to Motion to Dismiss & Exhibits (Mar. 22, 2022)	350

Volume II

Transcript of Hearing on Motion to Dismiss (Apr. 14, 2022)	399
Motion for Protective Order & Exhibits (June 9, 2022)	462
Response in Opposition to Motion for Protective Order and Motion to Compel Discovery Exhibits (June 14, 2022)	530
Transcript of Hearing on Discovery Motions (June 23, 2022).....	540
Motion for Protective Order (July 19, 2022)	610
Motion for Ruling on Plaintiffs' Motion to Compel and for Clarification of the Scope of Discovery Order (July 19, 2022).....	615

Motion to Exclude Wikswow Expert Testimony (July 21, 2022).....	625
Response in Opposition to Motion for Protective Order (July 29, 2022).....	861
Defendants’ Pretrial Brief (July 30, 2022).....	865

Volume III

Trial Transcript.....	874
Pretrial Motions	879
Plaintiffs’ Opening Statement	1041
Defendants’ Opening Statement.....	1047
Examination of Bryan Stirling	1059
Direct Examination by Mr. Kedrick	1059
Cross-Examination by Mr. Plyler	1092
Cross-Examination by Mr. Limehouse.....	1095
Examination of Colie Rushton	1098
Direct Examination by Mr. Kedrick	1098
Cross-Examination by Mr. Plyler	1120
Examination of John Peter Wikswow.....	1141
Direct Examination by Ms. Freedman.....	1141
Voir Dire by Mr. Plyler	1153
Direct Examination by Ms. Freedman.....	1167
Cross-Examination by Mr. Plyler	1215
Redirect Examination by Ms. Freedman	1302

Volume IV

Examination of Jonathan Arden.....	1314
Direct Examination by Ms. Vann	1314
Cross-Examination by Mr. Plyler	1367

Redirect Examination by Ms. Vann.....	1401
Recross-Examination by Mr. Plyler.....	1406
Examination of Jorge Alvarez.....	1416
Direct Examination by Mr. Plyler.....	1416
Cross-Examination by Mr. Kendrick.....	1426
Redirect Examination by Mr. Plyler	1433
Examination of Ronald Keith Wright	1438
Direct Examination by Mr. Plyler.....	1438
Cross-Examination by Ms. Freedman	1458
Examination of D’Michelle DuPre	1474
Direct Examination by Mr. Plyler.....	1474
Cross-Examination by Mr. Kendrick.....	1483
Redirect Examination by Mr. Plyler	1496
Plaintiffs’ Closing Argument	1501
Governor McMaster’s Closing Argument	1515
Stirling and SCDC’s Closing Argument.....	1539
Plaintiffs’ Rebuttal.....	1547

Exhibits

Plaintiffs’ Exhibit 6	1556
Plaintiffs’ Exhibit 8	1557
Plaintiffs’ Exhibit 9	1559
Plaintiffs’ Exhibit 10.....	1561
Plaintiffs’ Exhibit 11	1562
Plaintiffs’ Exhibit 12.....	1563
Plaintiffs’ Exhibit 13	1566

Plaintiffs' Exhibit 16	1643
Defendants' Exhibit 1	1648

Sealed Volume V

Transcripts and Motions

Trial Transcript	1657
Pretrial Motions	1662
Examination of Witness X.....	1695
Direct Examination by Mr. Kedrick	1695
Cross-Examination by Mr. Plyler	1700

Exhibits

Plaintiffs' Exhibit 1	1702
Plaintiffs' Exhibit 2	1706
Plaintiffs' Exhibit 3	1711
Plaintiffs' Exhibit 4	1712
Plaintiffs' Exhibit 5	1726
Plaintiffs' Exhibit 7	1743
Plaintiffs' Exhibit 14.....	1753
Plaintiffs' Exhibit 15	1757
Plaintiffs' Exhibit 17.....	1762
Plaintiffs' Exhibit 18.....	1774

State of South Carolina) In The Court of Common Pleas
) Fifth Judicial Circuit
County of Richland) 2021-CP-40-02306

Freddie Eugene Owens, Brad)
Keith Sigmon, Gary Dubose Terry,)
and Richard Bernard Moore,)
)
Plaintiffs,)

vs.)

Transcript of Record)

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.)

April 14, 2022
Columbia, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge

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I N D E X

1
2
3
4
5
6
7
8
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14
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16
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18
19
20
21
22
23
24
25

<u>Witness/Description</u>	<u>Page No.</u>
Ruling of the Court	59
Certificate Page.	63

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
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No exhibits introduced.

1 THE COURT: All right, this is the hearing in the
2 matter of *Freddie Eugene Owens vs. Bryan Stirling*. Of
3 course there are other plaintiffs, other defendants.
4 Recently consolidated three case under civil action number
5 2021-CP-40-02306. If all counsel will identify themselves
6 for the record before we get started.

7 MR. LAMBERT: Grayson Lambert on behalf of Governor
8 McMaster.

9 MR. LIMEHOUSE: Thomas Limehouse on behalf of Governor
10 McMaster.

11 MR. REED: Austin Reed on behalf of the Department of
12 Corrections and Director Stirling.

13 MR. SHEDD: Michael Shedd on behalf of Governor
14 McMaster.

15 MR. KENDRICK: I'm Josh Kendrick for the plaintiffs,
16 Your Honor.

17 MS. FREEDMAN: Hannah Freedman for the plaintiffs.

18 MS VANN: I'm Lindsey Vann for the plaintiffs.

19 THE COURT: All right. So as I indicated -- thank
20 you, counsel -- these were three cases recently
21 consolidated involving four inmates: Owens, Sigmon, Terry,
22 and Moore. I see that after our status conference on
23 Monday, counsel, plaintiffs' counsel went ahead and filed
24 the third amended complaint for permanent injunctive relief
25 and for a declaratory judgment. There had been some

1 pending motions to dismiss; we all agreed that those would
2 remain pending and need not be refiled in response to the
3 third amended complaint. So, I am now prepared to hear
4 those motions to dismiss.

5 MR. LIMEHOUSE: Thank you, Your Honor. Thomas
6 Limehouse on behalf of the Office of the Governor, and with
7 the court's indulgence, before turning it over to Mr.
8 Lambert to principally argue in support of the governor's
9 and SCDC's motion to dismiss, I just wanted to offer a,
10 a brief update regarding developments in the related
11 litigation given the, the pace and the subsequent
12 developments not reflected in the prior motion to dismiss.

13 First would be with respect to Mr. Moore. On April
14 6th, the supreme court denied his *habeas* petition and then
15 simultaneously -- or, excuse me, the following day issued
16 an execution notice for Mr. Moore which established April
17 29th as his execution date. Mr. Moore's counsel that same
18 day filed a motion to stay. The supreme court has not
19 taken action directing an expedited response or issuing any
20 further orders. A response is due, I believe, early next
21 week in that matter.

22 With respect to Owens and Sigmon, also on April 6th
23 the supreme court issued orders in those cases denying the
24 motions to stay the issuance of an execution notice.

25 And then finally with respect to Mr. Terry, the court

1 issued an order in light of his second successive PCR
2 staying his execution pending completion of that PCR action
3 in the circuit court.

4 And as the court is aware and is referenced in the
5 motion to dismiss, there is also a pending action in
6 federal district court in which the plaintiffs have raised
7 an Eighth Amendment challenge. Plaintiffs have indicated
8 they intend to seek preliminary injunctive relief in that
9 matter, but as of today's hearing, no, no such motion has
10 been filed. Thank you.

11 THE COURT: And so with respect to Owens and Sigmon,
12 stay of execution was denied by the supreme court. Do they
13 have execution dates?

14 MR. LIMEHOUSE: They do not, Your Honor. There have
15 been no execution notices issued in those cases. The, the
16 court denied those without prejudice to their refiling when
17 the matters becomes ripe.

18 THE COURT: Okay.

19 MR. KENDRICK: That's all I was going to say was
20 clarify. They were denied procedurally because the, the
21 notice hadn't been issued.

22 THE COURT: Okay.

23 MR. KENDRICK: And it's contemplated that we'll refile
24 on this issue, but Mr. Limehouse is correct.

25 THE COURT: Okay, Mr. Lambert, if you would give us

1 your most complete argument, which includes some background
2 in addition to what cocounsel gave us.

3 MR. LAMBERT: Yes, Your Honor. May it please the
4 court?

5 THE COURT: Yes, sir.

6 MR. LAMBERT: Ten months ago, this court denied
7 plaintiffs' motion for a preliminary injunction on the
8 first complaint in this case because of a lack of
9 likelihood of success on the merits. Here we are now on
10 the third amended complaint. They now have eight claims,
11 but their claims still fail as a matter of law. They
12 should be dismissed.

13 At bottom, all eight of their claims rest on some
14 combination of three ideas: that electrocution and the
15 firing squad violate the state constitution's prohibition
16 on cruel or unusual punishment; that the methods of their
17 execution cannot change; and that the act the General
18 Assembly passed last year is too vague to be
19 constitutional. None of these three premises can withstand
20 scrutiny. Your Honor, I'd like to start, unless you prefer
21 somewhere else, with their claim that the firing squad and
22 electrocution violate the state constitution.

23 THE COURT: Proceed.

24 MR. LAMBERT: The state supreme court has told us
25 repeatedly that we are supposed to interpret the

1 constitution as the framers and the ratifiers intended it
2 to mean. That means we have to look at the meaning of
3 cruel or unusual or corporal in 1973 when Article 1,
4 Section 15 was ratified. But really to get an
5 understanding of those terms, we have to go all the way
6 back to our country's founding and before because the West
7 Committee from the 60s and 70s, it recognized that it was
8 simply modernizing the language of the provision, but its
9 operative terms of cruel, usual, and corporal remain
10 untouched.

11 These terms are as old as our country's jurisprudence
12 itself. They find their origin in the English Bill of
13 Rights from 1689. They found their way into state bills of
14 rights such as Virginia's in 1776. They were found in the
15 Northwest Ordinance that Congress passed on the Articles of
16 Confederation, and they found their way in the Eighth
17 Amendment which was ratified in 1791. Our first -- state
18 first adopted the term cruel in 1790. It brought in the
19 term unusual in 1868, and then corporal came in the 1895
20 constitution.

21 So, to grasp what these mean, what these terms mean,
22 we need to look back to dictionaries and the understanding
23 of the time. Johnson's dictionary, Samuel Johnson, said
24 that cruel meant pleased with hurting others, inhumane,
25 hardhearted, void of pity, wanting compassion, savage,

1 barbarous, or unrelenting. Blackstone compared cruel
2 punishments to torture. The word unusual has often been
3 understood as a term of art in the law for a government
4 practice that is contrary to law or immemorial usage. In
5 fact, Thomas Jefferson used that word unusual to describe
6 what George III did to legislatures, colonial legislatures
7 in 1776 as part of our justification for announcing our
8 independence.

9 Then -- let's just stick with those two terms because
10 those are the two Eighth Amendment terms that often get
11 discussed, cruel or unusual. The Supreme Court in
12 analyzing this history has summed it up nicely to say that
13 these terms prohibit the superaddition of terror, pain, or
14 disgrace, that it is a method of execution that seeks to do
15 more than simply extinguish life, but to do something to
16 make that more unbearable or to make that more disgraceful
17 for the condemned inmate.

18 Finally, let's touch on corporal here, and that's a
19 term that didn't come around until the 1895 constitution.
20 It's also a term that's not in the Eighth Amendment, but
21 case law from the 18 and early 1900s makes clear what
22 corporal means. It is a distinct type of punishment from
23 capital punishment or from imprisonment. It involves some
24 sort of bodily -- imposition of bodily harm: flogging,
25 public whipping, cropping of the ears, sitting in the

1 stock. That was the idea of corporal punishment. It was
2 something distinct from capital punishment and thus it has
3 no bearing on whether a method of execution violates
4 Article 1, Section 15.

5 So with this understanding of cruel and unusual or
6 corporal in mind, we need to look at electrocution and the
7 firing squad. Electrocution was adopted in this state in
8 1912 and was the only method of execution in this state
9 until 1995. That means that in 1973 when South Carolina
10 ratified Article 1, Section 15, the voters who ratified
11 that and the General Assembly who put it to the voters
12 understood that capital punishment in this state meant
13 electrocution, and it still became part of our
14 constitution. Thus, the people who ratified this provision
15 necessarily understood that electrocution was not cruel or
16 unusual or corporal punishment within the meaning of that
17 term. Otherwise, why would they have enacted a bar on that
18 punishment while leaving on the books electrocution as the
19 sole means of execution?

20 Firing squad, Your Honor, has -- to be sure never used
21 in this state, but it has a long history in this country
22 and has long been on the books in other jurisdictions to
23 suggest that it is, in fact, a normal method of execution
24 amongst American tradition. It is, in fact, one of our
25 oldest methods of execution. The first documented case of

1 the firing squad in this country was in 1608 in Virginia.
2 It's been used ever since and while it's a small number,
3 some states have always kept the firing squad as a method
4 of execution in their state.

5 The fact that South Carolina has not used it before is
6 not dispositive to this cruel or unusual question. It's
7 what is the purpose and does it add, superadd terror, pain,
8 or disgrace, and there's no suggestion that it has ever
9 been understood to do that. It has been a simple way to
10 extinguish life if that is the method that the jurisdiction
11 chose.

12 As the court thinks through this, Your Honor, I think
13 there are a couple more points before leaving this claim.
14 One is the or in Article 1, Section 15. Plaintiffs make a
15 big deal that this is or. The Eighth Amendment is and. We
16 don't dispute the or. And, in fact, our arguments in our
17 motion to dismiss deal with all three of these terms
18 separately and acknowledge that, yes, there is a
19 disjunctive or. I would set the historical record
20 straight. It's not the complete outlier they suggest. The
21 Northwest Ordinance used or. So, this is not the only time
22 in American history or has appeared in a provision like
23 this.

24 The second piece, Your Honor, is this. When the
25 Supreme Court of the United States in *Gregg v. Georgia* in

1 1976 brought the death penalty back, the plurality opinion
2 said that they must presume the validity of a punishment
3 that is selected by a democratically-elected legislature,
4 and that those who attack that judgment bear a heavy
5 burden. Or, as Justice Scalia put it concurring in *Baze*
6 back fourteen years ago, we have to have something to
7 ground cruel and unusual punishment claims against, some
8 way to measure them other than just an innate sense of is
9 it good or bad because once you go down that road, we rule
10 by judicial fiat. And it takes power away from the
11 democratically-elected branches and to the whims of
12 whatever court may be holding a particular case before it.

13 Your Honor, at this point I'd like to move to the
14 retroactive legislation claim, this idea that there's a
15 vested right to be executed by lethal injection for these
16 plaintiffs. This ordinance -- June 2021 order denied the
17 preliminary injunction motion. Said that this claim is
18 somewhat arbitrary and capricious itself and that the
19 plaintiffs failed to point to any legal precedent which
20 would buttress their argument, perhaps because there is
21 none.

22 That is still true today. The plaintiffs cannot point
23 to a single case in the country that embraces this theory.
24 And, in fact, as the federal district court in Oklahoma put
25 it, oh, I guess seven years ago now, the plaintiff there

1 has not identified any cases or other applicable authority
2 clearly establishing that an inmate has a vested right in a
3 particular execution procedure in force at the time of his
4 sentencing. Again, this court -- these plaintiffs ask this
5 court to adopt a novel theory that no one else in this
6 country has adopted.

7 What this court recognized and denied at the
8 preliminary injunction is that these plaintiffs were
9 sentenced to death, not death by a particular method.
10 16-3-20 provides for a sentence of death upon a conviction
11 of murder, and that's what they were sentenced to. And
12 it's important to note that 16-3-20 provides a sentence of
13 death, not something more particular of death by a certain
14 method.

15 In this sense, our law is very different than the law
16 of England in the Colonial Era where sentences for certain
17 crimes were by method. For example, murder was death by
18 hanging; treason was death by burning alive or
19 disembowelment. There were particular methods attached to
20 crimes. We just attach death and fundamentally, Your
21 Honor, this is a procedural change, as the court's order
22 from last June noted, not a substantive one.

23 This plaintiffs' argument that we have a right here
24 and it affects our, our decision making is akin to saying,
25 Your Honor, as we said in our motion to dismiss, they

1 weren't deterred from committing these murders by lethal
2 injection, but had they known they faced electrocution or
3 the firing squad, they wouldn't have killed two people with
4 a baseball bat, they would not have shot a single mother in
5 the head, and they would not have cracked a woman's skull
6 open after raping her. They're saying that the method of
7 execution would have deterred their decision making
8 originally. That is not a credible claim.

9 The, the last point on the retroactive legislation
10 claim, Your Honor, is the absurd results that this theory
11 would lead to. One, it could result in indefinite delays
12 if, as the facts have laid out here, the state is unable to
13 carry out a particular method. But it also leads to a
14 judicial overruling of death sentences without holding the
15 death sentence is actually improper.

16 If the court were to hold a certain method violates
17 the constitution, if we had lethal gas and a court said
18 that's unconstitutional, then any inmate who was sentenced
19 to death while lethal gas, gas was the statutory method
20 would have no way to have their death sentence carried out,
21 and it would be a judicial commutation of a death sentence:
22 one, without saying the death sentence wasn't improperly
23 imposed; and, two, in violation of the governor's authority
24 under Article 4, Section 14 to commute a sentence of
25 death to life in prison.

1 Your Honor, if I could turn next to their *ex post*
2 *facto* claim. Again, this is one the court addressed last
3 June and in doing so, the court said that nothing has
4 changed about their sentence of death and that is, again,
5 exactly right. Nothing has changed: the sentence is still
6 death.

7 The United States Supreme Court has said in a case
8 actually arising out of South Carolina from 1912 when we
9 went from hanging to electrocution that changing the method
10 of execution is not an *ex post facto* violation. And courts
11 around the country have continued to hold as much. What
12 the plaintiffs try to grab onto on this point is that in
13 that 1912 US Supreme Court case, *Malloy v. South Carolina*,
14 the Supreme Court noted that the new method of
15 electrocution was thought to alleviate some of the odious
16 features of hanging.

17 The problem is there is nothing they can prove here
18 for a court to resolve that says there is an odious method
19 to firing squad or electrocution that lethal injection does
20 not have. And this is the debate we had ten months ago,
21 Your Honor, of do you have to show that the new methods
22 would violate the Eighth Amendment themselves, or could you
23 somehow say, well, they're a little bit worse than the
24 method you want, and that's enough for an *ex post facto*
25 violation.

1 And there's a reason I think this court thought that
2 showing an Eighth Amendment violation was, was necessary in
3 that situation, and that's because determining whether a
4 method of execution is more painful than another is an
5 incredibly difficult and hotly debated topic. It's for
6 this reason that the United States Supreme Court has
7 refused to transform courts into boards of inquiry charged
8 with determining best practices for execution, and it has
9 sought to avoid embroiling the courts in ongoing scientific
10 controversies beyond the court's expertise.

11 The constitution, as the Supreme Court has noted,
12 gives a measure of deference to the state's choice of
13 execution procedures. And a traditionally accepted method
14 of execution -- this is very important -- does not
15 necessarily render unconstitutional -- excuse me. A
16 traditionally accepted method is not necessarily rendered
17 unconstitutional as soon as an arguably more humane method
18 becomes available. That's why a method of execution
19 challenge, as the United States Supreme Court under federal
20 law, has required the plaintiff to show that there is a
21 readily and feasibly implemented alternative of execution
22 that would significantly reduce a substantial risk of
23 severe pain that the state has refused to adopt without a
24 legitimate penological reason.

25 This is a high bar and it's for good reason. It's

1 because there's a great debate in every case over whether a
2 method of execution is more painful than another or not.
3 The plaintiffs in multiple points -- for example, their
4 third amended complaint at paragraph 90, their opposition
5 to motion to dismiss at page 12, said -- quotes the United
6 States Supreme Court Chief Justice Roberts's plurality
7 opinion in *Baze* to say that lethal injection is, quote: The
8 most humane method. What that quote misses, Your Honor, is
9 that Chief Justice Roberts says in full: Lethal injection
10 is believed to be the most humane method. That's 553 US at
11 page 62. It's believed to be. The court thought it was.
12 That was fourteen years ago.

13 Well, the last decade and a half has seen a, a swing
14 the other way in many cases on lethal injection. And, in
15 fact, now you have multiple courts and litigants pushing
16 electrocution or the firing squad. For example, Justice
17 Sotomayor dissenting from cert -- the denial of cert in
18 *Arthur* and in *Johnson* suggested the firing squad is the
19 alternative method the Supreme Court should consider in
20 light of a challenge to lethal injection. Justice
21 Sotomayor actually called lethal injection perhaps our most
22 cruel and a cruel irony, our most awful method of execution
23 yet.

24 You've got multiple federal judges promoting the
25 firing squad as an alternative. And there's been an expert

1 in litigation in Nevada and in Oklahoma saying that the
2 firing squad is, in fact, a better alternative than lethal
3 injection. As far as execution, you've seen inmates in
4 Tennessee, five of them over the past few years, choose
5 electrocution over lethal injection. And then when it
6 comes to lethal injection itself, Justice Breyer
7 questioned the constitutionality of it in the *Barr v. Lee*
8 case. Justice Sotomayor did the same thing in her dissent
9 in *Arthur*.

10 And I think it's worth noting here that, in fact, one
11 of the exhibits to the plaintiffs' complaint here raises
12 questions about the validity of the method they claim. If
13 you look at the third amended complaint at paragraph 67,
14 Your Honor, the plaintiffs allege that the most humane way
15 to carry out an execution is a single dose of
16 Phenobarbital. But if you look at Exhibit K at page 11 --
17 this is an expert report out of Nevada litigation -- that
18 expert, while saying, well, I think lethal injection is
19 better than the firing squad, says that the plaintiffs
20 there had suggested a single dose of Phenobarbital was
21 better than the state of Nevada's three-drug procedure.
22 That expert said no, no, no. The three-drug procedure is
23 much better than a single dose of Phenobarbital. So, even
24 one of the experts plaintiffs are pointing to in their own
25 complaint is saying that the method that they want is, in

1 fact, not the best method even if you're debating amongst
2 procedures for lethal injection.

3 All of this, Your Honor, is why the United States
4 Supreme Court has imposed such a high bar on plaintiffs in
5 method of execution challenges, and it's why finding an *ex*
6 *post facto* violation when there's a change of method should
7 be equally hard. I think it's telling that in every case
8 where there is a plaintiff challenging a method, he always
9 says the method he is facing is the worst.

10 For example, the *Barr v. Lee* case when the United
11 States Supreme Court vacated a preliminary injunction hours
12 before federal executions were scheduled, the federal
13 inmates there were facing a single dose of Phenobarbital.
14 A federal district judge said this seems so bad, I'm going
15 to enjoin the federal government from carrying out
16 executions this way.

17 The fact that a federal judge, even though he was
18 later vacated by the Supreme Court, could enter a
19 preliminary injunction saying as much shows just how
20 difficult and hard these questions are, how close they are,
21 and why the Supreme Court has said courts don't need to be
22 in this. We can't resolve this. This is, as the Supreme
23 Court put it in *Baze* with Chief Justice Roberts, beyond
24 their expertise.

25 Your Honor, one last point before I leave the *ex post*

1 *facto* piece. The plaintiffs have asserted a claim here
2 under both the state and federal constitutions. They try
3 to say the state standard is somehow different than the
4 federal by citing the *Jernigan* case which involved parole
5 procedures and how often things came up. The Fourth
6 Circuit said this isn't *ex post facto*. The state supreme
7 court later said yes, it is an *ex post facto* violation.

8 What the plaintiffs missed is that *Jernigan*, since
9 *Jernigan* twenty years ago, the state supreme court
10 continues to cite federal *ex post facto* law as the
11 governing standard for the state provision as well. All
12 *Jernigan* amounts to is a difference of opinion between a
13 federal and a state court over whether one particular
14 change was an *ex post facto* problem, and courts disagree
15 over issues all the time while applying the same legal
16 standard. There is no relief here under the state
17 constitution that the federal constitution doesn't provide.

18 With that, Your Honor, I'd like to address the
19 vagueness claim, the idea that there's a due process
20 violation because the statute is too vague. Again, to go
21 back to the court's June 2021 order, this court said the
22 law on its face can be clearly understood, and so it can.
23 The court was exactly right about that. The basic rules of
24 statutory construction are we look for the legislators'
25 intent, and we do that by looking at the plain language, by

1 thinking about the context and the situation in which the
2 General Assembly acted, and by knowing that the legislature
3 intended to accomplish something by its act.

4 Here, the General Assembly said if something is
5 available. If, we know, is a condition word. It may
6 happen; it may not. And available here has an obvious
7 meaning based on the context in which this act was passed,
8 and that is something that is ready for immediate use.

9 Before the act was passed, inmates had the choice
10 between electrocution or lethal injection, and if they did
11 not affirmatively choose electrocution, lethal injection
12 was the default. Well, once SCDC was unable to procure the
13 drugs needed to carry out a lethal injection, inmates could
14 impose a *de facto* moratorium on the death penalty in this
15 state. That's the context in which the General Assembly
16 acted when they switched the default method to
17 electrocution and said that your right to make a choice
18 depends on if a method is available. Well, it has to be
19 available at a particular time and the only time that made
20 sense is at the time of that particular execution.

21 As far as the director's certification of what methods
22 are available, there's an easy answer to what that means,
23 too, even if the statute doesn't provide a deadline. It's
24 before the inmate's deadline fourteen days before the
25 execution to make an election. If the director had to

1 certify after that, the right to elect would be illusory
2 and the result would be absurd. That's why in this case
3 already Director Stirling has submitted an affidavit to the
4 state supreme court saying that electrocution and the
5 firing squad are available so that Mr. Moore, ahead of his
6 deadline for election, knows what options might be
7 available to elect.

8 Your Honor, it's probably worth stopping at this point
9 to, to touch on this availability question the plaintiffs
10 repeatedly pushed, both in their brief in here and in the
11 brief in the other case Mr. Limehouse described: SCDC
12 hasn't done enough; SCDC hasn't said enough; we need to
13 know more about the lethal injection.

14 There, there are four quick responses to that, Your
15 Honor. This is a transparent attempt at burden, burden
16 shifting. Two, the statute does not say anything about
17 SCDC having to explain to the Supreme Court or to anyone
18 else why something is not available. Three, the supreme
19 court can -- and, in fact, has -- ask for more information
20 about availability if it wants to upon receipt of the
21 director's affidavit.

22 And four, when they talk about other states that have
23 carried out electric -- executions by lethal injection in
24 the last eight or ten years, all of those states have a
25 shield statute. I'd point you to our reply brief at

1 footnote 2, Your Honor. It lists those states and points
2 to their shield statutes. So, those states have the
3 ability to get drugs in a way that South Carolina does not.

4 Your Honor, we're, we're getting towards the end here.
5 I want to hit the non-delegation claim before we keep going
6 too far. This court again took that up in its June order;
7 it quickly rejected that as lacking in support.

8 Our state supreme court said in *State v. Woomer* --
9 that's 278 SC 468 -- that capital punishment as such and
10 the method of execution are matters of legislative
11 determination. Those are the decisions the General
12 Assembly has made. In 16-3-20, we do have capital
13 punishment; in 24-3-530, we have three methods that SCDC
14 can use to carry it out. The General Assembly can leave to
15 the agency to fill up the details and, in fact, Subsection
16 F 24-3-350- -- excuse me, not 350. 24-3-530, that's the
17 method of execution statute, 530. Subsection F leaves to
18 the Department to fill up the details and set forth the
19 protocols and procedures for carrying out these methods.

20 The idea that all three methods have to be available
21 is inconsistent with the statutory task. The General
22 Assembly's use both in Subsection A of 530 and Subsection C
23 of if available means the General Assembly recognized that
24 the alternative methods might not always be available. It
25 was up to the Department to be able to use them at a

1 particular time.

2 The plaintiffs criticize this act in -- part of the
3 non-delegation of, well, there's no, there's no check here.
4 There's no judicial review the General Assembly provided
5 for. It may be well for good reason, Your Honor. As
6 Justice Alito said in, in one of the method of execution
7 cases, the seemingly endless proceedings that characterize
8 capital-related litigation simply drags on too long. The
9 General Assembly may well have decided, and reasonably so,
10 that at a certain point a sentence that has been duly
11 imposed and all the direct and *habeas* appeals have been
12 exhausted needs to be carried out, and there doesn't need
13 to be an avenue for yet another round of litigation.

14 The plaintiffs next, Your Honor, assert what they call
15 a statutory violation. They say that the statute gives
16 them this right on election. Again, if is a conditional
17 word. If it is available. I'm reading A:

18 A person convicted of a capital crime and having
19 imposed upon him the sentence of death shall
20 suffer the penalty by electrocution; or at the
21 election of the convicted person by firing squad
22 or lethal injection if it is available at the
23 time of election.

24 There is no statutory right here to always have these
25 choices.

1 The Supreme Court has the two stay orders from June,
2 Your Honor; they were entered shortly after your order
3 denying the preliminary injunction. The plaintiffs have,
4 have relied heavily on those in opposing the motion to
5 dismiss, saying, well, this one sentence that says
6 executions are stayed and, SCDC, inform us when you can do
7 the electrocution and the firing squad is somehow meaning
8 there has to be a choice.

9 A couple of quick points on that, Your Honor. One is
10 that was one sentence, and this issue is not fully briefed
11 there. It is not possible for that to be binding precedent
12 on this point.

13 But even if you accept that it is, even if they're
14 right, that means the rest of their claims necessarily fail
15 because the supreme court in those orders showed no problem
16 with SCDC being able to move forward. And, in fact, the
17 supreme court has issued an execution as for Mr. Moore with
18 only the firing squad and electrocution being available.
19 So, if those orders are going to carry the day, as
20 plaintiffs say they have to on this point, they have to
21 carry the day on that point, too, and that alone is
22 sufficient to dismiss the plaintiffs' entire complaint.

23 Lastly, while we're on the subject of the supreme
24 court orders, Your Honor, obviously a decision of the
25 supreme court must prevail. There is nothing in a circuit

1 court's jurisdiction that allows it to undo, stay, stop, or
2 otherwise inhibit a supreme court order from being carried
3 out. I think from that jurisdictional perspective, that's
4 important to keep in mind because while the plaintiffs here
5 have not yet asked for a preliminary injunction, they do
6 ask for a permanent one. And to the extent that is going
7 to impact any supreme court order that is an execution
8 notice, that would be beyond the jurisdiction of a circuit
9 court as an inferior court to the state supreme court,
10 which is the top of our state's unified judicial system.

11 The last two claims, Your Honor, I, I want to touch
12 just very briefly. One is the choice between two
13 constitutional methods, this idea that the plaintiffs have
14 to have two constitutionally permissible methods of
15 execution before an execution can be carried out. Number
16 one, that's not what the statute says. It says you have an
17 option if these other ones are available. Again, if is
18 conditional. And, two, the firing squad and electrocution,
19 as we discussed at length at the beginning, are, in fact,
20 constitutional. And the supreme court's orders, as I just
21 mentioned, seem to have no problem with those being the
22 methods.

23 The last claim they have, the eighth is Mr. Terry's
24 as-applied challenge. He has only conclusory allegations
25 as to what would happen with electrocution, but he doesn't

1 even have to elect to that if he doesn't want. And his
2 firing squad argument about his bleeding disorder is
3 premised on a mishap in the firing squad.

4 And given the track record of firing squad across the
5 country, as we discussed in the motion, and, and the fact
6 that you assume the good faith of public officials, I don't
7 think it's fair to assume there will be a mishap, that
8 there will be a substantial risk, to use the Supreme
9 Court's language, of a mishap.

10 And to the extent the court does begin embracing these
11 as-applied challenges like this, it's going to open
12 Pandora's box to get the -- another round of proceedings in
13 capital litigation where at the end when an inmate knows
14 what options are available, he's going to say, well, you
15 can't use this one for this medical reason. You can't use
16 this one for that. And we'll get -- again, be kicking the
17 can down the road of carrying out a duly imposed and fully
18 exhausted on appeal sentence because of yet another round
19 of challenges that have been judicially blessed.

20 That's all I have, Your Honor. That's a lot. If you
21 have questions, I am happy to answer them, or I'm happy to
22 sit down for a while and give the floor to Mr. Kendrick.

23 THE COURT: I do have questions. So, defendants'
24 motion to dismiss was filed pursuant to Rules 12(b)(1) and
25 12(b)(6) of the South Carolina Rules of Civil Procedure,

1 arguing or suggesting that this court lacks subject matter
2 jurisdiction and that the plaintiffs failed to state facts
3 sufficient to constitute a cause of action. At the very
4 end, you briefly touched on subject matter jurisdiction for
5 about ten seconds. But aside from that, I heard very
6 little argument about the jurisdiction of this court.

7 In addition, the question would be is it appropriate
8 at this stage of the proceedings to go into such
9 substantive arguments about the merits of the claims. Is
10 that appropriate at the motion to dismiss stage because
11 counsel relies heavily on the court's findings with respect
12 to the previous motion for temporary restraining order or
13 preliminary injunction, whichever it was. Preliminary
14 injunction, I suppose, and those findings of fact. But
15 should the court at this stage be concerned with those
16 matters because it's -- a motion to dismiss is simply a
17 procedural thing, is it not?

18 MR. LAMBERT: I don't know that it's entirely -- that
19 the motion is under a procedural rule. It can touch the
20 merits of a case. It, it may, Your Honor. If I could just
21 take them in the order that, that you asked them?

22 THE COURT: Absolutely.

23 MR. LAMBERT: As far as subject matter jurisdiction
24 goes, that argument was raised after -- in the, the short
25 motion to dismiss we filed after the third amended

1 complaint because after we filed the first motion to
2 dismiss, the notice of execution was issued. And this
3 court in its preliminary injunction order said it is wholly
4 inappropriate for the court to attempt to usurp the
5 authority of the supreme court of South Carolina by
6 effectively nullifying the execution notices which have
7 been served on plaintiffs after dozens of years of
8 otherwise unsuccessful appeals.

9 Our jurisdictional argument, Your Honor, is limited to
10 any attempt the court would have to undo, stay, or
11 otherwise interfere with a supreme court order. That's the
12 only 12(b)(1) issue we have. Everything else is 12(b)(6),
13 and it is entirely appropriate for this court to get into
14 the merits of the legal claims on a 12(b)(6) motion. The
15 supreme court has said that even novel issues of law can be
16 dealt with on a 12(b)(6) motion, and everything we raise
17 here is a legal argument based on case law and precedent.

18 As far as the preliminary injunction from June, Your
19 Honor, I don't want to touch any of the findings in that.
20 We don't rely on any of them. All I'm pointing to are to
21 the legal reasoning and conclusions you reached: to say
22 that you were right that they were not likely to succeed on
23 the merits then and, in fact, they fail on the merits now.
24 You don't need to take any of the findings from the June
25 order from last year to grant our 12(b)(6) motion. All I'm

1 doing in quoting that is reminding Your Honor you've looked
2 at these issues, and you said they aren't likely to
3 succeed.

4 We can go a step further than that now and say, in
5 fact, those claim fail and they fail for legal reasons. We
6 don't need to get into weighing facts. We don't need to
7 get into debating experts because when you look at the law,
8 there is nothing, no potential claim, no possible claim
9 they have under any of these eight theories that can
10 ultimately succeed.

11 So, instead of going through litigation and dragging
12 this out, the court should grant the motion to dismiss now
13 and recognize that. That also has the added benefit, Your
14 Honor, of letting the supreme court address these legal
15 issues up front. And if they think there's a claim there
16 and that facts need to be developed, the court can remand,
17 but there are a lot of legal questions here. And, in fact,
18 this case is dominated by legal questions, not by facts.

19 The facts they want to talk about are these expert
20 reports, these things that are attached to their complaint.
21 But as we discussed in the context of *ex post facto* claim,
22 all of that gets into weighing is one method more painful
23 than another? Is it not? That's -- well, the Supreme
24 Court has said we're not even opening that door. We're not
25 going to entertain those claims because they're too hard to

1 resolve.

2 We are not going to -- and I believe this was Justice
3 Scalia in his concurrence in *Baze* saying these issues of
4 what method do we use are -- and, and do we have capital
5 punishment -- are so hard and so complex and so intense for
6 society at large, to allow a court to rule based on one or
7 two experts that something is entirely off the table is
8 beyond the purview of what courts should be doing. That's
9 why the court has said when we look at what cruel or
10 unusual means, we look at is it the superaddition of
11 terror, pain, or disgrace. Is the state looking to do
12 something more than simply carry out an execution and
13 terminate life?

14 None of the methods that South Carolina has adopted,
15 including electrocution, the firing squad, does that. They
16 terminate life, and as the Supreme Court has recognized,
17 there is an inherent risk of pain in every execution.
18 There's an inherent risk of pain in all death. We can't
19 guarantee a painless death to anyone, but what we can say
20 is as long as the state is using a method that is long
21 established and known to simply be looking to exterminate,
22 extinguish life rather than add something more to it the
23 way that the rack, drawing and quartering, disemboweling,
24 burning alive -- all the things that would happen before
25 James II was kicked off the throne in England when they

1 wanted to really punish people and make an example of them.

2 That's what we don't do, but as long as the state
3 isn't doing that, we're going to, as the United States
4 Supreme Court said, give great deference to states and keep
5 courts from becoming boards of inquiry.

6 What the plaintiffs want you to do in this case, Your
7 Honor, is become a board of inquiry and look at what SCDC's
8 procedures are and look at these methods and take a bunch
9 of different experts and say maybe this is better, maybe
10 it's not. These are hard questions, but that -- the, the
11 complexity of them and the conflicting evidence from so
12 many directions is why courts shouldn't go down this road
13 in the first place. And because of these legal standards,
14 you can deal with all of these on 12(b)(6).

15 THE COURT: Okay. Thank you, sir.

16 MR. LAMBERT: Thank you, Your Honor.

17 THE COURT: Mr. Kendrick.

18 MR. KENDRICK: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. KENDRICK: If you don't mind, I'm just going to
21 briefly address kind of an introductory issue, and then I'm
22 going to let Ms. Freedman argue some of the constitutional
23 grounds, and I'll come back to respond to the rest the
24 governor's argument.

25 He stole my thunder a little bit because I was going

1 to talk about this 12(b)(6) standard, and I think we're,
2 we're misconstruing it from the start.

3 So, last summer when you ruled on the preliminary
4 injunction, one of the things that dictated your ruling was
5 our likelihood of success on the merits. 12(b)(6), South
6 Carolina courts say the opposite. In fact, if you don't
7 think we're going to win, you don't get to grant a motion
8 on those grounds. What you're looking at today is whether
9 the facts we have alleged, if taken to be true, give us an
10 avenue for relief. That's where I think that, that the
11 governor may be slightly wrong here when they say it sort
12 of touches on the merits.

13 On a procedural ground like we're facing right now,
14 we've alleged that electrocution is an incredibly barbaric
15 way to die: burning, boiling, cooking alive. We've alleged
16 that firing squad could potential be just as barbaric and
17 just as violent: blowing a hole in somebody.

18 Now if you accept those as true, then you would also
19 have to say that under Eighth Amendment jurisprudence or
20 under any view of the law, state or federal, we are okay
21 with that. That that violent, barbaric death which we
22 allege does, in fact, superadd pain is perfectly fine, but
23 that's not what a 12(b)(6) is for. So, it is, in fact,
24 proper for you to take evidence.

25 A board of inquiry is not a fair, a fair question. It

1 sounds like part of the argument is this is too hard, so
2 we're not going to do it. I mean, I think medical
3 malpractice lawyers would have difficulty with that; I
4 think criminal defense lawyers and DNA and forensic
5 technology would have difficulty with that. Your Honor,
6 the things you do on a daily basis that become routine to
7 those of us who labor in this courtroom are incredibly
8 difficult. The decisions you make are, are hard, and I
9 dare say that none of us would accept you saying, ah, too
10 hard, so let's, let's be done with it, and that seems to be
11 the argument here. But absolutely, Your Honor, this case
12 needs to be tried. This case needs to have discovery
13 conducted.

14 I find it a little bit hard to reconcile the argument
15 that we're constantly filing lawsuits, clogging things up
16 with, well, let's just see what the supreme court says, and
17 they can remand it to do what actually has to be done
18 before they make a decision.

19 There are two pieces to every case: the legal side and
20 the factual side. When there is no dispute about the
21 facts, or there could be no dispute about the facts, then
22 you grant 12(b)(6). It happens relatively rarely because
23 our state courts disfavor it. The system favors rulings on
24 the merits with a full evidentiary hearing.

25 So, I want to start at that point, that the bar the

1 governor has taken on in electing to proceed on a 12(b)(6)
2 motion is extremely high, and it requires Your Honor, who
3 is more than suited to do the hard work of a medical or a
4 scientific case, to accept the incredibly violent,
5 incredibly brutal methods of execution as perfectly okay
6 under statutory and constitutional state and federal law.
7 And I don't think that that's what 12(b)(6) is for, and I
8 don't think you can make that ruling.

9 So, there are some other brief responses to things he
10 brought up, but if I could turn it over to Ms. Freedman,
11 she will respond on the constitutional arguments, and then
12 I will come back for a, hopefully, short response to the
13 other arguments, Your Honor.

14 THE COURT: Yes, sir.

15 Ms. Freedman.

16 MS. FREEDMAN: Yes. Good morning, Judge Newman.

17 Thank you. I want to just briefly start with the two
18 substantive constitutional claims that are pending before
19 you today. Those two claims at the end of the day really
20 boil down to a simple question, and that question is what
21 standard applies in the state of South Carolina to a method
22 of execution challenge. We don't know the answer. The
23 state supreme court has not weighed in on that question yet
24 because they haven't had the opportunity. And because
25 we're in the posture of this case on a motion to dismiss,

1 Your Honor's ruling becomes the law of the land. If you
2 grant their motion to dismiss, the standard you adopt
3 becomes the standard for the state of South Carolina until
4 a higher court says otherwise, and so that's the way this
5 case comes to you.

6 And so you have before you today two proposals about
7 how to read the state constitution. On the one hand,
8 they've proposed an interpretation that asks you to look
9 back to pre-founding-era documents that asks you to consider
10 the barbarity of a punishment like, for example,
11 disemboweling. They have not really drawn a line between
12 what constitutes corporal punishment versus not. All they
13 say is these two that we like, not corporal. The other two
14 ones we don't like, corporal. That's their line. Now, I
15 don't think really think that that is what our state
16 supreme court has said is the proper way to engage in
17 constitutional analysis when the question is whether the
18 state constitution goes beyond what the federal
19 constitution requires. And so, of course, if South
20 Carolina adopts the standard that's lower than the federal
21 constitutional minimum, then the federal standard applies.

22 But we have laid out, I think, a map for Your Honor
23 that adopts the framework that the state supreme court
24 applied in *Forrester* when the state supreme court extended
25 the state corollary to the Fourth Amendment to apply beyond

1 what the Fourth Amendment does. It's a similar situation.
2 You've got language in the state constitution that says
3 more than what the federal constitution says. The state
4 supreme court looked at that language, started with the
5 language in the constitution, and it was very important in
6 *Forrester* to the court that South Carolina had adopted
7 specific language in that West committee. They adopted
8 language that went beyond the federal constitution, and
9 they did that with the specific desire to ensure that South
10 Carolina citizens are entitled to a more broad based
11 protection under the Fourth -- than the Fourth Amendment
12 provides.

13 So, the same applies here. The first step is to look
14 at the text. Our contention is not that that the
15 disjunctive framing of the state constitution is out of the
16 norm. It's actually quite common. Our contention is that
17 other states with the disjunctive framing have said that
18 their state constitutions go beyond the federal
19 constitution. Florida pre-1998 did that, California did
20 that, Michigan did that.

21 The next step in looking at the analysis is to
22 consider the way in which the actual language of the state
23 constitution differs from the federal constitution. We are
24 the only state in the Union that uses the word corporal in
25 our Eighth Amendment parallel, the only state. That is

1 unusual. That's beyond even what the court was considering
2 in *Forrester*. And so I think, you know, the court has to
3 find a way to give meaning to that very unusual framing of
4 what is prohibited as a form of punishment in South
5 Carolina.

6 And I think we actually have some historical evidence
7 that supports our position. *State v. Brown*, decided in
8 1985, involved a challenge under the state constitution to
9 the practice of castration for people convicted of sexual
10 offenses, and the state supreme court said that that
11 violates Article 1, Section 15 of the state constitution.
12 I would point out that that is not a violation of federal
13 law as it stands today. Alabama in 2019 passed a very
14 similar law that allows castration for sex offenses. So,
15 nine states permit that still, and yet it's prohibited
16 under the state constitution. I think that tells Your
17 Honor not everything you need to know but a huge amount.

18 And I don't want to kind of belabor the point, but I
19 think on these two positions, we have explained why the
20 firing squad and the electric chair are both cruel.
21 They're cruel because of what they do to a person. The
22 electric chair, other states that have looked at the
23 electric chair under their state constitutions. *Dawson* was
24 the supreme court of Georgia. *Mata* was the supreme court
25 of Nebraska. Both of those decisions are from the last

1 twenty-five years. They considered the constitutionality
2 of the electric chair under their state constitutions.
3 Both state courts said absolutely not. Those violate the
4 principles of decency and humanity in our state. We will
5 not tolerate a method of execution that mutilates the body
6 by charring the flesh, cooking and destroying internal
7 organs, leaving the shaving -- corpse marred with burns and
8 bruises. Regardless of how well the executioners carry it
9 out, it doesn't take a botched execution to accomplish that
10 with the electric chair. Firing squad explodes a hole in
11 the, in the corpse. Leaves a giant, gaping hole in the
12 middle of the person's chest,. Exposes internal tissue.
13 Blood pours out, soaks the sandbags that surround the body.
14 Both punishments are highly unusual.

15 As we know, South Carolina has never carried out a
16 firing squad execution. Only three have taken place since
17 1973 in the United States. It's very unusual, very, very
18 unusual.

19 And then electrocution is also unusual. We know it's
20 unusual because both *Mata* and *Dawson* say so, but it's also
21 unusual because since 2010, only 2 percent of executions in
22 the United States have been carried out by electrocution.

23 And then finally the word corporal, I don't think the
24 state supreme court would agree that the proper way to
25 understand that word is to look back at ear notching or

1 disemboweling and compare the punishment at issue here with
2 what people did in a pre-Civil War Era of punishment. I
3 think what the Supreme Court wants us to do is take that
4 language of the constitution, interpret it as it comes
5 before us, and I think the word corporal means what it says
6 it means. It means damage to the corpse, damage to the
7 body. And firing squad and electrocution both superadd
8 damage to the body beyond what would be accomplished with
9 something like lethal injection.

10 And I think at the end of the day, there are factual
11 questions underpinning these claims. It's not just a
12 question of sort of dueling experts or something like that.
13 There is a trial going on in Nevada. Opposing counsel
14 mentioned that. Why do we have to rely on what experts in
15 Nevada say about lethal injection or the firing squad? Why
16 can't we just have a trial here? That's what we've asked
17 for.

18 We would like to develop the facts. We'd like an
19 opportunity to hear what the Department of Corrections has
20 to say on the record about their attempts to obtain lethal
21 injection drugs. We think that this court is perfectly
22 well suited to make factual determinations about what is
23 going to happen or likely to happen if they carry out these
24 executions by firing squad and lethal injection.

25 And finally I will just add that at this stage, we

1 have not sought a preliminary injunction but if we were to
2 do so, the standard is completely different from what
3 applies in In Re stays. In Re stays is what applies to an
4 execution. That would be directed at the South Carolina
5 Supreme Court. What a preliminary injunction would do is
6 ask this court to do what it does every single time it
7 entertains that kind of a motion in a civil case: to enjoin
8 one party or the other from engaging in particular conduct.
9 That doesn't overrule anything the supreme court did or did
10 not do.

11 And I'm glad to answer any questions Your Honor might
12 have.

13 THE COURT: No, ma'am.

14 Mr. Kendrick.

15 MR. KENDRICK: Thank you, Judge. I'll be brief, and
16 I'll start somewhere I meant to start and forgot to, the
17 12(b)(1) argument Ms. Freedman reminds me.

18 So, there, there's two things that happened and that
19 have been referenced related to an execution. There is the
20 issuant -- issuance of the warrant, the notice, the
21 procedural way they set a date, and then there is a stay
22 that stops it.

23 So, the first one is a ministerial duty and, in fact,
24 that is why my stay was recently denied on behalf of Mr.
25 Sigmon because they said we haven't done anything yet. So,

1 there's nothing for us to do. Also, when we do issue this,
2 that's just a ministerial thing, and it doesn't have
3 anything to do with, with what you may or may not want to
4 happen.

5 So, there is a very big difference between what we're
6 asking Your Honor to do eventually. And, to be quite
7 honest with you, we want this case to go to a trial, to go
8 through discovery, which means there will be other vehicles
9 by which we will need to pursue that remedy.

10 Your injunction will likely not be what stops an
11 execution because in all honesty, Your Honor, number one,
12 was last Thursday and we expect every Thursday -- and maybe
13 they'll take holy Thursday off, but we expect every
14 Thursday to get another warrant, and then we will be three
15 weeks away from an execution. We do not expect to try this
16 case in three weeks. So, 12(b)(1) isn't a proper ground
17 for you to dismiss this because we're not asking you to do
18 anything that would implicate 12(b)(1).

19 I think just briefly, Your Honor, I'm going to go a
20 little bit out of order because I recognize that of the
21 eight claims, some are stronger than others, but, but that
22 isn't standard here. We're not required to just argue our
23 very best winning cases. That's what we would do in front
24 of Your Honor at a trial.

25 But the question of availability that, that we have,

1 have concentrated on which I think implicates both the
2 vagueness and the non-delegation, it, it strikes me as when
3 I am in front of Your Honor and I have an unavailable
4 witness which triggers a very special procedure and how I
5 can introduce things I wouldn't normally be able to
6 introduce, but I think your first question would be Mr.
7 Kendrick, what did you do to get the witness. And if I say
8 I don't know where they live, you're not going to accept
9 that. You're going to require me to have made a good-faith
10 attempt through legal process to secure a witness and, in
11 fact, maybe even get the court involved.

12 In this case, what we have from Mr. Stirling is I
13 don't know. I can't get the drugs, and he brings a letter
14 from Hikma Pharmaceuticals, which is attached to various
15 proceedings. To the best of our knowledge, Your Honor,
16 Hikma Pharmaceuticals doesn't manufacture any drug that the
17 South Carolina Department of Corrections would use in a
18 protocol. They send that form letter out to every
19 department of corrections in the country. It's probably an
20 investor relations matter to say, hey, don't use our stuff
21 for any of this stuff, you know, regardless of whether
22 there's been a question.

23 You know, the states that have committed to these
24 executions and have said we are going to, to execute you by
25 lethal injection, including the federal government, have

1 been able to do it with, with seemingly little impediment,
2 Your Honor. I, I think the numbers are in our pleadings,
3 but since 2013 when SCDC said that they couldn't get the
4 drugs, there have been 222 executions. Just since 2020,
5 there have been twenty-seven. There have been two this
6 year. There are thirteen scheduled.

7 These states have no magic formula. They've just done
8 what they need to do to get these drugs that, that would be
9 a much more humane way to execute somebody, which goes to
10 the heart of our argument, Your Honor. We are asking you
11 to look at that, to the humanity of how these executions
12 would be carried out.

13 I mean, there's, there's always this accusation of two
14 things: the brutality of what was done by our defendants,
15 but that's every case like that. That's -- every murder
16 case has some element of violence, and the law is set up
17 for that. And then there's this claim we are endlessly
18 litigating in some attempt to delay the inevitable, Your
19 Honor.

20 But what it comes down to is this, and I saw a speaker
21 yesterday at lunch who talks about whether or not these
22 people deserve to die is the wrong question. It's whether
23 we deserve to kill them. But we don't even go that far in
24 this litigation. What we are asking Your Honor to do is
25 not allow the government just an unfettered right to kill

1 them however they want. And to make that decision, you
2 need to be able to hear and see what has happened to get us
3 here.

4 So, for the availability question, Mr. Stirling can be
5 deposed and he can tell us exactly what he has done to try
6 to get these drugs, who he has talked to. We might be
7 incredibly helpful if he, if he's not done everything he's
8 supposed to do. But when given the opportunity to add to
9 his affidavit in federal court last year where he said I
10 can't get them, his counsel said no, we don't want to.
11 And, and the reasoning was we'll never be happy with that
12 answer, but that's a little unfair because how would you
13 know until you give us the answer? But if no effort has
14 been made to get these drugs, then I don't -- that's not
15 unavailable, and I think that implicates the vagueness,
16 Your Honor. I think it implicates the fact that this has
17 been delegated to one person to say whether not, with no
18 explanation -- and again, Your Honor, as a judicial figure
19 in, in a trial, has the ability to say we will define
20 availability. I think if you use the common meaning of
21 available, then we need more information about how this
22 happened.

23 And again, Your Honor, I'm trying not to just rehash
24 our reply because I know you've read it and are -- probably
25 don't want to hear the same thing over and over again. So,

1 I'm just looking at some of the things that, that Mr.
2 Lambert concisely laid out so that I can address them. But
3 I, but I did notice that I have a lot of notes written in
4 red and circled about debate factual issue, things they
5 don't believe are true, all things that you can't use to
6 reach your decision here.

7 So, at the end of the day what you have to look at is
8 what we alleged, and you have to determine if all that's
9 true, you know, do we get a trial on it. And, and if you
10 look at it and say I don't think they're going to win, I
11 don't think I'm going to rule in their favor, you have to
12 do that after the trial. You can't do it at the 12(b)(6)
13 stage, and the court's been very clear about that.

14 I, I bring this argument up because sometimes we lose
15 sight of it when we're dealing with -- I mean, this is the
16 weightiest issue we may deal with in a state courtroom, but
17 the opinion will apply wherever we go. So, if we try to
18 change the 12(b)(6) standard, then in the next car wreck or
19 med mal case or whatever the case may be, we will then be
20 stuck with a relaxed standard, and we will create endless
21 litigation that the supreme court will fix eventually. So,
22 we can do it right now and let this case proceed.

23 If you will give me once second, Your Honor? I want
24 to make sure I have not missed anything. I'm sure I have,
25 but...

1 (A PAUSE.)

2 MR. KENDRICK: Your Honor, I think just the last point
3 is that -- because it came up in the, the, the four points
4 that Mr. Lambert made on availability. You know, I think
5 probably what's most important, you know, if I look at
6 number 3, which is the supreme court currently has asked
7 for more information, why? Why don't we have our trial and
8 you can give them the answer so that if we do get up there,
9 they will have all the facts they need to apply the law,
10 which is actually the role -- I don't take the position
11 that you're an inferior court other than you're just down
12 the totem pole when they start issuing opinions. But most
13 of our law comes out of the common pleas court or the
14 circuit court. So, the role we have here, I think, is to
15 give them the information they need to reach a legal
16 conclusion, but they don't ever do anything independently,
17 Your Honor. They always review what you did. Sometimes
18 you're right, sometimes you're wrong, but, but you make the
19 first decision, and that's what we're asking you to do
20 here, which is not in any way a unique or strange request
21 to make in a circuit court. In fact, it's what we do all
22 day long.

23 The shield statute, you know, in some other
24 litigation, Your Honor, I think the state has taken the
25 position the shield statute would protect the identity of

1 some providers but maybe not the entire chain that, that we
2 -- might be a problem. So, you know, whether that could,
3 could be an issue or not, I mean, I don't know. I, I think
4 that, that they certainly could pass a law if they wanted.
5 I mean, they, they referenced in some pleadings that my
6 cocounsel's law firm has prevented the shield statute from
7 taking -- passing, which is a little bit exaggerated maybe
8 because we, we certainly didn't have any success in
9 stopping this bill from passing, Your Honor. So, it's
10 clear the General Assembly can get things passed that they
11 need passed. So, to the extent they rely on that, I mean,
12 that shouldn't really matter.

13 The question of availability comes down to this: are
14 you able to obtain it and use it, not do you have it
15 instantly on hand. There are resources available to all of
16 us that are not sitting in the courtroom with us. And it
17 seems to be the very narrow definition they want Your Honor
18 to take, which is if I don't have the drugs in my desk
19 drawer, they're just not available, but of course that's
20 not the case. The case is can I get them, and then the
21 second question is what have you done to get them, and that
22 circles back to kind of the overarching issue here, which
23 is we need a trial to determine these facts.

24 THE COURT: Mr. Lambert, is Mr. Kendrick not correct
25 that the court procedurally must accept as true all the

1 allegations in the complaint and only dismiss on 12(b)(6)
2 if the complaint states absolutely no cognizable claim for
3 relief? Not whether the court doubts that the plaintiffs
4 will prevail but whether they couldn't under any
5 circumstances, assuming things to be true, prevail?

6 MR. LAMBERT: Your articulation of the 12(b)(6)
7 standard, Your Honor, is correct and we don't take issue
8 with that. We are not asking you to rewrite it. But what
9 you have to do when you look at the complaint and the facts
10 alleged is judge those facts against the law that exists,
11 and I think this is where it's important to dive into the
12 constitutional claims again.

13 Those words cruel, unusual, corporate have to mean
14 something. What the plaintiffs ask you to do is to -- is,
15 as the judge in this case, what do you think the words mean
16 and the humanity of it. That was a word I heard. Think
17 about what it does to a person. Take today's
18 sensibilities, perhaps take your sensibilities and see how
19 the alleged facts that could say it's cruel or unusual or
20 corporal. That's not what the law is.

21 Our Supreme Court has said constitutional terms should
22 be interpreted in light of the intent of the framers and
23 the people who ratified it. We cannot sit here today on a
24 Thursday afternoon now and say, well, we think it means
25 this and we think they've got a claim that could get there.

1 We have to say, okay, this is what they've alleged. This
2 is what we know the law that controls means. Does it work?
3 And what we know in this case is that cruel and unusual and
4 corporal have well established and well understood
5 meanings. And they, they, they denigrate the idea that
6 we're looking back to Colonial Era sources. That's an
7 incredibly well established and well accepted way we
8 interpret our constitution. To do anything otherwise
9 allows a court in a particular time to rewrite what the
10 people's representatives picked.

11 So, let's take the *Brown* case about castration as an
12 example from 1985. Of course that's a corporal punishment
13 like cropping of the ears. You are doing some damage to
14 the body of a person. What they have not shown you, Your
15 Honor, is a single case out of South Carolina that says
16 corporal is implicated in capital punishment because
17 capital punishment is different in kind. We, in fact, know
18 that hanging could do damage to the body. I mean, there
19 are story -- there are horror stories and, Your Honor, I
20 can leave some of the details aside unless you really want
21 me to get into some of the specific examples of botched
22 hangings where bodies were harmed, but that didn't mean
23 that that became unconstitutional.

24 This is not about an unfettered right to kill people,
25 Your Honor. This is about carrying out a statute that the

1 General Assembly has enacted, that has gone through our
2 constitutional process to become law, and giving those
3 words their everyday meaning. So, let's get into the words
4 of the statute again briefly and its availability and what
5 does it mean.

6 Your Honor said the law could be understood clearly on
7 its face last June. That's still true today, Your Honor.
8 The law can be clearly understood. We know what available
9 means. It doesn't mean the drugs have to be in your desk
10 drawer. It means you have to be able to go get them and,
11 and readily so for that execution. It doesn't mean that
12 they're out there somewhere. Possibly we could find
13 someone and there's this chance they could get them. It
14 means you've got to be able to go out and carry it out in
15 the normal course of fulfilling your duties in good faith,
16 which the law presumes all public officials do. This is
17 not -- yet another example of the burden shifting the
18 plaintiffs are trying to impose on the Department to say
19 you have to satisfy a court and, and, and us for us to stop
20 litigating, that you've done whatever we think you should
21 have done.

22 But what's telling is the General Assembly, in
23 enacting the amended 24-3-530, did not do that. It did not
24 require the director's affidavit to explain why something
25 is unavailable; it didn't require anything else on that

1 front. So, we have to take the meaning of the word
2 available as it's understood in this context, which is what
3 prompted this act to be passed, and say okay. What is it?

4 What the supreme court has shown you, Your Honor, is
5 that if it wants to know more about the availability, the
6 supreme court is able to do that in the context of the
7 certifica -- the affidavit certifying available methods
8 that the director has to file. But to suggest that that
9 the idea that available doesn't have a meaning flies in the
10 face of the supreme court's instruction to Director
11 Stirling to say explain more. He submitted a letter, and
12 the supreme court said okay. Here are the stay orders.
13 Let us know when the firing squad and electrocution can be
14 used. If there is any question about what available means,
15 the supreme court's actions in those stay orders should
16 tell you that it's satisfied about what available means and
17 what the director's done.

18 So, this ultimate attempt to shift burdens is not
19 what's in the statute. It's not what the General Assembly
20 passed, and yet again, Your Honor, it's opening the door to
21 continue litigating to drag out these claims.

22 It's telling, and they mentioned they didn't move for
23 preliminary injunction. They didn't. I don't know why but
24 had they done it, either side could have appealed
25 immediately. They could have appealed the denial of that;

1 we could have appealed the grant of that. The supreme
2 court could have gotten the case right away for the legal
3 questions.

4 THE COURT: Well, that brings me to my next question,
5 which is are the court's conclusions in that order denying
6 preliminary injunction binding on the court now because --
7 and I ask because that was a request to stop. Hit the
8 pause button essentially is what injunctions do, right?
9 Time out. Everybody stay where you are. Don't do anything
10 different. That's in one context.

11 But is that determinative and binding on this court to
12 say there's no theory under which the plaintiffs could
13 prevail in their action? Just because I won't hit the
14 pause button, does that mean that I must conclude that they
15 don't even have a case? And if it does, why didn't I just
16 dismiss it then? Why wasn't it the end of the case?

17 MR. LAMBERT: I, I, I -- there was a motion to dismiss
18 there, Your Honor. The court decided not to take it up in
19 conjunction with the motion for preliminary injunction, if
20 I recall correctly, but I believe that that -- that was,
21 that was your decision and that's fine.

22 The June order is not law of the case and such that
23 you are bound by it here. I want to be very clear about
24 that. I'm not saying the June order requires you to
25 dismiss this.

1 THE COURT: You're just saying I was right in those
2 conclusions and ---

3 MR. LAMBERT: I'm saying you were right.

4 THE COURT: --- I should ---

5 MR. LAMBERT: Exactly.

6 THE COURT: --- reach the same conclusions.

7 MR. LAMBERT: The best way to get reversed, Your
8 Honor, is to rule differently on the same question, right?
9 I mean, you had it right. I mean, you looked at it and,
10 and perhaps it's easier in that context to deny the
11 preliminary injunction motion because the case isn't over
12 at that point. They still have some hope, and the 12(b)(6)
13 seems more final because it is, at least in this court.

14 But the court's logic in the June order was spot on.
15 The legal analysis issues you did was spot on. That
16 doesn't need to change. What we're saying is that applying
17 that logic and applying the law that's been established,
18 even to the facts they allege, leads you to dismissing the
19 complaint.

20 THE COURT: Are there no additional factual inquiries
21 that need to occur, depositions or experts or reports or
22 otherwise, that need to occur before the court can make a
23 full, competent decision on the issues?

24 MR. LAMBERT: No, there's not, Your Honor, in a couple
25 respects. One, as far as the director or people at SCDC,

1 as the plaintiffs have suggested, they're asking you to get
2 into questions that the statute doesn't allow them to get
3 into. It's legally irrelevant. Under Rule 401, that would
4 not be relevant. You don't need to get into it.

5 As far as these experts on methods and pain and all of
6 that, if, if you apply the same law that the United States
7 Supreme Court as applied in federal method of execution
8 challenges, there's no need to get into those because they
9 haven't alleged a significant reduction of a substantial
10 risk of severe pain.

11 I go back to a point I touched on earlier, Your Honor.
12 Every plaintiff who brings a method of execution challenges
13 says the method I'm facing is the worst, and there are
14 plaintiffs across this country on death row who have
15 challenged a single dose of Phenobarbital as being cruel
16 and unusual punishment. That's the very method these
17 plaintiffs say no, no, no. That's the most humane way.
18 You should use that method in our executions. I think
19 that's really telling, Your Honor, that the plaintiffs
20 always think the method they're facing is the worst. I
21 mean, there are inmates in Tennessee who have chosen
22 execution over lethal injection.

23 All of this suggests, Your Honor -- and I, I --
24 inmates on death row are looking for a claim. They always
25 are; they always have been. That's a fact. I understand

1 the incentive structure, but at a certain point, a court
2 has to say enough is enough. They have had direct appeals,
3 they have had collateral appeals, and the state is now able
4 to carry out their duly-imposed sentences through methods
5 that are constitutional and have long been used across this
6 country that do not superadd terror, pain, and disgrace.
7 And to stop the state from doing it now, as the supreme
8 court said in *Bucklew*, the state and its people and the
9 victims of crime deserve better than setting off another
10 round of litigation that has no hope of succeeding.

11 THE COURT: Okay. While they have had direct appeals,
12 have any of those other actions answered the question of
13 whether this newly revised statute is unconstitutional, or
14 whether the firing squad itself is barbaric, cruel, and
15 unusual in the state of South Carolina? I'm not talking
16 about other states around the country and what they do and
17 don't do, but is this not an issue of first impression in
18 South Carolina?

19 MR. LAMBERT: I think the answers are no and yes. No,
20 none of the appeals did it. Yes, it's an issue of first
21 impression, and I go back to what the supreme court has
22 said about 12(b)(6). Novel issues can be resolved on
23 12(b)(6) when they involve a question of law. And our
24 contention here is that everything they've alleged, when
25 put against the law that exists, their claims fail as a

1 matter of law. You don't need a trial. You don't need
2 experts. You don't need depositions to reach that
3 conclusion.

4 What they're fundamentally asking you to do to keep
5 these claims alive is to adopt new readings of the law.
6 The idea that you would appeal to a judge's humanity when
7 interpreting a statute is not what law is. The words have
8 a set meaning and that's what applies. Asking you to use
9 your intuition as a person is not the judicial power.
10 Those arguments belong in the General Assembly; they belong
11 in committee hearings and on the floor of the house or the
12 senate.

13 Your role is to look at the meaning of cruel, unusual,
14 corporal. Your role is to look at what is an *ex post facto*
15 law. Your role is to read a -- if it, if it is available
16 in the context of the statute and say do these have
17 meaning? Do we understand what they mean? Do their
18 allegations somehow rise to a level where these methods
19 violate some of this established law? And if the answer to
20 that is no, and it is, the case should be dismissed. Any
21 policy arguments about the methods, any suggestion that we
22 should, should do something else belongs in a committee
23 hearing with the legislature, not in a courtroom with a
24 judge who's charged with interpreting the law as it has
25 been enacted by the people and the constitution and by the

1 General Assembly and in statutes.

2 THE COURT: Okay, and I know I interrupted you. Did
3 you have other points that you wanted to make?

4 MR. LAMBERT: If you have more questions, I'm happy to
5 answer them. Otherwise, I think we've been here for plenty
6 long today.

7 THE COURT: I don't think I have any questions.

8 Mr. Kendrick, Ms. Freedman, did you have additional
9 responses?

10 MR. KENDRICK: I, I did miss something, Your Honor,
11 but I, but I do want to briefly -- listen, I'm not asking
12 you to do something improper, and to the extent I'm
13 appealing to humanity, there has to be some element in
14 the law of -- we're not a robot factory. I mean, we're
15 sitting here on the eve of the, the most famous execution
16 in mankind. There's some element of emotion to killing
17 people. They bring it up every, every pleading. They,
18 they -- our clients did it and got convicted of it, but
19 it doesn't make two wrongs all of a sudden make things
20 right.

21 What we're asking you to do, Your Honor, is to ensure
22 that what the General Assembly did is constitutional under
23 both state and federal grounds. If you were to ask me to
24 pull out a chalkboard and make a list of things since the
25 1700s that have been accepted, not just by the people but

1 as constitutional, that no longer exist, it will be a dark
2 and heartbreaking list. Things change. Judges change, and
3 they change them by listening to the facts, applying the
4 law, and determining what makes sense, and that's what
5 we're asking you to do. We're asking you for a trial.

6 What I didn't mention is that tomorrow morning on Good
7 Friday, Richard Moore is going to have to decide how he
8 dies. I'm not appealing to your humanity or your sympathy.
9 Just logically, he needs to know how he's going to die.
10 And part of what goes on in this lawsuit is what has that
11 statute entitled him to, the statutory rights that he can
12 elect between constitutional methods of the state affecting
13 his own death. There are two parties to this transaction.
14 So, while the state may be frustrated with the endless
15 litigation, the other party is going to die at the state's
16 hand.

17 So, so, the endless litigation is by no means -- I get
18 accused of this. I don't -- I'm new to capital work, Your
19 Honor. Started doing it a couple of years ago, and I have
20 not stepped into a courtroom where I don't get accused of
21 this. You know, it's so telling that I don't do what the
22 other plaintiffs who I don't know and don't know their
23 lawyers or know anything about their cases -- I don't know
24 what they ask for. I'm asking for Mr. Moore and Mr. Sigmon
25 and Mr. Terry and Mr. Owens's rights to be protected, and

1 I'm asking you to do it, and that is not a novel thing. I
2 have parties I represent. I have a circuit judge with the
3 ability to protect their rights. And I'm actually not even
4 asking you to do that yet, Your Honor. Just asking you to
5 let us make our case, which is what happens in courtrooms
6 everywhere.

7 So, I think at the end of the day I probably could
8 keep going on, and nobody wants that, especially right
9 before Easter, but we're just asking you to do some
10 fact-finding. We're asking you to every time they raise a
11 question, ever time Your Honor raises a question, every
12 time I raise a question, why don't we go get the answer?
13 That's what courtrooms are for.

14 THE COURT: Any other party have anything else on this
15 matter?

16 RULING OF THE COURT:

17 THE COURT: Defendants' motion to dismiss is denied. I
18 think that to grant the motion to dismiss and dismiss the
19 case at this juncture would be inappropriate. This is an
20 issue that has never been decided by a South Carolina
21 court, and for me to dismiss this matter at this time would
22 be to tell Mr. Owens, Mr. Sigmon, Mr. Moore, and Mr. Terry
23 that you're not entitled to have a court decide it, or the
24 court has all of the information that it needs. You can't
25 tell us anything else other than these allegations that

1 you've made, and that's enough. And for this court, that
2 is not enough.

3 It is inappropriate to prevent any judicial inquiry
4 into the constitutionality of the statute giving the court
5 a full picture of what's happening. When parties file
6 motions for injunctive relief, the court only has a
7 snapshot at that moment in time of the parties' positions
8 on the matter, and the court makes a determination based on
9 what it knows at the time. And when those are denied or
10 granted, the parties engage in discovery. They exchange
11 documents, depositions, et cetera, in order to fully flesh
12 out the claims to give the finder of fact a complete
13 picture and as much information as the finder of fact can
14 have when making the determination. I think that is --
15 it's certainly appropriate in every other case that we try.
16 It's appropriate in this case as well, so for those
17 reasons, the defendants' motion to dismiss the plaintiffs'
18 third amended complaint is respectfully denied.

19 MR. KENDRICK: Your Honor, could I raise a related
20 issue?

21 THE COURT: Yes, sir.

22 MR. KENDRICK: In August of 2021 in one of the
23 iterations of this lawsuit that has now been consolidated,
24 there was a motion to stay discovery and a motion for a
25 protective order which is still pending. Would Your Honor

1 deny that as part of the, the ruling on the motion to
2 dismiss because I think that the two go hand-in-hand, and
3 we can start discovery ASAP.

4 THE COURT: This is the motion filed August 26, 2021?

5 MR. KENDRICK: Yes, ma'am.

6 THE COURT: Are defendants prepared to argue that
7 motion, Mr. Lambert?

8 MR. LAMBERT: Your Honor, that's the Department and
9 Director Stirling's motion. So, I would defer to Mr. Reed
10 on where they are with that.

11 THE COURT: Yes, sir, Mr. Reed.

12 MR. REED: Yes, Your Honor. Thank you. The
13 Department and Director Stirling's motion for a protective
14 order and motion to stay discovery was dependent on your
15 ruling today. We made that motion just because there was a
16 pending dispositive matter, and Your Honor has spoken to
17 that.

18 THE COURT: And so with that motion being resolved,
19 essentially this motion for protective order?

20 MR. REED: We'll respectfully withdraw that, Your
21 Honor.

22 THE COURT: Okay. I was going to say it's moot, but
23 yeah, it's withdrawn by ---

24 MR. REED: Yes, ma'am.

25 THE COURT: --- the parties, and so discovery may

1 begin.

2 MR. KENDRICK: We appreciate that, Your Honor.

3 THE COURT: Okay. Thank you all.

4 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 14TH DAY OF APRIL, 2022.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

APRIL 25TH, 2022

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-40-02306

Freddie Eugene Owens, Brad Keith)
Sigmon, Gary DuBose Terry, and)
Richard Bernard Moore,)
)
Plaintiffs,)

**DEFENDANTS’ MOTION FOR
PROTECTIVE ORDER TO PROHIBIT OR
LIMIT THE SCOPE OF DISCOVERY**

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.)

TO: LINDSEY S. VANN, ESQUIRE, EMILY PAAVOLA, ESQUIRE, HANNAH FREEDMAN, ESQUIRE, BRENDAN VAN WINKLE, ESQUIRE, J. CHRISTOPHER MILLS, ESQUIRE, JOSHUA S. KENDRICK, ESQUIRE, JOHN H. BLUME, III, ESQUIRE, AND ELIZABETH FRANKLIN-BEST, ESQUIRE, ATTORNEYS FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for Defendants South Carolina Department of Corrections (“SCDC”), Bryan P. Stirling, in his official capacity as the Director of SCDC, and Henry McMaster, in his official capacity as Governor of the State of South Carolina (“Governor McMaster”) (collectively, “Defendants”) will move, pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, for an Order limiting the scope of discovery during this litigation. Defendants’ Motion is based on the following:

BACKGROUND

This litigation stems from Plaintiffs' exhaustion of direct and collateral appellate review of their duly imposed convictions and death sentences. Plaintiffs now challenge South Carolina's recently amended statute (S.C. Code Ann. § 24-3-530)—which provides the statutorily approved methods of execution—under various theories, ranging from arguments claiming cruel or unusual punishment to due process to retroactivity to the prohibition on *ex post facto* laws.

According to Plaintiffs, lethal injection by a single dose of pentobarbital is the most humane method—and seemingly the only one acceptable to Plaintiffs—by which South Carolina can carry out their sentences, despite the fact that lethal injection is unavailable to SCDC. A review of Plaintiffs' Third Amended Complaint makes certain that Plaintiffs are asserting that electrocution and firing squad are both facially unconstitutional—no matter what protocols SCDC uses to carry out an execution by either of those methods. Also, Plaintiffs do not challenge the constitutionality of lethal injection.

Therefore, based on Plaintiffs' own allegations and the framing of their specific causes of action, the wide-ranging discovery Plaintiffs seek is irrelevant to their claims and otherwise unnecessary and inappropriate, particularly in light of section 24-3-580 of the South Carolina Code of Laws, which prohibits disclosure of the identity of a current or former member of an execution team or disclosure of any record that would identify a person as being a current or former member of an execution team. Accordingly, Defendants respectfully ask this Court to issue an Order prohibiting Plaintiffs from seeking discovery on certain matters and limiting the scope of any future discovery, whether written or oral, during this litigation.¹

¹ Defendants hereby incorporate by reference all of the objections set forth in their Responses to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production (Exhibit 3), as well as the arguments set forth in Defendants' Motion for Partial Summary Judgment.

LEGAL STANDARD

Rule 26(b)(1) of the South Carolina Rules of Civil Procedure provides that, “[u]nless otherwise limited by order of the court,” “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” To ensure discovery does not go beyond these bounds, Rule 26(c) affords this Court great flexibility to control and limit discovery. Specifically, it provides in pertinent part:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court[.]

Rule 26(c), SCRPC.

In other words, if the discovery process threatens to become abusive or creates a particularized harm to a litigant, the circuit court may issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense.” *Id.* “If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is ‘relevant and necessary’ to the case.” *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009).

ARGUMENT

Plaintiffs served Defendants with their First Set of Interrogatories and First Set of Requests for Production on May 13, 2022. Defendants have since responded to Plaintiffs’ discovery but were required to lodge several objections in those responses. Defendants will suffer particularized

harm if Plaintiffs' discovery efforts continue, so therefore Plaintiffs bear the burden of showing that the information they are seeking is both relevant and necessary to their specific claims. They cannot make such a showing. They have alleged that under all circumstances electrocution and firing squad are unconstitutional, and they seek information protected by statute. Therefore, based on the facts of this case, the framing of Plaintiffs' Third Amended Complaint, and the seriousness of the protected information sought during the course of discovery, an Order from this Court limiting the scope of discovery is appropriate and necessary.

I. Information about execution protocols is irrelevant.

Plaintiffs propounded Interrogatories and Requests for Production seeking SCDC's protocols concerning lethal injection, electrocution, and firing squad. (Exhibit 1 – Plaintiffs' Written Discovery Requests to Defendants SCDC and Stirling, at Rog ¶¶ 2, 5, 6, 7, and 8; RFP ¶¶ 5, 6, 11, 12, 14, and 15; Exhibit 2 – Plaintiffs' Written Discovery Requests to Governor McMaster, at Rog ¶¶ 5 and 6; RFP ¶¶ 5, 6, 7, 8 and 9).

A. Any discovery on SCDC's protocols is irrelevant.

From the outset, it is worth mentioning that Plaintiffs do not challenge the constitutionality of lethal injection in South Carolina. They proclaim that the most humane way to carry out an execution is lethal injection by a single dose of pentobarbital. Third Am. Compl. ¶ 67. Given Plaintiffs' position, nothing about SCDC's current lethal injection protocol has anything to do with whether other methods of execution are constitutional or whether Plaintiffs' proposed alternative of a single dose of pentobarbital is "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 Precythe*, 139 S. Ct. 1112, 1125 (2019).

Rather than challenge lethal injection, Plaintiffs argue carrying out an execution by electrocution or firing squad would *always* violate their state constitutional rights. This is not a case where Plaintiffs are contending that SCDC’s chosen protocols and procedures for an execution by electrocution or firing squad create an undue risk of constitutional injury. Rather, Plaintiffs contend that under no circumstances could an execution by firing squad or electrocution be constitutionally permissible. Therefore, any information sought by Plaintiffs through discovery regarding the protocols, procedures, or policies for an execution by electrocution or firing squad is irrelevant because none of the protocols, procedures, or policies has “any tendency to make the existence of any fact that is of consequence to the determination” of the constitutionality of electrocution or firing squad any “more probable or less probable than it would be without the evidence.” Rule 401, SCRE. Any effort to pursue discovery on matters that are irrelevant to Plaintiffs’ claims would naturally, and necessarily, pose an undue burden. *See, e.g., Taylor v. Taylor*, 434 S.C. 307, 324, 863 S.E.2d 335, 344 (Ct. App. 2021) (“Our courts have interpreted ‘undue burden’ as requesting materials irrelevant to the matter before the court.”).

Preventing discovery is even more important here given the security concerns involved. Indeed, much of the information sought by Plaintiffs regarding the execution protocols is sensitive in nature and/or carries unique security implications. (Exhibit 4 – Affidavit of Collie Rushton). These protocols and policies include up-to-the-minute details of the movements and actions during the hours and minutes prior to an execution. The execution protocols are marked “LIMITED DISTRIBUTION”—SCDC’s highest designation of confidentiality. Only a few SCDC personnel are privy to this information given the gravity of the security concerns. Much of the information in the execution protocols has the potential to generate security problems for SCDC, its employees,

members of the execution team(s), and, potentially, for the death row inmates themselves, if that information is disseminated beyond those few people at SCDC who have access to it.

Courts traditionally afford great deference to the opinions of prison administrators regarding the maintenance of internal security. As the United States Supreme Court has acknowledged, “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.” *Turner v. Safley*, 482 U.S. 78, 84 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974)). As the Court went on to explain:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities.

Id. at 84–85. Here, because this information is irrelevant to the specific claims and allegations in Plaintiffs’ own Complaint, Defendants’ significant security concerns warrant great deference. Thus, the Court should prohibit Plaintiffs from pursuing discovery of this irrelevant information and subjecting SCDC personnel to unnecessary risks.

B. If the Court were to permit limited discovery on protocols, a confidentiality order would be necessary.

This Court has previously recognized the confidential nature of execution protocols that are now being sought by Plaintiffs in discovery. In a South Carolina Freedom of Information Act lawsuit filed by counsel for Plaintiffs, which sought production of SCDC’s execution protocols, this Court denied the request, finding “the information requested by Plaintiff [Justice 360] constitutes security plans and devices adopted and utilized by” SCDC. Order 1, *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306 (Nov. 25, 2020). If the Court were to find that certain aspects

of the requested information were relevant and necessary to Plaintiffs' case as pled in their Third Amended Complaint, a confidentiality order is needed to protect against the improper dissemination of these protocols and procedures.²

One final point to briefly highlight the importance of a confidentiality order in this case. In the United States District Court for the District of South Carolina, Justice 360 has sued Director Stirling and SCDC for violating Justice 360's purported First Amendment rights to access and freely distribute protected execution protocols. *Justice 360 v. Stirling*, 3:20-03671-MGL (D.C.S.C. 2021), *appeal pending* 21-2205 (4th Cir.). Essentially, Justice 360 has argued that because SCDC has in the past (subject to the terms of consent confidentiality orders) provided certain execution protocols and policies to inmates, their counsel, and their hired experts to assist inmates who are making their method of execution election, SCDC has now violated Justice 360's First Amendment rights by not allowing Justice 360 to freely disseminate this information to the public at large. Almost needless to say, Defendants disagree with Plaintiffs' position, which would completely neuter the application of court-issued consent confidentiality orders. The District Court granted Defendants' Motion to Dismiss, and the matter is on appeal in the Fourth Circuit. Thus, based on Justice 360's stance in the First Amendment litigation, were the Court to require Defendants to produce certain information to Plaintiffs, the Court should enter an appropriate confidentiality order in an effort to limit the attendant confidentiality concerns and significant security risks.

² Defendants began the conversation and presented a draft proposed confidentiality order to Plaintiffs; however, this issue remains unresolved.

II. The Court should prohibit Plaintiffs' requested discovery regarding lethal injection.

Plaintiffs propounded Interrogatories and Requests for Production seeking information regarding lethal injection and SCDC's efforts to obtain lethal injection drugs. (Exhibit 1 at Rog ¶¶ 5, 6, and 7; RFP ¶¶ 5, 6, 7, 8, 9, and 10); (Exhibit 2 at Rog ¶¶ 5 and 6; RFP ¶¶ 5, 6, 7, 8 and 9). The Court should prohibit Plaintiffs' requested discovery for several reasons.

First, and as mentioned above, Plaintiffs have challenged only the constitutionality of electrocution and firing squad. Plaintiffs present no challenge to the constitutionality of lethal injection. Counsel for Plaintiffs were told over a year ago in correspondence from SCDC about the drugs that could be used by the Department; however, they still chose not to challenge lethal injection. (Exhibit 5 – 11.20.2020 Letter to Justice 360). Therefore, the entirety of this requested discovery is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCF. Moreover, courts are not “boards of inquiry charged with determining ‘best practices’ for executions,” *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by seeking information regarding a method they do not challenge in this litigation.

Second, Plaintiffs present myriad requests for information concerning SCDC's attempts to procure lethal injection drugs, to purchase the bulk components for lethal injection drugs to have them compounded, and to create a compounding pharmacy to have drugs for lethal injection compounded at SCDC. There is nothing in Act 43 that allows Plaintiffs to pursue this discovery. Section 24-3-530(B) of the South Carolina Code of Laws states, “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.” The Director has complied with the statute and will continue to comply with the

plain language of the statute when submitting his affidavits to the South Carolina Supreme Court. Therefore, Plaintiffs' requested discovery is untethered from the text of the statute and irrelevant to their specific claims in this litigation.

Plaintiffs are attempting to second guess SCDC's efforts and shift the burden to SCDC to prove an alternative method is *not* feasible and is *not* a readily available alternative method. This Court should prohibit this legally irrelevant and unduly burdensome discovery. Otherwise, each time a notice of execution is issued by the South Carolina Supreme Court, the condemned person or their counsel will demand a mini-trial on SCDC's efforts to procure the drugs needed to perform an execution by lethal injection. In essence, if Plaintiffs are allowed to pursue this discovery, it will inevitably result in yet another form of last-minute litigation designed at delaying or obstructing the State's ability to carry out the lawfully imposed sentence.

Such a series of events could not have been the intent of the General Assembly in passing the newly amended, and currently challenged, statute. In fact, members of the General Assembly said during the debate on Act 43 that that legislation was needed because of SCDC's inability to secure lethal injection drugs and the resultant stalemate it created. *See, e.g.*, S.C. Senate, Video of Floor Proceedings, 1:09:28 (Mar. 2, 2021), <https://tinyurl.com/4czcc4yc> (statement of Sen. Hembree); S.C. House, Video of Floor Proceedings, 1:08:40 (May 5, 2021), <https://tinyurl.com/4czcc4yc> (statement of Rep. Newton). The whole point of this newly amended statute was to allow the State to carry out lawfully imposed sentences, not to create yet another avenue of delay and tacking on to already seemingly endless litigation and appeals.

Third, Act 43 does not create a private right of action in circuit court for Plaintiffs to challenge Director Stirling's certification of available methods to the South Carolina Supreme Court. If the Supreme Court requires additional information, it can ask; however, the General

Assembly did not include within Act 43 a private cause of action for such a challenge in the circuit court, and as mentioned above, the General Assembly clearly did not intend to create an implied private cause of action. *See Dema v. Tenet Physician Servs. – Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009) (“Where not expressly provided, a private right of action may be created by implication if the legislation was enacted for the special benefit of the private party.”). Here, there is no special benefit for Plaintiffs; the Act simply instructs the Director to certify the available methods of execution.

Therefore, the Court should issue a protective order, prohibiting Plaintiffs’ irrelevant discovery requests concerning lethal injection.

III. This Court should prohibit any inquiries as to the identities of members of the execution team and into facts that are reasonably calculated to lead to, or may result in, discovery of their identities.

Plaintiffs propounded Interrogatories and Requests for Production seeking names, addresses, and information regarding members of the execution team. (Exhibit 1 at Rog ¶¶ 1, 2, 4, 5, 6, 7, 9, 10, 11, and 12; RFP ¶¶ 4, 6, 7, 8, 9, 10, 12, 13, 15, 16, and 18). The Court should prohibit Plaintiffs’ requested discovery for several reasons.

As the Court is well-aware, a person’s involvement in executions has become a precarious and dangerous activity. Incidents in death-penalty States across the country underscore the importance of anonymity.³ Nevertheless, Plaintiffs have requested the names and addresses of any

³ For example, the following declaration was given by a Texas compounding pharmacy under the pseudonym, “Pharmacy X”:

Pharmacy X says that it will stop supplying [Texas Department of Criminal Justice] with lethal injection chemicals should its identity be disclosed. Pharmacy X based its decision to supply TDCJ with drugs on its “identity remaining secret.” Because of “documentary evidence of threats, harassment, and boycotts to which other suppliers of lethal injection drugs have been subjected as a result of their lawful decision to supply state correctional departments with

and all witnesses concerning the facts of the case. This would necessarily include potential members of the execution team. Plaintiffs have also requested all documents regarding SCDC's efforts to recruit, identify, select, and train individuals for carrying out execution by lethal injection, electrocution, and firing squad. Although Plaintiffs note that specific names and other identifying information may be redacted, Defendants must note that production of requested facts are reasonably calculated to lead to, or would necessarily result in, the discovery of their identities.

Section 24-3-580 of the South Carolina Code prohibits disclosure of the identity of members of the execution team. It provides:

A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team. However, this information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a willful violation of this section, punitive damages.

S.C. Code Ann. § 24-3-580.

The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Under section 24-3-580, Plaintiffs are prohibited from seeking, and Defendants are prohibited from producing information that may

drugs needed to carry out executions,” Pharmacy X “reasonably fears that if its identity is disclosed or revealed, anti-death penalty advocates will harass and retaliate against Pharmacy X, resulting in physical and financial harm to Pharmacy X, its owner(s), and its employees.” Accordingly, “[i]f Pharmacy X’s identity is disclosed or revealed, Pharmacy X will no longer conduct business with the [TDCJ].

McGehee v. Texas Dep’t of Crim. Justice, 2018 WL 3996956, at * 9 (S.D. Tex. 2018). Unfortunately, these rational fears are echoed across the country.

lead to the disclosure of the identities of persons participating in the executions, to include persons participating in the planning of executions, persons participating in the training of executions, persons participating in the implementation of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form.

The safety of members of the execution team is of paramount importance and is worthy of this Court's protection. The disclosure of the identities of members of the execution team would increase the risk that the person could be targeted by inmates or others based on or by virtue of their involvement in the execution process. Unnecessary disclosure would undoubtedly have a chilling effect on all executions in South Carolina, which again, would be contrary to the intent of our General Assembly. The requested information is not relevant to Plaintiffs' causes of action. Nothing regarding the execution team, how they are recruited, how they are trained, etc. impacts whether electrocution and firing squad are constitutional or what Act 43 means. Even if this otherwise irrelevant discovery could be provided under seal, the risk of inadvertent disclosure, impacting significant safety and security concerns, greatly outweigh any purported benefit this information may have to Plaintiffs. Plus, it leaves open the problem of how any of this could be used at trial without sealing the proceedings and clearing the courtroom. Therefore, the Court should bar any requests for the identification of members of the execution team or production of these facts that are reasonably calculated to lead to, or necessarily would result in, the discovery of their identities.

CONCLUSION

Accordingly, based on the foregoing, the Court should issue an Order prohibiting discovery into the matters detailed herein and otherwise limiting the scope of Plaintiffs' discovery. Defendants have shown a particularized harm which would be caused by allowing the discovery, and Plaintiffs have not met and cannot meet their burden of showing the information sought is "relevant and necessary" to their specific claims in this litigation. *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498.

(signature page to follow)

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June 9, 2022

EXHIBIT 1

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,
and SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS,**

Defendants.

and

**HENRY McMASTER in his official
capacity as Governor of the State of
South Carolina,**

Intervenor-Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2021-CP-40-02306

**PLAINTIFFS' FIRST
DISCOVERY REQUESTS**

INTERROGATORIES

The following interrogatories are submitted by the Plaintiff to Defendants Bryan P. Stirling and South Carolina Department of Corrections (“SCDC”) (hereinafter “Defendants”) pursuant to Rule 33 of the South Carolina Rules of Civil Procedure.

Each interrogatory shall be answered separately and fully in writing under oath unless the Defendants object to the request. If there is an objection, the reasons for the objection shall be stated instead of an answer. The answers should be signed by the person making them and the objections signed by the attorney making them. The Defendants

should serve a copy of these answers and objections, if there are any, within 30 days of the date of service of these interrogatories.

These interrogatories continue from the time of service to the time of trial. If the information requested comes into the knowledge of the party, her representative, or her attorney after the original answers have been submitted, that information shall be promptly delivered to the Plaintiff.

1. Please list the names and addresses of any persons known to the Defendants or their counsel who may be witnesses concerning the facts of this case. Indicate whether written or recorded statements have been taken from any witness and who has possession of any statements.
2. Please provide a list of photographs, plats, sketches, or other prepared documents in possession of the Defendants that relate to the claims or defenses in this case.
3. Please identify in complete detail each person whom Defendants expect to call as an expert witness at the trial. For each expert provide the following information:
 - a. Name, occupation, title, business address, area of specialization, if any, and professional relationship to the Defendants or Defendants' attorney.
 - b. How the person became familiar with the facts of this case.
 - c. The subject matter or area in which the person plans to testify.
 - d. The substance of the facts and opinions to which the person plans to testify.
 - e. A summary of the grounds or basis for each opinion and fact.
 - f. A list of books, treatises, articles, and other works which the person

regards as authoritative on the subject matter to which the person plans to testify.

4. For each person the Defendants or counsel believe will be a witness concerning the facts of the case, please set forth either a summary sufficient to inform the other party of the important facts known to or observed by the witness or provide a copy of any written or recorded statements taken from the witness.
5. Please describe Defendants' efforts to obtain lethal injection drugs. To the extent those efforts involved communication with any other individual or entity please identify the other individual or entity and describe the manner, date, and contents of such communication.
6. Please list each person who has been involved in efforts to obtain lethal injection drugs, including their title and the nature of their involvement in such efforts.
7. Please list each person involved in the creation of the current lethal injection protocol and their role in the creation of that protocol.
8. To the extent there are no documents in response to Requests for Production #5 and 6, please explain whether such documents ever existed and why they are no longer in the possession of the Defendants.
9. Please list each person involved in the creation of the current electric chair protocol and their role in the creation of that protocol.
10. Please list each person involved in the creation of the current firing squad protocol and their role in the creation of that protocol.
11. Please describe how Defendants recruit or identify individuals who will participate in and carry out executions. To the extent these practices are different for different

methods of execution, please explain those differences.

12. Please describe the professional qualifications of individuals who will participate in and carry out executions. To the extent these practices are different for different methods of execution, please explain those differences.
13. For any document requested which the Defendants does not possess but knows that the document exists and is possessed by another individual or entity, please identify the document and the individual or entity which possesses the document.

REQUESTS FOR PRODUCTION

The following requests to produce documents are submitted by the Plaintiffs to Defendants, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure.

These are requests to produce and/or inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained or translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, copy, test or sample any tangible things which constitute or contain matters within the scope of Rule 26 and which are in the possession, custody or control of the party upon whom the request is served.

The response to these requests shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection will be stated. Items produced by the Defendants shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the request.

The responses to these requests shall be served within 30 days of the date of service of this request. These requests shall be deemed continuing from the time the request is made to the time of trial.

All references to Interrogatories are a reference to the Interrogatories served with these Requests to Produce.

1. Please produce all documents, correspondence, or other material provided to any expert or received from any expert you have retained in this matter.
2. Please produce all materials you intend to introduce at the trial of this case.
3. Please produce all materials you intend to rely on or introduce at any depositions in this case.
4. Please produce any document you relied on or referenced in your answer to the Plaintiffs' Interrogatories.
5. Please produce a copy of the current lethal injection protocol.
6. Please produce all documents related to lethal injection maintained by the Defendants, to include all autopsies from prior executions by lethal injection.
7. Please produce all documents related to Defendants' attempts to procure lethal injection drugs, including any emails, written or typed notes, written or typed memoranda, and any call logs, documenting communications between SCDC and other departments of corrections, pharmaceutical companies, compounding pharmacies, and other medical or pharmaceutical providers.
8. Please produce all documents related to Defendants' attempts to purchase the bulk components for lethal injection drugs to have them compounded.
9. Please produce all documents related to Defendants' attempts to, or investigation

- into, create or upgrade its own compounding pharmacy to have drugs for lethal injection compounded at SCDC.
10. Please produce all documents regarding Defendants' efforts to recruit, identify, select and train individuals for carrying out an execution by lethal injection and the professional qualifications of those individuals. Names and other specific identifying information of individual execution team members may be redacted.
 11. Please produce a copy of the current electric chair protocol.
 12. Please produce all documents related to the electric chair maintained by the Defendants, to include all autopsies from prior executions by electrocution.
 13. Please produce all documents regarding Defendants' efforts to recruit, identify, select and train individuals for carrying out an execution by electrocution and the professional qualifications of those individuals. Names and other specific identifying information of individual execution team members may be redacted.
 14. Please produce a copy of the current firing squad protocol.
 15. Please produce all documents related to firing squad maintained by the Defendant.
 16. Please produce all documents regarding Defendants' efforts to recruit, identify, select and train individuals for carrying out an execution by firing squad and the professional qualifications of those individuals. Names and other specific identifying information of individual execution team members may be redacted.
 17. If prior versions of the documents requested in Requests for Production 5-16 exist and are in the possession of the Defendants, please produce those prior versions.
 18. Please produce all written correspondence, notes, memos, electronic mail, text messages, or other documentation related to your efforts to obtain lethal injection

drugs as described in Interrogatory 5.

Respectfully submitted,

s/ Joshua Snow Kendrick

Joshua Snow Kendrick (SC Bar 70453)

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May 13, 2022

EXHIBIT 2

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,
and SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS,**

Defendants.

and

**HENRY McMASTER in his official
capacity as Governor of the State of
South Carolina,**

Intervenor-Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2021-CP-40-02306

**PLAINTIFFS' FIRST
DISCOVERY REQUESTS**

INTERROGATORIES

The following interrogatories are submitted by the Plaintiff to Defendant Henry McMaster pursuant to Rule 33 of the South Carolina Rules of Civil Procedure.

Each interrogatory shall be answered separately and fully in writing under oath unless the Defendant objects to the request. If there is an objection, the reasons for the objection shall be stated instead of an answer. The answers should be signed by the person making them and the objections signed by the attorney making them. The Defendant should serve a copy of these answers and objections, if there are any, within 30 days of

the date of service of these interrogatories.

These interrogatories continue from the time of service to the time of trial. If the information requested comes into the knowledge of the party, her representative, or her attorney after the original answers have been submitted, that information shall be promptly delivered to the Plaintiff.

The term “Defendant” in these interrogatories refers to Governor McMaster, anyone in his office, and anyone under his direction or control.

1. Please list the names and addresses of any persons known to the Defendant or his counsel who may be witnesses concerning the facts of this case. Indicate whether written or recorded statements have been taken from any witness and who has possession of any statements.
2. Please provide a list of photographs, plats, sketches, or other prepared documents in possession of the Defendant that relate to the claims or defenses in this case.
3. Please identify in complete detail each person whom Defendant expects to call as an expert witness at the trial. For each expert provide the following information:
 - a. Name, occupation, title, business address, area of specialization, if any, and professional relationship to the Defendant or Defendant’s attorney.
 - b. How the person became familiar with the facts of this case.
 - c. The subject matter or area in which the person plans to testify.
 - d. The substance of the facts and opinions to which the person plans to testify.
 - e. A summary of the grounds or basis for each opinion and fact.

- f. A list of books, treatises, articles, and other works which the person regards as authoritative on the subject matter to which the person plans to testify.
4. For each person the Defendant or counsel believe will be a witness concerning the facts of the case, please set forth either a summary sufficient to inform the other party of the important facts known to or observed by the witness or provide a copy of any written or recorded statements taken from the witness.
5. Please describe Defendant's efforts to obtain lethal injection drugs. To the extent those efforts involved communication with any other individual or entity please identify the other individual or entity and describe the manner, date, and contents of such communication.
6. Please list each person in the Governor's Office who has been involved in efforts to obtain lethal injection drugs, including their title and the nature of their involvement in such efforts.
7. For any document requested which the Defendant does not possess but knows that the document exists and is possessed by another individual or entity, please identify the document and the individual or entity which possesses the document.

REQUESTS FOR PRODUCTION

The following requests to produce documents are submitted by the Plaintiffs to Defendant, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure.

These are requests to produce and/or inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data

compilations from which information can be obtained or translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, copy, test or sample any tangible things which constitute or contain matters within the scope of Rule 26 and which are in the possession, custody or control of the party upon whom the request is served.

The response to these requests shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection will be stated. Items produced by the Defendant shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the request.

The responses to these requests shall be served within 30 days of the date of service of this request. These requests shall be deemed continuing from the time the request is made to the time of trial.

All references to Interrogatories are a reference to the Interrogatories served with these Requests to Produce.

The term “Defendant” in these Requests for Production refers to Governor McMaster, anyone in his office, and anyone under his direction or control.

1. Please produce all documents, correspondence, or other material provided to any expert or received from any expert you have retained in this matter.
2. Please produce all materials you intend to introduce at the trial of this case.
3. Please produce all materials you intend to rely on or introduce at any depositions in this case.
4. Please produce any document you relied on or referenced in your answer to

Plaintiffs' Interrogatories.

5. Please produce a copy of the current lethal injection protocol.
6. Please produce all documents related to Defendant's attempts to procure lethal injection drugs, including any emails, written or typed notes, written or typed memoranda, and any call logs, documenting communications between Defendant and other Governors, departments of corrections, pharmaceutical companies, compounding pharmacies, and other medical or pharmaceutical providers.
7. Please produce all documents related to Defendant's attempts to purchase the bulk components for lethal injection drugs to have them compounded.
8. Please produce all documents related to Defendant's inquiries or investigation into creating or upgrading a state compounding pharmacy to have drugs for lethal injection compounded at by the State of South Carolina.
9. Please produce all written correspondence, notes, memos, electronic mail, text messages, or other documentation related to your efforts to obtain lethal injection drugs as described in Interrogatory 5.

Respectfully submitted,

s/ Joshua Snow Kendrick

Joshua Snow Kendrick (SC Bar 70453)

KENDRICK & LEONARD, P.C.

506 Pettigru Street (29601)

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Greenville, SC 29606

(864) 760-4000

Josh@KendrickLeonard.com

Greenville, South Carolina

May 13, 2022

EXHIBIT 3a

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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.)

**DEFENDANTS SCDC AND DIRECTOR
STIRLING’S ANSWERS TO PLAINTIFFS’
FIRST SET OF INTERROGATORIES**

**TO: LINDSEY S. VANN, ESQUIRE, EMILY PAAVOLA, ESQUIRE, HANNAH
FREEDMAN, ESQUIRE, BRENDAN VAN WINKLE, ESQUIRE, J.
CHRISTOPHER MILLS, ESQUIRE, JOSHUA S. KENDRICK, ESQUIRE, JOHN
H. BLUME, III, ESQUIRE, AND ELIZABETH FRANKLIN-BEST, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS:**

Defendants South Carolina Department of Corrections (“SCDC”) and Director Bryan P. Stirling (collectively, “Defendants” or “SCDC”) respond to Plaintiffs Freddie Eugene Owens, Brad Keith Sigmon, Gary DuBose Terry, and Richard Bernard Moore’s First Set of Interrogatories pursuant to Rule 33 of the South Carolina Rules of Civil Procedure as follows:

INTERROGATORIES

INTERROGATORY #1:

1. Please list the names and addresses of any persons known to the Defendants or their counsel who may be witnesses concerning the facts of this case. Indicate whether written or recorded statements have been taken from any witness and who has possession of any statements.

ANSWER #1:

Objection. Defendants object to this Interrogatory insofar as it asks for names and addresses concerning members of the execution team or the names and addresses of private companies in which it is currently attempting to obtain lethal injection drugs from. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from disclosing the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Subject to and without waiving the above-mentioned objections, Defendants respond as follows:

**Freddie Eugene Owens
c/o Attorneys for Plaintiffs**

Mr. Owens is a named Plaintiff in this matter. He is expected to testify as to his personal knowledge and observations as may be relevant to the matters at issue in this litigation. Mr. Owens has not given a “statement,” as that word is commonly defined of which Defendants are aware. Any such “statements” would also be in possession of counsel to Mr. Owens.

**Brad Keith Sigmon
c/o Attorneys for Plaintiffs**

Mr. Sigmon is a named Plaintiff in this matter. He is expected to testify as to his personal knowledge and observations as may be relevant to the matters at issue in this litigation. Mr. Sigmon has not given a “statement,” as that word is commonly defined of

which Defendants are aware. Any such “statements” would also be in possession of counsel to Mr. Sigmon.

Gary DuBose Terry
c/o Attorneys for Plaintiffs

Mr. Terry is a named Plaintiff in this matter. He is expected to testify as to his personal knowledge and observations as may be relevant to the matters at issue in this litigation. Mr. Terry has not given a “statement,” as that word is commonly defined of which Defendants are aware. Any such “statements” would also be in possession of counsel to Mr. Terry.

Richard Bernard Moore
c/o Attorneys for Plaintiffs

Mr. Moore is a named Plaintiff in this matter. He is expected to testify as to his personal knowledge and observations as may be relevant to the matters at issue in this litigation. Mr. Moore has not given a “statement,” as that word is commonly defined of which Defendants are aware. Any such “statements” would also be in possession of counsel to Mr. Moore.

Director Bryan P. Stirling
c/o Smith Robinson

Director Stirling is at all times relevant hereto, the Director of SCDC. Director Stirling is expected to testify as to his knowledge, observations, training, and experience as may be relevant to the matters at issue in this litigation. Director Stirling has not given a “statement,” as that word is commonly defined of which Defendants are aware.

Colie Rushton
c/o Smith Robinson

Mr. Rushton is the Director of Security for SCDC. He is expected to testify as to his knowledge, observations, training, and experience as may be relevant to the matters at issue in this litigation. Mr. Rushton has submitted affidavits in related litigation involving Mr. Moore and Mr. Sigmon. These affidavits are being produced to Plaintiffs herewith.

Defendants reserve the right to supplement this answer should additional information become available and/or relevant. Furthermore, Defendants reserve the right to call as a witness at the trial of this matter any individual identified by any party through the discovery process. Lastly, Defendants reserve the right to call as a witness, at the trial of this matter, any individual identified in the documentation produced in this case, including any investigative documents, that may have information relevant to the matters at issue.

INTERROGATORY #2:

2. Please provide a list of photographs, plats, sketches, or other prepared documents in possession of the Defendants that relate to the claims or defenses in this case.

ANSWER #2:

Objection. Defendants object to this Interrogatory insofar as it asks for documents containing the names, addresses, and factual information that may reasonably lead to the identities of members of the execution team or the names and addresses of private companies in which it is currently attempting to obtain lethal injection drugs from. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Subject to and notwithstanding the above-mentioned objections, Defendants are producing the following documents that relate to the claims or defenses in this case:

- South Carolina Attorney General Opinion, 2015 WL 4699337 (S.C.A.G. July 27, 2015).
- 2020-09-01 Letter from Vann, Kendrick, and Lee
- 2020-09-29 Response Letter to Vann, Kendrick, and Lee
- 2020-11-20 Letter to Vann
- 2020-11-23 Affidavit of Colie Rushton
- 2020-11-24 Transcript of Hearing in *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306.
- 2020-11-25 Judge Lee’s Order Denying Declaratory Judgment in *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306.

- 2021-07-09 Stipulation of Dismissal in *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306.
- 2021-02-01 Letter to Kendrick
- 2021-02-01 Affidavit of Willie Davis
- 2021-04-27 Letter to South Carolina Supreme Court
- 2021-05-19 Letter to South Carolina Supreme Court
- 2021-05-20 Letter to South Carolina Supreme Court
- 2021-06-01 Letter from South Carolina Supreme Court
- 2021-06-03 Affidavit of Director Bryan Stirling
- 2021-01-07 Report of Dr. James S. Williams
- 2021-08-05 Report of Dr. James S. Williams
- SCDC Medical Records – Gary Terry
- Collection of Industry Statements
- ANA Position Statement
- Johnson & Johnson Position Statement
- APhA Policy Statement
- IACP Position Statement
- Akorn Position Statement
- Roche Position Statement
- Endo Position Statement
- Hikma Position Statement
- Fresenius Position Statement
- Hospira Position Statement

- Letter and Response from Chief Executive of Hospira
- Lundbeck Position Statement
- Letter and Response from Chief Executive of Lundbeck
- American Board of Anesthesiology Position Statement
- Pfizer Position Statement
- American Medical Association Position Statement
- 2020-09-15 Letter from Meitheal Pharmaceuticals
- 2019-04-02 Response Letter to Hikma
- 2020-03-09 Response Letter to Hikma
- 2022-04-19 Letter from Hikma
- 2022-05-09 Response Letter to Hikma
- 2018-05-03 Response Letter to Alvogen
- 2018-08-06 Response Letter to Sandoz
- 2021-08-30 Letter from Sandoz
- 2020-09-09 Response Letter to Sandoz
- 2021-04-16 Letter from Zydus
- 2021-06-30 Letter from Pfizer
- CV of Dr. Ronald K. Wright
- Photos produced to Press
- Correspondence between SCDC and Press
- SCDC Press Releases

Defendants acknowledge they have produced other documents to Plaintiffs and their counsel in other lawsuits pursuant to the terms and conditions of a consent confidentiality order. However, Defendants are not producing these documents at this time because there

is currently no confidentiality order in this case. Defendants began the discussion and circulated a draft confidentiality order; however, an agreement has not been reached between the parties. A confidentiality order is needed because of the extreme sensitivity of the issues, the protections afforded by relevant South Carolina law, and Justice 360's stance it has taken regarding pending litigation against Defendants in the Fourth Circuit.

Once a confidentiality order is entered, Defendants are willing to provide additional information.

Defendants also incorporate by reference the numerous documents publicly filed and orders issued throughout the related litigation between the parties involved and the counsel representing the parties. This information is in Plaintiffs' possession or in possession of counsel for Plaintiffs.

Furthermore, Defendants reserve the right to supplement their Answer to this Interrogatory as permitted by the South Carolina Rules of Civil Procedure or any court order.

INTERROGATORY #3:

3. Please identify in complete detail each person whom Defendants expect to call as an expert witness at the trial. For each expert provide the following information:

- a. Name, occupation, title, business address, area of specialization, if any, and professional relationship to the Defendants or Defendants' attorney.
- b. How the person became familiar with the facts of this case.
- c. The subject matter or area in which the person plans to testify.
- d. The substance of the facts and opinions to which the person plans to testify.
- e. A summary of the grounds or basis for each opinion and fact.
- f. A list of books, treatises, articles, and other works which the person regards as authoritative on the subject matter to which the person plans to testify.

ANSWER #3:

**Ronald K. Wright B.S., M.D., J.D.
1000 Ducks Nest Road
Turtle-town, TN 37391**

Dr. Wright is an expert regarding the physiological effects of electrocution to the human body. He is expected to testify to the fullest extent permitted by the South Carolina Rules of Evidence and the South Carolina Rules of Civil Procedure, and he is expected to provide expert testimony regarding the physiological effects of electrocution on the human body, the arguments raised by Plaintiffs related to the same, and his relevant knowledge, expertise, research, and experience. Dr. Wright's testimony will be based on his extensive training, knowledge, and experience in the field of electrocution, and his review of relevant literature and treatises and any materials provided in connection with this litigation. Dr. Wright also expects that interviews with or deposition testimony of the parties and witnesses in this matter and in related matters may contribute to his opinions, and he reserves the right to supplement his opinions. The CV for Dr. Wright is being produced contemporaneously herewith.

Defendants reserve the right to supplement this Answer, should they elect to retain the services of any additional experts who are expected to testify in this case. Furthermore, Defendants specifically reserve the right to elicit opinions from the named fact or expert witnesses in their various fields of expertise. This would include those witnesses employed in the field of prison management and prison security, such as Director Stirling and/or Mr. Rushton to render opinions regarding proper management and security concerns in prisons.

INTERROGATORY #4:

4. For each person the Defendants or counsel believe will be a witness concerning the facts of the case, please set forth either a summary sufficient to inform the other party of the important facts known to or observed by the witness or provide a copy of any written or recorded statements taken from the witness.

ANSWER #4:

Defendants crave reference to the Answers provided above to Plaintiffs' Interrogatories 1 and 3.

INTERROGATORY #5:

5. Please describe Defendants' efforts to obtain lethal injection drugs. To the extent those efforts involved communication with any other individual or entity please identify the other individual or entity and describe the manner, date, and contents of such communication.

ANSWER #5:

Objection. Defendants object to this Interrogatory as it is overbroad and irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director's certification of available methods.

Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC. Moreover, courts are not "boards of inquiry charged with determining 'best practices' for executions," *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal injection will be resolved by the parties' cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Interrogatory insofar as it asks for the identification of individuals or entities in which SCDC has attempted to obtain lethal injection drugs. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has "broadly construed" the phrase "member of an execution team." 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Notwithstanding the above-mentioned objection, Defendants crave reference to the Affidavits of Director Stirling filed with the South Carolina Supreme Court regarding the available methods of execution and the testimony given to the General Assembly when determining whether to Amend the methods of execution statute. These are publicly available documents not protected by section 24-3-580, and nothing about the production of these documents should be interpreted as waiving any objection Defendants have made to this Interrogatory.

Additionally, to further support the fact that Defendants, despite significant efforts, have been unable to obtain lethal injection drugs, Defendants produce contemporaneously herewith the position statements of various pharmaceutical companies and organizations that have publicly announced their position against their drugs being used for capital punishment. Defendants also produce contemporaneously herewith letters and responses from pharmaceutical companies. Again, these are publicly available documents not protected by section 24-3-580, and nothing about the production of these documents should be interpreted as waiving any objection Defendants have made to this Interrogatory.

INTERROGATORY #6:

6. Please list each person who has been involved in efforts to obtain lethal injection drugs, including their title and the nature of their involvement in such efforts.

ANSWER #6:

Objection. Defendants object to this Interrogatory as it is irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director's certification of available methods.

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCP. Moreover, courts are not "boards of inquiry charged with determining 'best practices' for executions," *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal injection will be resolved by the parties' cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Interrogatory insofar as it asks for the identification of individuals involved in the efforts to obtain lethal injection drugs. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has "broadly construed" the phrase "member of an execution team." 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Defendants must note that this is an attempt to identify and receive information as to members of the execution team that is prohibited by law.

INTERROGATORY #7:

7. Please list each person involved in the creation of the current lethal injection protocol and their role in the creation of that protocol.

ANSWER #7:

Objection. Defendants object to this Interrogatory as it is irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director's certification of available methods.

Objection. Defendants object to this Interrogatory as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC. Moreover, courts are not "boards of inquiry charged with determining 'best practices' for executions," *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal injection will be resolved by the parties' cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Interrogatory insofar as it asks for the identification of individuals who are or have been involved in the creation of the current lethal injection protocol. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has "broadly construed" the phrase "member of an execution team." 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

INTERROGATORY #8:

8. To the extent there are no documents in response to Requests for Production #5 and 6, please explain whether such documents ever existed and why they are no longer in the possession of the Defendants.

ANSWER #8:

Defendants crave reference to their objections stated in regard to Requests for Production #5 and 6.

INTERROGATORY #9:

9. Please list each person involved in the creation of the current firing squad protocol and their role in the creation of that protocol.

ANSWER #9:

Objection. This Interrogatory seeks information that is irrelevant to Plaintiffs' claims in this litigation. Plaintiffs have challenged the firing squad generally, essentially stating that in no way can firing squad ever be Constitutional. But even if Plaintiffs were to somehow construe their Third Amended Complaint as asserting claims related to the protocol specifically, who developed that protocol does not "hav[e] any tendency to make . . . more probable or less probable" the constitutionality of the firing squad generally or the protocol specifically. Rule 401, SCRE.

Objection. Defendants object to this Interrogatory insofar as it asks for the identification of individuals involved in the creation of the current firing squad protocol. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has "broadly construed" the phrase "member of an execution team." 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code, Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

INTERROGATORY #10:

10. Please describe how Defendants recruit or identify individuals who will participate in and carry out executions. To the extent these practices are different for different methods of execution, please explain those differences.

ANSWER #10:

Objection. Defendants object to this Interrogatory as being irrelevant. Plaintiffs have not presented a challenge regarding the sufficiency of the recruitment or identification of individuals to be members of the execution team. The entirety of this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC.

Objection. Defendants object to this Interrogatory insofar as it asks for the identification of individuals who will participate in and carry out executions. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc. This is a back-door attempt to identify and receive information as to members of the execution team that is prohibited by section 24-3-580.

Notwithstanding the above-mentioned objections, Defendants recruit and identify qualified individuals with respect to their roles on the execution team. Defendants also crave reference to the Affidavit of Colie Rushton that is being provided contemporaneously herewith. This document is publicly available and not protected by section 24-3-580, and nothing about the production of this document should be interpreted as waiving any objection Defendants have made to this Interrogatory.

INTERROGATORY #11:

11. Please describe the professional qualifications of individuals who will participate in and carry out executions. To the extent these practices are different for different methods of execution, please explain those differences.

ANSWER #11:

Objection. Defendants object to this Interrogatory as being irrelevant. Plaintiffs have not presented a challenge regarding the sufficiency of the qualifications of the members of the execution team. The entirety of this Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC.

Objection. Defendants object to this Interrogatory insofar as it asks for the professional qualifications of individuals who will participate in and carry out executions.

Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc. This is a back-door attempt to identify and receive information as to members of the execution team that is prohibited by section 24-3-580.

Notwithstanding the above-mentioned objections, Defendants recruit and identify qualified individuals with respect to their roles on the execution team. Defendants also crave reference to the Affidavit of Colie Rushton that is being provided contemporaneously herewith. This document is publicly available and not protected by section 24-3-580, and nothing about the production of this document should be interpreted as waiving any objection Defendants have made to this Interrogatory.

INTERROGATORY #12:

12. For any document requested which the Defendants do not possess but know that the document exists and is possessed by another individual or entity, please identify the document and the individual or entity which possesses the document.

ANSWER #12:

After a reasonable investigation, none.

(signature page to follow)

SMITH | ROBINSON



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*Counsel for Defendants Bryan P. Stirling and the
South Carolina Department of Corrections*

June 9, 2022
Columbia, South Carolina

EXHIBIT 3b

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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.

**DEFENDANTS SCDC AND DIRECTOR
STIRLING’S RESPONSES TO
PLAINTIFFS’ FIRST SET OF REQUESTS
FOR PRODUCTION**

**TO: LINDSEY S. VANN, ESQUIRE, EMILY PAAVOLA, ESQUIRE, HANNAH
FREEDMAN, ESQUIRE, BRENDAN VAN WINKLE, ESQUIRE, J.
CHRISTOPHER MILLS, ESQUIRE, JOSHUA S. KENDRICK, ESQUIRE, JOHN
H. BLUME, III, ESQUIRE, AND ELIZABETH FRANKLIN-BEST, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS:**

Defendants South Carolina Department of Corrections (“SCDC”) and Director Bryan P. Stirling (collectively, “Defendants” or “SCDC”) respond to Plaintiffs Freddie Eugene Owens, Brad Keith Sigmon, Gary DuBose Terry, and Richard Bernard Moore’s First Set of Requests for Production pursuant to Rule 34 of the South Carolina Rules of Civil Procedure as follows:

REQUESTS FOR PRODUCTION

REQUEST #1:

1. Please produce all documents, correspondence, or other material provided to any expert or received from any expert you have retained in this matter.

RESPONSE #1:

Objection. The documents, correspondence, or other material provided to Defendants' experts were provided to them pursuant to confidentiality agreement. There is currently no confidentiality order entered by the Court. Defendants began the discussion and circulated a draft confidentiality order; however, an agreement has not been reached between the parties. A confidentiality order is needed because of the extreme sensitivity of the issues, the protections afforded by relevant South Carolina law, and Justice 360's stance it has taken regarding pending litigation against Defendants in the Fourth Circuit.

Once a confidentiality order is entered, Defendants are willing to produce pertinent documents. However, Defendants object to providing documents protected by attorney-client privilege or the attorney work product doctrine.

REQUEST #2:

2. Please produce all materials you intend to introduce at the trial of this case.

RESPONSE #2:

Defendants have not yet decided what materials they intend to introduce at the trial of this case. Defendants will supplement their response in accord with the South Carolina Rules of Civil Procedure and any pre-trial order.

Defendants reserve the right to use any and all documents produced herewith or produced in discovery by any of the parties to this litigation.

REQUEST #3:

3. Please produce all materials you intend to rely on or introduce at any depositions in this case.

RESPONSE #3:

Defendants have not yet decided what materials they intend to rely upon or introduce at any depositions in this case. Defendants will supplement their response in accord with the South Carolina Rules of Civil Procedure.

Defendants reserve the right to use any and all documents produced herewith or produced in discovery by any of the parties to this litigation.

REQUEST #4:

4. Please produce any document you relied on or referenced in your answer to the Plaintiffs' Interrogatories.

RESPONSE #4:

Copies of the following documents are being produced contemporaneously herewith:

- South Carolina Attorney General Opinion, 2015 WL 4699337 (S.C.A.G. July 27, 2015).
- 2020-09-01 Letter from Vann, Kendrick, and Lee
- 2020-09-29 Response Letter to Vann, Kendrick, and Lee
- 2020-11-20 Letter to Vann
- 2020-11-23 Affidavit of Colie Rushton
- 2020-11-24 Transcript of Hearing in *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306.
- 2020-11-25 Judge Lee's Order Denying Declaratory Judgment in *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306.
- 2021-07-09 Stipulation of Dismissal in *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306.
- 2021-02-01 Letter to Kendrick
- 2021-02-01 Affidavit of Willie Davis
- 2021-04-27 Letter to South Carolina Supreme Court
- 2021-05-19 Letter to South Carolina Supreme Court
- 2021-05-20 Letter to South Carolina Supreme Court
- 2021-06-01 Letter from South Carolina Supreme Court
- 2021-06-03 Affidavit of Director Bryan Stirling
- 2021-01-07 Report of Dr. James S. Williams

- **2021-08-05 Report of Dr. James S. Williams**
- **SCDC Medical Records – Gary Terry**
- **Collection of Industry Statements**
- **ANA Position Statement**
- **Johnson & Johnson Position Statement**
- **APhA Policy Statement**
- **IACP Position Statement**
- **Akorn Position Statement**
- **Roche Position Statement**
- **Endo Position Statement**
- **Hikma Position Statement**
- **Fresenius Position Statement**
- **Hospira Position Statement**
- **Letter and Response from Chief Executive of Hospira**
- **Lundbeck Position Statement**
- **Letter and Response from Chief Executive of Lundbeck**
- **American Board of Anesthesiology Position Statement**
- **Pfizer Position Statement**
- **American Medical Association Position Statement**
- **2020-09-15 Letter from Meitheal Pharmaceuticals**
- **2019-04-02 Response Letter to Hikma**
- **2020-03-09 Response Letter to Hikma**

- 2022-04-19 Letter from Hikma
- 2022-05-09 Response Letter to Hikma
- 2018-05-03 Response Letter to Alvogen
- 2018-08-06 Response Letter to Sandoz
- 2021-08-30 Letter from Sandoz
- 2020-09-09 Response Letter to Sandoz
- 2021-04-16 Letter from Zydus
- 2021-06-30 Letter from Pfizer
- CV of Dr. Ronald K. Wright
- Photos produced to Press
- Correspondence between SCDC and Press
- SCDC Press Releases

Defendants acknowledge they have produced other documents to Plaintiffs and their counsel in other lawsuits pursuant to the terms and conditions of a consent confidentiality order. However, Defendants are not producing these documents at this time because there is currently no confidentiality order in this case. Defendants began the discussion and circulated a draft confidentiality order; however, an agreement has not been reached between the parties. A confidentiality order is needed because of the extreme sensitivity of the issues, the protections afforded by relevant South Carolina law, and Justice 360's stance it has taken regarding pending litigation against Defendants in the Fourth Circuit.

Once a confidentiality order is entered, Defendants are willing to produce such documents.

Defendants also incorporate by reference the numerous documents publicly filed and orders issued throughout the related litigation between the parties involved and the counsel representing the parties. This information is in Plaintiffs' possession or in possession of counsel for Plaintiffs.

Furthermore, Defendants reserve the right to supplement their Response to this Request for Production as permitted by the South Carolina Rules of Civil Procedure.

REQUEST #5:

5. Please produce a copy of the current lethal injection protocol.

RESPONSE #5:

Objection. Defendants object to this Request for Production as it is overbroad and irrelevant to Plaintiffs' claims, the defenses of any party, and the issues raised in this litigation. Plaintiffs have not elected to be executed by lethal injection, and they have not challenged the constitutionality of lethal injection in this litigation and therefore have no basis to seek such sensitive and protected information and materials. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCF. Moreover, courts are not "boards of inquiry charged with determining 'best practices' for executions," *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by seeking to obtain the protocol for a method they do not challenge in this litigation. Any issues regarding lethal injection will be resolved by the parties' cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Should a Court find that certain aspects of the requested material is relevant to Plaintiffs' claims, a confidentiality order would be necessary before any aspect of this protocol could be produced. There is currently no confidentiality order entered by the Court. Defendants began the discussion and circulated a draft confidentiality order; however, an agreement has not been reached between the parties. A confidentiality order is needed because of the extreme sensitivity of the issues, the protections afforded by relevant South Carolina law, and Justice 360's stance it has taken regarding pending litigation in the Fourth Circuit.

REQUEST #6:

6. Please produce all documents related to lethal injection maintained by the Defendants, to include all autopsies from prior executions by lethal injection.

RESPONSE #6:

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCF. Indeed, nothing about the any records related to lethal injection will "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of" any of Plaintiffs' eight claims about the constitutionality of electrocution, the firing squad, or Act 43 "more probable or less probable than it would be without" these records. Rule 401, SCRE. The irrelevance of this Request for Production is magnified by the fact that the lethal injection protocol that SCDC has used

in the past is different from the “single dose of pentobarbital” that Plaintiffs assert that SCDC should use for their executions. Any issues regarding lethal injection will be resolved by the parties’ cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. This Request for Production is vague, ambiguous, overbroad, and unduly burdensome. It seeks every single document—every email, every piece of paper in a file, every scrap of paper—in SCDC’s possession related to lethal injection, going back to at least 1995 when lethal injection was first statutorily authorized as a method of execution in South Carolina. Defendants must highlight the inappropriateness of this Request, especially in light of Justice 360’s stance in pending litigation in the Fourth Circuit.

REQUEST #7:

7. Please produce all documents related to Defendants’ attempts to procure lethal injection drugs, including any emails, written or typed notes, written or typed memoranda, and any call logs, documenting communications between SCDC and other departments of corrections, pharmaceutical companies, compounding pharmacies, and other medical or pharmaceutical providers.

RESPONSE #7:

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director’s certification of available methods.

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCP. Moreover, courts are not “boards of inquiry charged with determining ‘best practices’ for executions,” *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal injection will be resolved by the parties’ cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Request for Production insofar as it asks for the identification of individuals or entities in which SCDC has attempted to obtain lethal injection drugs or identifies employees who have participated in the attempts to secure lethal injection drugs. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Defendants crave reference to their response to Interrogatory #5.

Notwithstanding these objections, Defendants produce contemporaneously herewith the position statements of various pharmaceutical companies and organizations that have publicly announced their position against their drugs being used for capital punishment. Defendants also produce contemporaneously herewith letters from and responses to pharmaceutical companies. These are publicly available documents not protected by section 24-3-580, and nothing about the production of these documents should be interpreted as waiving any objection Defendants have made to this Request for Production.

REQUEST #8:

8. Please produce all documents related to Defendants’ attempts to purchase the bulk components for lethal injection drugs to have them compounded.

RESPONSE #8:

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director’s certification of available methods.

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCPP. Moreover, courts are not “boards of inquiry charged with determining ‘best practices’ for executions,” *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal

injection will be resolved by the parties' cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Request for Production insofar as it asks for the identification of individuals or entities in which SCDC has attempted to obtain bulk components for lethal injection drugs or information pertaining to those employees who participated in SCDC's attempts to obtain bulk components for lethal injection drugs. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has "broadly construed" the phrase "member of an execution team." 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Defendants crave reference to their response to Interrogatory #5.

Notwithstanding these objections, Defendants produce contemporaneously herewith the position statements of various pharmaceutical companies and organizations that have publicly announced their position against their drugs being used for capital punishment. Defendants also produce contemporaneously herewith letters and responses from pharmaceutical companies. These are publicly available documents not protected by section 24-3-580, and nothing about the production of these documents should be interpreted as waiving any objection Defendants have made to this Request for Production.

REQUEST #9:

9. Please produce all documents related to Defendants' attempts to, or investigation into, to create or upgrade its own compounding pharmacy to have drugs for lethal injection compounded at SCDC.

RESPONSE #9:

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director's certification of available methods.

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC. Moreover, courts are not “boards of inquiry charged with determining ‘best practices’ for executions,” *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal injection will be resolved by the parties’ cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Request for Production insofar as it asks for the identification of individuals or entities in which SCDC has contacted in its attempts to create its own compounding pharmacy to allow for drugs for lethal injection to be compounded at SCDC or the identifies of any employees who participated in these efforts. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc.

Defendants also crave reference to their Answer to Interrogatory #5.

REQUEST #10:

10. Please produce all documents regarding Defendants’ efforts to recruit, identify, select and train individuals for carrying out an execution by lethal injection and the professional qualifications of those individuals. Names and other specific identifying information of individual execution team members may be redacted.

RESPONSE #10:

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Nothing in Act 43 requires Defendants to prove that lethal injection is unavailable, and nothing in Act 43 creates a private right of action for Plaintiffs to bring a claim based on the Director’s certification of available methods.

Objection. Defendants object to this Request for Production as it is irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC. Moreover, courts are not “boards of inquiry charged with determining ‘best practices’ for executions,” *Baze v. Rees*, 553 U.S. 35, 51 (2008), which is what Plaintiffs are effectively trying to do by injecting the protocol for a method they do not challenge into this litigation. Any issues regarding lethal injection will be resolved by the parties’ cross-motions for summary judgment. Indeed, by also moving for summary judgment, Plaintiffs have conceded that discovery is unnecessary to resolve the threshold legal questions.

Objection. Defendants object to this Request for Production as it is completely irrelevant to the issues raised in this litigation. Plaintiffs have not challenged the constitutionality of lethal injection or the sufficiency of the training of these individuals. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRPC.

Objection. Defendants object to this Request for Production insofar as it asks for the identification of individuals or facts that can be reasonably used to identify these individuals. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc. This is a back-door attempt to identify and receive information as to members of the execution team that is prohibited by section 24-3-580.

REQUEST #11:

11. Please produce a copy of the current electric chair protocol.

RESPONSE #11:

Objection. There is currently no confidentiality order entered by the Court. Defendants began the discussion and circulated a draft confidentiality order; however, an agreement has not been reached between the parties. A confidentiality order is needed because of the extreme sensitivity of the issues, the protections afforded by relevant South Carolina law, and Justice 360’s stance it has taken regarding pending litigation against Defendants in the Fourth Circuit.

Once a confidentiality order is entered, Defendants are willing to produce the relevant protocol related to the electric chair.

REQUEST #12:

12. Please produce all documents related to the electric chair maintained by the Defendants, to include all autopsies from prior executions by electrocution.

RESPONSE #12:

Objection. This Request for Production is overbroad and unduly burdensome. It seeks every single document—every email, every piece of paper in a file, every scrap of paper—within SCDC related to electrocution, going back to at least 1912 when electrocution was first enacted as a method of execution in South Carolina.

Objection. Nothing about the most records related to the electronic chair will “hav[e] any tendency to make the existence of any fact that is of consequence to the determination of” any of Plaintiffs’ eight claims about the constitutionality of electrocution, the firing squad, or Act 43 “more probable or less probable than it would be without” these records. Rule 401, SCRE.

Notwithstanding these objections, Defendants have agreed to produce the relevant protocol related to the electric chair upon entry of a confidentiality order.

REQUEST #13:

13. Please produce all documents regarding Defendants’ efforts to recruit, identify, select and train individuals for carrying out an execution by electrocution and the professional qualifications of those individuals. Names and other specific identifying information of individual execution team members may be redacted.

RESPONSE #13:

Objection. Defendants object to this Request for Production insofar as it asks for the identification of individuals or facts that can be reasonably used to identify these individuals. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons

participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants' efforts to obtain lethal injection drugs, persons and companies involved in Defendants' efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants' efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc. This is a back-door attempt to identify and receive information as to members of the execution team that is prohibited by section 24-3-580.

Objection. Defendants also object to this Request for Production as being irrelevant. Plaintiffs have not presented a challenge regarding the recruitment or identification of individuals to be members of the execution team. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCP.

Notwithstanding the above-mentioned objections, Defendants produce contemporaneously herewith the Affidavit of Colie Rushton. This document is publicly available and not protected by section 24-3-580, and nothing about the production of this document should be interpreted as waiving any objection Defendants have made to this Request for Production.

REQUEST #14:

14. Please produce a copy of the current firing squad protocol.

RESPONSE #14:

Objection. There is currently no confidentiality order entered by the Court. Defendants began the discussion and circulated a draft confidentiality order; however, an agreement has not been reached between the parties. A confidentiality order is needed because of the extreme sensitivity of the issues, the protections afforded by relevant South Carolina law, and Justice 360's stance it has taken regarding pending litigation against Defendants in the Fourth Circuit.

Once a confidentiality order is entered, Defendants are willing to produce the relevant protocol related to firing squad.

REQUEST #15:

15. Please produce all documents related to firing squad maintained by the Defendants.

RESPONSE #15:

Objection. Defendants object to this Request for Production as being vague, ambiguous, and overly broad.

This Request for Production is overbroad and unduly burdensome. It seeks every single document—every email, every piece of paper in a file, every scrap of paper—in SCDC’s possession related to the firing squad since the General Assembly adopted the firing squad as a method of execution in Act 43.

Objection. Nothing about most of the records related to the firing squad will “hav[e] any tendency to make the existence of any fact that is of consequence to the determination of” any of Plaintiffs’ eight claims about the constitutionality of electrocution, the firing squad, or Act 43 “more probable or less probable than it would be without” these records. Rule 401, SCRE.

Notwithstanding these objections, Defendants have agreed to produce the relevant protocol related to the firing squad upon entry of a confidentiality order.

REQUEST #16:

16. Please produce all documents regarding Defendants’ efforts to recruit, identify, select and train individuals for carrying out an execution by firing squad and the professional qualifications of those individuals. Names and other specific identifying information of individual execution team members may be redacted.

RESPONSE #16:

Objection. Defendants object to this Request for Production insofar as it asks for the identification of individuals or facts that can be reasonably used to identify these individuals. Section 24-3-580 of the South Carolina Code of Laws prohibits the disclosure of the identity of any current or former member of an execution team. The South Carolina Attorney General has “broadly construed” the phrase “member of an execution team.” 2015 WL 4699337 (S.C.A.G. July 27, 2015). Pursuant to section 24-3-580 of the South Carolina Code of Laws, Plaintiffs are prohibited from obtaining, and Defendants are prohibited from producing information that may lead to the disclosure of the identities of persons participating in the executions, persons participating in the planning of executions, persons participating in the training of executions, persons and companies involved in Defendants’ efforts to obtain lethal injection drugs, persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs, and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form, etc. This is a back-door attempt to identify and receive information as to members of the execution team that is prohibited by section 24-3-580.

Objection. Defendants also object to this Request for Production as being irrelevant. Plaintiffs have not presented a challenge regarding the recruitment or identification of individuals to be members of the execution team. The entirety of this Request for Production

is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCP.

REQUEST #17:

17. If prior versions of the documents requested in Requests for Production 5-16 exist and are in the possession of the Defendants, please produce those prior versions.

RESPONSE #17:

Objection. In addition to the objections interposed above to said requests for production, Defendants object to this Request for Production as being irrelevant. Plaintiffs have no challenges as to prior versions; only the current versions of electrocution and firing squad have applicability, if any, to Plaintiffs' claims. This is backwards looking discovery and is inappropriate. The entirety of this Request for Production is not reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 26(b)(1), SCRCP.

REQUEST #18:

18. Please produce all written correspondence, notes, memos, electronic mail, text messages, or other documentation related to your efforts to obtain lethal injection drugs as described in Interrogatory #5.

RESPONSE #18:

Defendants crave reference to their Answer to Interrogatory #5.

(signature page to follow)

SMITH | ROBINSON



Daniel C. Plyler (S.C. Bar No. 72671)
Austin T. Reed (S.C. Bar No. 102808)
2530 Devine Street
Columbia, SC 29205
(803) 254-5445
Daniel.Plyler@SmithRobinsonLaw.com
Austin.Reed@SmithRobinsonLaw.com

*Counsel for Defendants Bryan P. Stirling and the
South Carolina Department of Corrections*

June 9, 2022
Columbia, South Carolina

EXHIBIT 4

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

Case No. 2001-021895

Richard Bernard Moore.....Petitioner,

v.

Bryan P. Stirling, Director of the
South Carolina Department of
Corrections, and South Carolina
Department of Corrections.....Respondents.

AFFIDAVIT OF COLIE RUSHTON

PERSONALLY APPEARED BEFORE ME, COLIE RUSHTON, who being
duly sworn, deposes and states as follows:

1. I am currently employed by the South Carolina Department of Corrections (SCDC) as Director of Security and Emergency Operations.
2. My responsibilities, as Director of Security, included oversight of planning, preparation, and training related to the execution process and the participation in the actual selection of persons – both SCDC employees and civilian

medical personnel – who become part of the execution team and carry out the actual execution.

3. SCDC has an established policy, SCDC Policy SK-22.03 “Execution Procedures,” which sets forth and addresses training, procedures, and protocols for carrying out an execution by lethal injection and/or electrocution.

4. The SK-22.03 policy has been designated a “Limited Distribution” policy by SCDC, which is the highest level of confidentiality attached to any SCDC policy. The policy is not even available to all employees of SCDC, and certainly should not be made widely available to the general public, as to do so could jeopardize the safety and security of SCDC operations, facilities, staff, and other non-employees.

5. I have served as the Director of Security for the South Carolina Department of Corrections since May 2007 and not aware of the agency producing execution protocols to the public.

6. If SCDC is not allowed to have the ability to keep confidential certain policies and procedures, such as SK-22.03, then the safety and security of SCDC institutions, employees, inmates, and others would be directly at risk.

7. It is no secret that the death penalty and state sanctioned executions are polarizing topics. Many members of the public are extremely motivated to find ways to prevent the State from carrying out Court-Ordered executions. Some attempts are

lawful and remain in the courts, others are not and could create significant dangers to SCDC employees and non-employees involved in the execution process.

8. For instance, policies like SK-22.03, set forth detailed timelines and movements of SCDC security staff. If a member of the public was inclined to attempt to facilitate an escape or some other form of disruption of necessary SCDC security activities, such as a court-ordered execution, having access to such detailed information would increase the likelihood of success for such nefarious actions, and would greatly increase the likelihood that the safety and security of SCDC's facilities would be breached.

9. Furthermore, South Carolina law provides for substantial protections relating to confidentiality of the execution process. For instance, S.C. Code Ann. § 24-3-580 prevents any person from disclosing the identify of any member of an execution team. The South Carolina Office of the Attorney General has opined that said statute applies also to any individual or company providing or participating in the preparation of chemical compounds intended for use by SCDC in carrying out a Court-Ordered execution. *See* Exhibit A (S.C.A.G. July 27, 2015 Opinion).

10. The detailed information in SK-22.03 could be used by persons to narrow down who may be a member of any given execution team, and could potentially compromise the statutorily provided confidentiality the execution team members have been given.

11. Furthermore, if policies like SK-22.03 were to be publicly disseminated, SCDC's ability to effectively and safely carry out its statutorily mandated duties would be frustrated and/or compromised.

FURTHER AFFIANT SAYETH NOT.

Colie Rushton

Colie Rushton

SWORN TO BEFORE ME THIS 23RD
DAY OF November 23RD, 2020

Sandra S. Bowie (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 8-16-2026

EXHIBIT 5

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
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:

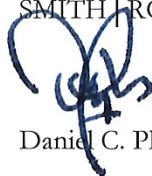
I have been informed by the South Carolina Department of Corrections (SCDC) that your client, Richard Bernard Moore, has refused to sign a Notice of Election form, and has affirmatively stated, in writing, that said refusal is not a waiver, in his opinion, under S.C. Code Ann. § 24-30-530. Additionally, 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

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
MCMASTER,** in his official capacity as
Governor of South Carolina,

Defendants.

Civil Action No. 2021-CP-40-02306

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION FOR
PROTECTIVE ORDER TO PROHIBIT OR LIMIT THE SCOPE OF DISCOVERY, AND
MOTION TO COMPEL DISCOVERY**

Plaintiffs Owens, Sigmon, Terry, and Moore, through undersigned counsel, submit the following in response to Defendants’ Motion for Protective Order to Prohibit or Limit the Scope of Discovery (“Motion for Protective Order”) and move this Court to order Defendants to produce the discovery requested by Plaintiffs following this Court’s denial of Defendants’ Motion to Dismiss. The discovery requested by Plaintiffs in this case “is relevant to the subject matter involved in the pending action,” and Defendants do not meet their burden to obtain an order drastically limiting the scope of discovery as they request. *See* Rule 26(b)(1), (c), SCRCF.

I. Legal Standards.

“Rule 26, SCRCF, allows broad pre-trial discovery.” *Hamm v. South Carolina Public Svc. Com’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994). “[U]nless otherwise limited by order of

the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (quoting Rule 26(b)(1), SCRPC) (internal quotation marks omitted).

“If the discovery process threatens to become abusive or create a particularized harm to a litigant . . . the trial judge may issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense.” *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498 (quoting Rule 26(c), SCRPC) (internal quotation marks omitted). “If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is ‘relevant and necessary.’” *Id.* (quoting *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009)). “When both parties meet their burden of proof, the court must weigh the opposing factors.” *Hamm*, 312 S.C. at 242, 439 S.E.2d at 854.

II. Defendants Fail to Demonstrate a Particularized Harm in Disclosing SCDC’s Execution Protocols, and They Are Relevant and Necessary to the Litigation.

Defendants fail to demonstrate a particularized harm in disclosing SCDC’s execution protocols because Plaintiffs’ counsel have informed Defendants’ they will agree to the proposed confidentiality agreement, and SCDC indicated in its discovery responses that “[o]nce a confidentiality order is entered, Defendants are willing to produce the relevant protocol related to the electric chair [and firing squad].” Motion for Protective Order, Ex. 3b (Response to Request #1, 5, 11, 14). Regarding the lethal injection protocol, Defendants submit additional objections, but also request a confidentiality agreement if the Court deems it the appropriate subject of

discovery. Plaintiffs similarly agree to a confidentiality agreement with regard to the lethal injection protocol. As of this filing, Plaintiffs have not yet received the execution protocols for review.

Even if Defendants have identified a particularized harm, the protocols are relevant and necessary to the litigation. Count VI of the Third Amended Complaint alleges that electrocution and firing squad violate the South Carolina Constitution. In support of that claim, Plaintiffs submitted the expert statements of Dr. John Wikswo (Third Amended Complaint Ex. I) and Dr. Jonathan Arden (Third Amended Complaint Ex. J), in which the experts described how electrocution and firing squad executions have historically been carried out in South Carolina and elsewhere in the county. The experts then opined on the pain and damage to the body resulting from typical procedures by which each method is carried out. To allow for a full “presentation of the case on the merits,” it will be important to compare how the SCDC intends to carry out each method to the experts’ descriptions and opinions. *See Hollman*, 384 S.C. at 578, 683 S.E.2d at 498.

The protocols are also relevant and necessary to consider the defenses raised in this case given that Defendants denied, in their answer, that electrocution and firing squad violate the South Carolina Constitution. In doing so, Defendants necessarily assert that they have identified a constitutional way in which to carry out both methods of execution.¹ Thus, the Court will be required to decide between the parties’ positions, which it cannot do without knowing how SCDC intends to conduct executions.

¹ Defendants cannot be asserting that firing squad and electrocution are constitutional regardless of the manner in which they intend to carry out the methods. For example, a firing squad protocol could theoretically call for shooting an inmate in the leg and waiting for him to bleed to death, which could not seriously be argued to be constitutional.

Additionally, Defendants SCDC and Stirling's discovery responses appear to indicate they provided the protocols to their expert under a confidentiality agreement. *See* Motion for Protective Order, Ex. 3b (Response #1) ("The documents, correspondence, or other materials provided to Defendants' experts were provided to them pursuant to confidentiality agreement [sic]."). By providing these materials to their expert, the Defendants have tacitly acknowledged that they are "relevant and necessary" to the litigation. It would impair Plaintiffs in their investigation and presentation of the case if they did not have access to all of the documents provided to the expert proposed to be introduced by the Defendants.

Finally, Defendants argue the lethal injection protocol is not relevant because Plaintiffs do not challenge lethal injection as unconstitutional. However, the lethal injection protocol is relevant and necessary to Plaintiffs' claim that the statutory change allowing for Plaintiffs' executions by electrocution or firing squad, as opposed to lethal injection, violates the ex post facto clause. 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). To make this determination requires the courts to compare the different punishments to determine if the newly imposed punishment is greater than the punishment imposed at the time of the offense. To do so, the Court must have access to information about each of the execution methods, and it would impair presentation of the case to have only two of the three protocols SCDC intends to use to carry out executions.

III. Defendants Fail to Identify a Particularized Harm that Would Result from Disclosing Information about Defendants' Attempts to Obtain Lethal Injection Drugs, and the Information is Relevant and Necessary to the Litigation.

Defendants once again ask this Court to bar it and the Plaintiffs from discovering anything about SCDC and Defendant Stirling's attempts to obtain lethal injection drugs. As an initial matter,

Defendants have not alleged a particularized harm that would result from disclosure of this information. Instead, they argue the information is irrelevant and ask the Court to prohibit discovery on this issue, assuming their interpretation of the term “available” is correct, which is one of the subjects of this suit.

In doing making this argument, they attempt to relitigate their motion to dismiss, which this Court denied. Plaintiffs raised a claim that, whatever the term “available” means in South Carolina Code section 24-3-530 (2021), it creates at least some affirmative obligation for SCDC to make the authorized methods of execution available and SCDC has failed to comply with that obligation. Defendants moved to dismiss the claim, alleging that the statute does not require SCDC to prove lethal injection’s unavailability, but that argument was denied, and the Court ordered the parties to engage in discovery. Plaintiffs’ discovery requests related to SCDC’s attempts to obtain lethal injection drugs are directly relevant and necessary to litigation of this claim.² “[I]n order to fully flesh out the claims to give the finder of fact a complete picture and as much information as the finder of fact can have when making the determination,” this Court should allow discovery on the issue of SCDC’s attempts to make one of the statutorily authorized methods of execution available. *See* Tr. M. to Dismiss Hrg., 60 (Apr. 14, 2022).

Defendants’ warning that allowing discovery in this case would allow a “mini-trial on SCDC’s efforts to procure the drugs” in every case, Motion for Protective Order, at 9, is overblown. In this case, this Court ordered discovery to commence, and the Supreme Court of

² Defendants have asserted that SCDC “has been unable, despite numerous and diligent attempts, to acquire the drugs necessary . . . to perform a lethal injection,” Third Amended Complaint Ex. F, and that “[w]hat the General Assembly expects and what the law presumes is that SCDC will make a good faith effort to make each method available,” Reply to Motion for Summary Judgment, at 11. These assertions indicate that there are responsive documents to Plaintiffs’ requests, and it cannot be unduly burdensome for Defendants to produce those responsive materials.

South Carolina ordered a trial on the claims raised in the suit in 90 days. In doing so, the courts recognized the novel issues raised by the amended statute and have allowed time for the issues to progress through fact development and trial. The same will likely not be true in future cases following a judicial determination on the constitutionality and interpretation of the amended statute.

IV. Defendants Overstate the Discovery Requests and Statutory Protections Related to Execution Team Members and Fail to Acknowledge the Court’s Ability to Craft a Narrow Protective Order.

Defendants overstate the Plaintiffs’ discovery request by asserting they ask for the names and addresses of execution team members. Defendants do so by citing the general requests for information about witnesses in this case. However, in the specific requests for information related to the “efforts to recruit, identify, select and train individuals for carrying out an execution” by lethal injection, electrocution, and firing squad, Plaintiffs specifically acknowledge that the “[n]ames and other specific identifying information of individual execution team members may be redacted.” Motion for Protective Order, Ex. 1 (requests 10, 13, 16).

Nevertheless, Defendants ask this Court to bar discovery of any information about the types of people and the training given to individuals selected to carry out executions, despite similar information being disclosed in other execution method litigation across the country without prejudice to the State, executions, or the execution team members. They assert that any such information is “calculated to lead to, or would necessarily result in, the discovery of their identities.” Motion for Protective Order, at 11. Their objection cannot be correct. Not all information about what experience level, rank, prior training, or training received following recruitment would necessarily lead to the discovery of the identify of execution team members. Further, if the Defendants believe that all such information would necessarily lead to disclosing

the identity of the execution team members, this Court could order the disclosure “under seal for the proper adjudication of pending litigation.” S.C. Code § 24-3-580.

Defendants further seek to limit disclosure of the individuals involved in developing the execution protocols and involved in attempting to obtain lethal injection drugs by relying on an insupportably broad interpretation of the term “execution team member” in South Carolina Code section 24-3-530. The statute provides: “A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team.” *Id.* Despite the plain language of the statute protecting only the identities of the individuals who compose the team that carries out an actual execution, Defendants interpret the term “execution team” to mean:

- persons participating in the planning of executions, persons participating in the training of executions,
- persons participating in the implementation of executions,
- persons and companies involved in Defendants’ efforts to obtain lethal injection drugs,
- persons and companies involved in Defendants’ efforts to obtain the raw components of lethal injection drugs,
- and persons and companies involved in Defendants’ efforts to identify or develop a compounding pharmacy to produce lethal injection drugs in usable form.”

Motion for Protective Order, at 12. In support of this proposition, Defendants rely on a letter opinion from the Attorney General—another member of the executive branch—to Director Stirling. *See* 2015 WL 4699337 (S.C.A.G. July 27, 2015).

“Attorney General opinions, while persuasive, are not binding.” *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 560, 713 S.E.2d 604, 609 (2011). The language of the statute limits disclosure of the “execution team,” not disclosure of every person at the Department of Corrections involved in any part of preparing for an execution. The Attorney General’s opinion, which merely agreed with Director Stirling’s proposed interpretation, stretches the statutory language beyond its plain meaning and should be rejected. However, even if a broad interpretation prevails, the statute explicitly provides that disclosure of the execution team may be made pursuant to a court order under seal, making this information discoverable under certain parameters that the Court is able to specify.

Finally, Defendants assert that information about the recruiting and training of the execution team and others involved in developing the execution protocols is not relevant to the constitutionality of electrocution or firing squad or the interpretation of the statute, but the types of people and their training is part of how SCDC plans to carry out the executions of Plaintiffs, which is relevant to this litigation just as the protocols themselves. Accordingly, this Court should order discovery on these topics, with appropriate protections in place, if necessary.

V. Defendants Discovery Responses are Insufficient and This Court Should Compel Defendants to Supplement Their Responses.

Plaintiffs’ submitted requests for production of documents related to each method of execution as follows: “Please produce all documents related to [lethal injection, the electric chair, and firing squad] maintained by the Defendants, including all autopsies from prior executions by [lethal injection and electrocution].” Motion for Protective Order, Ex. 1, Request for Production ¶¶ 6, 12, 15. Defendants provided no responsive documents to these requests.

Defendants made no response—objection or otherwise—to the requests for autopsies of individuals executed by either lethal injection or electrocution. *See* Motion for Protective Order,

Ex. 3b. Plaintiffs previously obtained documents indicating the bodies of executed individuals have been sent for autopsies following lethal injection and electrocution executions, yet Defendants did not produce them with their discovery production. The autopsy reports are not privileged as they were not prepared for this litigation and the subjects of the autopsy reports are dead. There can also be no argument that the autopsy reports are not relevant. This case alleges that electrocution is unconstitutional because of the pain and the damage to the body it causes. Plaintiffs' experts relied on autopsies from other states in providing the opinions submitted with the complaint in this action. Review of electrocution autopsies from South Carolina are, therefore, relevant to the litigation. Similarly, the ex post facto claim requires a comparison of lethal injection and electrocution and firing squad. Comparison of the autopsies from lethal injection and electrocution is relevant to that question. Accordingly, this Court should compel Defendants SCDC and Stirling to produce autopsy reports as requested.

Regarding the general request for any documents related to the methods of execution, Defendants object that the requests are vague, ambiguous, and overly broad. Plaintiffs disagree. Defendants SCDC and Stirling are tasked with developing protocols and carrying out executions by the statutorily authorized methods of execution. They are in control of documents related to carrying out that grave responsibility. Because each of the methods are the subject of this litigation, discovery of documents related to the methods are appropriate subjects of discovery.

To the extent the Court agrees with Defendants' objections, Plaintiffs would be willing to reform their requests as follows:

6. Please produce all documents, correspondence, photographs, and contemporaneous records (including notes and/or audio recordings) related to lethal injection executions carried out by the Defendants since 1995, to include all autopsies from prior executions by lethal injection.

12. Please produce all documents, correspondence, photographs, and contemporaneous records (including notes and/or audio recordings) related to electrocution executions carried out by the Defendants since 1977, to include all autopsies from prior executions by electrocution, testing of the electric chair.

14. Please produce all documents, correspondence, and records related to developing and/or obtaining the firing squad facility, apparatus, and weapons maintained by the Defendants.

CONCLUSION

For the reasons stated above, the Court should compel Defendants to produce discovery relevant to this litigation.

Respectfully submitted,

Dated: June 14, 2022

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2 County of Richland) Fifth Judicial Circuit
3
4 Freddie Eugene Owens, Brad) Transcript of Record
5 Keith Sigmon, Gary DuBose,)
6 Terry, and Richard Bernard)
7 Moore,)
8) 2021-CP-40-02306
9 Plaintiffs,)
10)
11 vs.)
12)
13 Bryan P. Stirling, in his)
14 official capacity as the)
15 Director of the SC Department)
16 of Corrections, and Henry D.)
17 McMaster, in his official)
18 capacity as the Governor of)
19 South Carolina,)
20)
21)
22)
23)
24)
25)
Defendants.)

June 23, 2022
Columbia, South Carolina
Via WebEx Videoconferencing

B E F O R E:

The Honorable Jocelyn Newman, Judge

A P P E A R A N C E S:

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Hannah L. Freedman, Esquire
J. Christopher Mills, Esquire
Joshua S. Kendrick, Esquire
On behalf of the Plaintiffs

Daniel C. Plyler, Esquire
On behalf of Bryan Stirling/SC Department of Corrections

Thomas A. Limehouse, Jr., Esquire
W. Grayson Lambert, Esquire
On behalf of Henry McMaster D. McMaster, Governor

Transcribed by: Stacy S. Johnson,
Circuit Court Reporter

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E X H I B I T S

NO EXHIBITS WERE INTRODUCED

1 (The following proceedings were held July 23,
2 2022, via WebEx Videoconferencing.)

3 THE COURT: ... a motion for discovery -- regarding
4 discovery.

5 MS. VANN: We filed a joint response and motion to
6 compel just on a couple of things that were objected to
7 in the discovery.

8 THE COURT: I see it now. I thought I had seen it
9 before and I just couldn't lay my eyes on it, but, yes.

10 Okay. We're good.

11 So let me hear first from defense counsel, whoever
12 that is gonna be.

13 MR. PLYLER: Judge, I think that's me. We drew
14 straws ahead of time, so.

15 THE COURT: Okay. Forge on.

16 MR. PLYLER: Thank you for -- for hearing --
17 hearing this. You know, obviously we're on a bit of
18 an accelerated timeframe with discovery in this case.

19 Judge, our -- our motion for protective order
20 essentially deals what I'm gonna call two different
21 categories of information.

22 You know, the -- the first is various categories
23 of information that although we don't believe are
24 necessarily relevant or reasonably calculated to lead
25 to discoverable -- excuse me -- admissible evidence in

1 the trial of this matter based on the pleadings and
2 the answers to interrogatories that we did eventually
3 receive, which we'll talk about in a few minutes, Judge,
4 but if -- if discovery is gonna be allowed on those
5 issues despite our arguments against their relevance,
6 there needs to be some protections in place. There needs
7 to be some confidentiality and, quite frankly, it needs
8 to be an order that had some teeth to it.

9 Obviously Your Honor's aware we're on the third
10 amended complaint.

11 THE COURT: I'm sorry, before you get into the
12 meat of your argument, I need to take a quick break.

13 MR. PLYLER: We'll call that a false start. How
14 is that?

15 THE COURT: Yeah, exactly.

16 Not that you-all care, but I'm supposed to be in
17 Kershaw this week, I finished in Kershaw and come back
18 to my office in Richland except my father is using my
19 Richland office and has just walked in and he had planned
20 to do status conferences in the office, so let me work
21 out a game plan with him really quickly.

22 MR. PLYLER: No problem.

23 THE COURT: You-all pause.

24 (Pause in proceedings.)

25 THE COURT: All right, folks. I've gotten

1 permission from my father to use my office, so we can
2 proceed.

3 Mr. Plyler, I'm listening.

4 MR. PLYLER: All right. Well, Judge, I am gonna
5 just -- I'm gonna start back just a little bit, just
6 frame the issues again. So, you know, there's basically
7 two categories of information that we -- we're talking
8 about here. One is a category of information that we
9 don't think is necessarily relevant and shouldn't --
10 would not lead -- be reasonably calculated to lead to
11 admissible evidence at the trial of this matter based
12 on the pleadings and interrogatory answers that we've
13 received, but they -- if discovery's gonna be allowed
14 into them, they need some sort of protection. They need
15 -- they need a strong confidentiality order and strong
16 teeth to that order to prevent disclosure.

17 And as I was saying right before we took the break,
18 this is the third amended complaint in this particular
19 State court matter, but there were Federal court matters.
20 I mean, we've been dealing with the majority of the
21 lawyers that are on the other side of this case and
22 either issues that are still in this matter or -- or
23 interrelated with it as the -- the statute -- you know,
24 the primary statute that we're all discussing was being
25 amended in Federal court, and one of those cases is --

1 is Mr. Sigmon's Federal case. Even Judge Har -- Harwell
2 had a hearing on it, on a motion -- their motion for
3 preliminary injunction, and denied their -- their motion,
4 a stay was issued by the State court shortly or right
5 around that timeframe which kind of prevented that
6 Sigmon case from going up on appeal at that moment, but
7 in the interim we agreed to a consent confidentiality
8 agreement with plaintiffs' counsel, including Justice
9 360. I believe Mr. King was also part of that, but
10 he's not in this case, I believe Josh Kendrick was in
11 that one as well, to -- to start sharing some of the
12 information, as long as it was gonna be held confidential,
13 that they claim they needed to be able to advise their
14 clients as they were being asked to make selections of
15 the method of execution; that the -- the election forms
16 were gonna become an issue and they said they needed this
17 information to advise their clients so we -- we agreed to
18 some consent confidentiality stuff.

19 When -- when this case was filed and we reached
20 this third amended complaint, that iteration of the
21 pleadings, we all started talking and -- and I mentioned
22 to Josh, and we have the e-mail exchanges that I can
23 provide to the Court, as early as April, that we were
24 probably gonna need some confidentiality because I know
25 you-all are gonna want to do some discovery and we're --

1 we can't share it without that.

2 Well, as kind of a parallel track, Judge, and
3 this is important because I -- I don't want you to
4 think we were not willing to try to work out some sort
5 of confidentiality agreement with the other side.
6 Initially we were trying to basically do what we're
7 asking you to do today but without having to, you know,
8 get the Court to intervene.

9 Well, in parallel litigation that's pending in
10 front of the Fourth Circuit currently, Justice 360
11 actually used the fact that we had shared information
12 under a confidentiality order in the Sigmon case to
13 argue that now they have a First Amendment right to
14 share it with whoever they want and that we became
15 willing speakers by sharing that information to them
16 in discovery and they can use it however they want and
17 to stop them would be violating their First Amendment
18 rights.

19 I don't know if I have the ability to screen share,
20 Your Honor, but I even have the opinion pulled up. I
21 can -- it's U.S.C. Court of Appeals Fourth. The -- the
22 -- the appellate docket number is 21-2205.

23 In the oral arguments that were in front of the
24 Fourth Circuit, I believe that was late May, early June,
25 but I can get the date later, they -- they made those

1 oral arguments and claimed that because we had shared
2 it under a consent confidentiality order in discovery
3 that we were willing speakers and they had a First
4 Amendment right to use it as they see fit. Obviously
5 that concerns us.

6 Secondly, Your Honor, they previously had asked
7 to do a video interview of Mr. Moore to be used for a
8 clemency petition. So to petition to the governor to
9 ask for clemency for Mr. Moore they wanted to video an
10 interview of him. SCDC almost never allows inmates to
11 be video interviewed for a myriad of reasons. They
12 allowed it, but under -- there's an -- and I've got the
13 e-mail exchanges if we need to get into it, under the --
14 the understanding that it would only be used for that
15 petition, would not be widely shared, wouldn't be
16 disclosed to people outside the petition. Well, then
17 we see two media reports, one national news and one
18 local news, with the video being played with a stamp on
19 it saying courtesy of Justice 360. So we -- we're at a
20 position where we can't just work this out with them
21 because every time we try to it gets used against us.

22 So if some of this information we're gonna be
23 talking about today is gonna be allowed to be
24 discoverable, we're gonna need a very strong
25 confidentiality order and it's gonna have to have

1 some teeth to it. So the -- the -- the majority of
2 the stuff that -- that the motion for protective order
3 is about falls into that first category.

4 The second category is information that we just
5 don't think under any circumstances should be disclosed,
6 it's not relevant to the case, and as you can see --
7 or at least it's our position you can see from the
8 affidavit of Mr. Rushton, as well as just some -- what
9 I believe are common sense arguments and -- and logical
10 reasoning, it would create some real dangers and some
11 very real safety and security concerns for employees
12 at the Department of Corrections, for vendors that the
13 Department of Corrections either works with or attempts
14 to work with and -- and basically anybody that is
15 associated with the process.

16 The first one of that is anything that might not
17 necessarily just disclose the identity of a member of
18 the execution team, but it would narrow it down -- you
19 know, it would allow you to narrow down a -- a field of
20 potential candidates to a point that it would be easy
21 to figure out who's -- who it is.

22 I mean, Judge, it would be like me not saying
23 Grayson Lambert, but -- but me saying to you, Judge,
24 it's the one person on the call who's wearing a bowtie.
25 You know, it would narrow it down where it wouldn't be

1 hard to figure out who the person is and the fact that
2 that information could be shared in this case. For
3 instance, they want all the qualifications and training
4 and all that sort of stuff for anybody that's eligible
5 to be a -- a member of the execution team or on the
6 execution team. They could then in FOIA requests outside
7 of this litigation send targeted FOIA requests asking
8 for a listing of all employees of the Department of
9 Corrections that have the following qualifications and
10 it would -- it would -- they could get the names, they
11 could figure it out, they -- it would not be hard to
12 boil it down and, quite frankly, the case they've pled,
13 it's not relevant.

14 Your Honor, obviously discovery is targeted,
15 especially on the defense side, to narrow the issues
16 and figure out what it is you're actually saying my
17 client did wrong or what the -- what are the allegations
18 you're making against my client. So we sent very
19 targeted interrogatories in this case and as Your Honor
20 knows there is a motion to compel pending that we filed.
21 I believe that's essentially moot at this point. I do
22 think I have one or two issues maybe at the end of the
23 hearing we can talk about that -- that you could help
24 push this along, but they did respond to them after we
25 filed the motion to compel.

1 I'm gonna -- I'm gonna get -- I'm gonna walk
2 you down kind of a series of -- of three sets of
3 interrogatories we asked. One that we asked was are
4 you saying that under all circumstances electrocution
5 would violate the South Carolina Constitution and their
6 answer was yes. The follow-up interrogatory that we
7 asked was if your answer is not yes, tell us the
8 protocols and procedures that you believe would be a --
9 a constitutionally valid electrocution, so obviously
10 they said that's not applicable because their position
11 is under all circumstances it violates the -- the
12 constitution. It doesn't matter how we plan on doing
13 it, it doesn't matter how well trained our people are,
14 it doesn't matter what equipment we're gonna use, what
15 protective measures we have in place, it's always
16 unconstitutional.

17 We asked the same series of questions with firing
18 squad. Same answers. Under their -- their -- their --
19 their answers to interrogatories, their pleadings in
20 this case, what they're alleg -- they're gonna try to
21 prove at trial is it's always unconstitutional. It
22 does not matter even if it's carried off perfectly.

23 With lethal injection we asked the same series.
24 They said no. And, of course, a lot of that has to do
25 with, and I'm sure Your Honor's aware, the prevailing

1 analysis comes -- comes down from the U.S. Supreme
2 Court when you're challenging the method -- the
3 constitutionality of a method of execution that you're
4 gonna have to -- you have the burden as the person
5 challenging it to offer a readily available and
6 implemented -- readily implemented alternative that
7 would substantially reduce a -- a -- what is it --
8 significant risk of serious harm.

9 So it's their burden to show avail -- that it's
10 available, that there is an alternative that is
11 available, and in this case what they allege is a
12 single dose of pentobarbital would be the
13 constitutionally available and implemented alternative.

14 So we -- we asked that question. Well, tell us
15 what the protocols would be and the answer is, you know,
16 an FDA-approved single dose of pentobarbital provided
17 that Fentanyl or some other pain relieving initial drug
18 -- I mean, it's -- it's very detailed. It's not the
19 protocol SCDC has, and they know that.

20 So then another interrogatory we asked was if
21 you're aware of anybody that can legally sell
22 pentobarbital to the South Carolina Department of
23 Corrections, tell us who it is, give us their contact
24 information, and their response to that was we're not
25 aware of any source.

1 The reason I walk you through those interrogatory
2 answers is I believe we've narrowed the scope quite a
3 bit on what this trial should be about because we have
4 a right to rely on those interrogatory answers and we
5 have a right to rely on their complaint.

6 Since electrocution and firing squad in their
7 position is always unconstitutional, then anything that
8 might lead to an identification or narrow the pool of
9 -- of potentials about members of the execution team
10 serves absolutely no purpose in this case and we don't
11 need to even risk that information getting out for of
12 the myriad of reasons we've provided through affidavit
13 and that you can take judicial notice of just from
14 either common sense or, you know, other filings that
15 have been made, opinions that have been held by the
16 Federal courts.

17 Secondly, and it takes me to the -- the other
18 part of that category of information we just don't
19 think should be disclosed at all, is -- is their
20 wide-ranging and attempts to deep dive into all the
21 efforts the Department of Corrections has ever made to
22 try to get their hands on lethal injection drugs.

23 And you -- and you've already heard some of this
24 previously. You know, their position is that the
25 Department essentially has to prove that it's not

1 available, which clearly, Your Honor, given the
2 prevailing analysis, what we're supposed to be looking
3 at, would be burden shifting.

4 Secondly, we all know this. There's a reason we
5 don't require people to prove the negative. It's
6 impossible to prove a negative. You know, it's like
7 when I argue with one of my children and I tell them
8 something and they say why and I answer their question
9 and the next question is why and then I answer that
10 question and the next question is why, and they can do
11 that forever, and that's exactly what would happen if
12 we start going down this route.

13 So not -- you know, with these -- these efforts to
14 obtain lethal injection drugs, one, it would be burden
15 shifting; two, we've already provided what the statute
16 requires, which is an affidavit of the director of the
17 Department of Corrections certifying that it's not
18 available; three, the -- you -- you can pick from a
19 handful of U.S. Supreme Court opinions, and I'm not
20 talking historically, I'm talking within the last two
21 years, that have -- that have said this is a nationwide
22 issue. Departments of corrections across the country
23 are unable to get their hands on lethal injection drugs
24 mainly because of lobbying efforts of anti-death --
25 anti-death penalty advocacy groups.

1 So this is not like the Department of Corrections
2 of South Carolina is the only place in the world that's
3 not able to get this. In fact, the ones they point to
4 or suggest to in their complaint are in states where
5 there is a secrecy statute that specifically says that
6 information can't be disclosed to anybody and those are
7 the states that seem to be able to get their hands on
8 these sort of drugs.

9 So it would be burden shifting and that shouldn't
10 be required. There's no way to prove it and, I mean,
11 we're not required to prove a negative.

12 And then lastly, Judge, the statute -- and we
13 all know this, this is something that you can take
14 judicial notice of, the only reason the General
15 Assembly amended the methods of execution statute was
16 to remove impediments to death sentences being carried
17 out. That when you had exhausted all your appeals, we
18 were unable to carry out the sentence that's been handed
19 down and -- that the jury had determined and the judge
20 had handed down because of the unavailability of these
21 drugs. It was not created -- they didn't pass it to
22 create a new layer of litigation, to create some new
23 impediment to moving forward with executions. We know
24 that. The legislative intent was to reduce, to remove
25 impediments. If plaintiffs are allowed to start doing

1 some deep dive into all the various efforts that were
2 done by various people at the Department of Corrections,
3 I think the request says since 2012, then you're
4 essentially going to allow a mini trial, a new layer of
5 litigation, every single time an execution notice is
6 issued. And I'm not talking about the first time it's
7 issued for a condemned person. I'm talking about every
8 time it's issued. If some stay is -- is issued, six to
9 eight months go by, a new execution notice is issued,
10 that's a brand new layer of litigation because they
11 could just say well, what have you done in the last six
12 to eight months to try to find any of these drugs and
13 they could start trying to take depositions and do
14 discovery like they're trying to do in this case. The
15 statute clearly never intended that, that you shouldn't
16 allow it, it's burden shifting, it's not relevant to
17 the case they've actually brought. We've already asked
18 them in interrogatories that if you're -- if you're
19 aware of a source that can legally provide pentobarbital
20 to the -- the Department of Corrections of South
21 Carolina, tell us who it is.

22 And, Judge, we've sent -- we've sent a letter, and
23 this was -- this was a long time ago at this point or at
24 least it feels that way, as Exhibit 5 to our motion for
25 protective order. It's dated November 20th of 2020, so

1 we're almost two years ago. It was in the Richard
2 Bernard Moore case that was actually -- I think they
3 attempted to file it in the original jurisdiction of
4 the South Carolina Supreme Court. One of the things
5 they said they needed to know was the protocols for
6 lethal injection so that they could then advise their
7 client. I mean, that was kind of the same argument we
8 dealt with in Sigmon. So we sent them a letter and it
9 says the current lethal injection protocol is a
10 three-drug protocol, it lists the three drugs. It also
11 says it's a similar three-drug protocol to -- to what
12 the State of Kentucky was -- was using, at least in 2008,
13 and that was found to be constitutional by the United
14 States Supreme Court. We then said they reserve -- we
15 reserve the right to amend it if we're unable to secure
16 the drugs needed for that protocol and -- and enact a
17 one-drug protocol, and the reason is the Federal Bureau
18 of Prisons was using a one-drug protocol and it is a
19 single dose of pentobarbital. We told them we're willing
20 to adopt that. We're not -- we're not unwilling to adopt
21 a single dose of pentobarbital lethal injection protocol.
22 We just can't get the drug. It's not available.

23 It's like if I go Colorado, I can buy marijuana,
24 right? In South Carolina I can't, it's not available
25 in South Carolina because it's illegal because of the

1 legis -- the -- the red tape and F -- DEA requirements.
2 I mean, there's all sorts of layers of -- of impediments
3 that are preventing us without a secrecy statute from
4 getting these drugs and under the prevailing analysis
5 plaintiffs in this case are gonna have to show that it
6 is available.

7 We've asked them in interrogatories, which you know
8 that's sworn, it's supposed to be sworn testimony, what
9 I can use as evidence in a case, and it says they're not
10 aware of any source that can provide you pentobarbital.
11 If that's not -- especially in the backdrop -- I mean,
12 just look at Barr v. Lee or the -- the Glossip case
13 where the United States Supreme Court has recognized
14 it's not -- they're not available, these drugs are not
15 available. The position statements of every major
16 manufacturer of pharmaceuticals it seems like in the
17 word are in there. There's amicus briefs in there
18 explaining position statements in the industry. These
19 drugs are not available and their interrogatory answer
20 even says it. So diving into well, what efforts did you
21 do to try to find these, one, it's irrelevant and, two,
22 it's burden shifting.

23 Lastly, Judge, it contributes to the chilling effect
24 of people not being willing to partis -- to provide those
25 drugs to any Department of Corrections, but specific --

1 specifically South Carolina. When they hear about things
2 like a hearing in this case and their identity is being
3 disclosed to agen -- to entities like Justice 360 or --
4 or a colleague's identity is being disclosed to somebody
5 like Justice 360, it shields their -- their desire to
6 even consider talking to us and providing the drugs, and
7 that's something that is -- that's not a secret. This
8 is not a South Carolina only problem.

9 So with -- with the discovery requests, and they're
10 outlined in the motion for protective order, that -- that
11 either asks for identi -- identities of the members of
12 the election -- execution team, excuse me, or that would
13 narrow the pool to the point where it would be easy to
14 figure out, especially through like FOIA requests or
15 discovery in other litigation outside of your -- of this
16 litigation, that should not be allowed. It's not
17 relevant. It creates all sorts of security and safety
18 concerns and -- and it just should not be allowed under
19 any circumstances.

20 We take the same position with regards to their
21 efforts to try to find out what -- what have you done to
22 try to secure the drugs. It's -- it's got some of the
23 same problems. It's also not relevant to the case they
24 pled and it's burden shifting. It shouldn't be allowed.

25 So I -- the rest of it, Judge, I believe it's pretty

1 clearly outlined in the motion for protective order. I
2 did want to tell you why we at this stage didn't feel
3 like we could just work something out with plaintiffs
4 counsel. There were some efforts there, but just given
5 the changing landscape, I think it's gonna have to be a
6 court order on any of this, on any of the information
7 that -- that -- that we've held back at this point, but
8 that you decide is discoverable, it's gonna need that
9 sort of confidentiality and protection.

10 I believe those are the -- the main points I needed
11 to cover with you, Judge. Obviously I'm answering --
12 I'm here to answer any questions you might have.

13 Mr. Lambert's here for the Governor's office. He may
14 have something he needs to add to that because they've
15 -- you know, they've joined in these motions as well.
16 So I'll -- I'll -- I'll step away from the mic at this
17 point.

18 Thank you, Judge.

19 MR. LAMBERT: Judge Newman, I'm gonna be very
20 brief with -- I agree with everything Daniel said and
21 -- and join that. The one piece I think I would point
22 to, and this is to do with the Department of Corrections'
23 motion to compel, but I would note that one of the
24 objections the plaintiffs had in their -- in response
25 to the Department's request for production was any

1 communications that the plaintiffs or their lawyers had
2 had with any third parties related to efforts to obtain
3 drugs or -- or any pharmaceutical companies that sell
4 drugs and they said that wasn't relevant to this case.
5 It seems to me that if they're gonna say the Department's
6 efforts are relevant, their -- any efforts they have on
7 the same side are, too. So however you decide that it
8 needs to go the same way for both parties.

9 With that, we would urge you just to keep in mind
10 with the confidentiality issues here, the security
11 issues involved, and whatever you do ensure that steps
12 are taken that information that needs to be protected is
13 sufficiently protected and that information that under
14 the 24-3-580 about identities of individuals that are
15 part of the execution team, that that statute allows for
16 discovery under seal, it does not allow for any -- any
17 such disclosures at trial, so whatever you decide in this
18 I -- I urge you to think with an eye towards how would
19 this be used and how would this be admitted at trial in
20 a courtroom, particularly an open courtroom, so that we
21 aren't putting ourselves in an awkward position to figure
22 out things in a pre-trial conference.

23 THE COURT: Who do we have? Ms. Freedman?
24 Ms. Vann? Mr. Kendrick? I don't know.

25 MS. VANN: Good morning, Your Honor. It will be me

1 this morning. We drew straws on our end, too. So thank
2 you -- again, thank you for taking up these matters. I
3 will try to go in the order that Mr. Plyler went, but I
4 may get a little out of order with my own outline. But
5 I think the confidentiality issue is probably the first
6 thing to address and -- and I think one thing that just
7 is important for you to know is that, you know, he said
8 that this has been going on in the Sigmon litigation and
9 the protocols were provided under a confidentiality
10 agreement in the Sigmon litigation to myself and
11 Mr. Kendrick, who are on this call, Ms. Freedman and I
12 also received protocols in the Moore litigation under
13 the same confidentiality agreement, and there have been
14 no allegations that we have released any of that
15 information, we certainly have not released any of that
16 information, we have complied fully with that agreement,
17 so we don't think that it's necessary that the protocols
18 be kept confidential. Prior confi -- or prior protocols
19 have been released and have not led to issues, but we
20 have in other litigation agreed to confidentiality,
21 we're willing to agree to confidentiality for the
22 protocol materials in this litigation, and so we would
23 agree to an order by the Court if that's what you feel
24 is necessary, but we have been in compliance with --
25 for many months with prior vers -- or at least at that

1 time current versions of the protocols.

2 With regard to the video in Richard Moore's case,
3 I just want to respond briefly to that. That is
4 obviously a collateral issue to what is here before the
5 Court today, that being Mr. Moore's underlying death
6 penalty litigation. We have a disagreement over whether
7 we actually came to an agreement over who controlled
8 the video once we were able to make that video in the
9 Department of Corrections and we are appreciative that
10 we were able to film Mr. Moore, but we don't think that
11 we came to a meeting of the minds that there was an
12 agreement that we would never release that. Obviously
13 clemency proceedings become public at some point and --
14 and so I'm sorry that we have a disagreement, but I
15 think that is collateral to the issues that are before
16 the Court today.

17 In -- in terms of relevance of the protocols and,
18 you know, for all three stat -- statutorily authorized
19 methods, I'll start with electrocution and firing
20 squad. I think those ones are very clearly relevant and
21 necessary to the litigation here. It appears from the
22 defendant's responses that they have provided those
23 protocols to their experts, so they by doing that have
24 identified those as relevant to their experts'
25 consideration. If we don't have access to that

1 information and our experts don't have access to that
2 information, they're all really gonna be talking past
3 each other and won't be able to kind of test their
4 opinions and by their defense saying that they don't
5 agree that electrocution and firing squad are
6 unconstitutional in all circumstances, they've
7 necessarily said that they have a constitutional way
8 to carry out electrocution and firing squad and so the
9 issue that will end up being before the Court in trial
10 is, is it unconstitutional in all circumstances, is it
11 constitutional in the way that SCDC plans to carry out
12 those execution methods, and that really can't be decided
13 if those protocols are not provided.

14 Lethal injection protocols --

15 THE COURT: Time out. Let me ask is that going to
16 be the issue before the Court? Because if your response
17 is under no circumstances could this ever be carried out
18 in a constitutional way, if that's the plaintiff's
19 position, then what does it matter what protocols they
20 use? They could use the best, the worse, somewhere in
21 between. I'm -- I'm confused as to how that would be the
22 issue before the Court if it appears from your discovery
23 responses that the plaintiffs don't take that position.

24 MS. VANN: Well, we have -- you know, our experts
25 have issued opinions and we have provided that with our

1 complaint saying that this is how electrocution and
2 firing squad are typically carried out around the
3 country and that that causes damage to the body, that
4 causes severe pain and that -- and we have used those
5 opinions to argue that it's unconstitutional.

6 In answer, the defendants have said it's not
7 unconstitutional and so presumably they say that the way
8 that they have come up with to carry out that execution
9 method is a constitutional way of carrying both out and
10 so it's kind of -- the Court will have to decide between
11 those two positions and the question in discovery is,
12 is it relevant to the claims or defenses that will be
13 raised?

14 And I think the other point is that it has been
15 given to their experts and so if our experts aren't able
16 to review their protocols, you know, we're really gonna
17 be speaking apples and oranges, you know, without our
18 experts being able to evaluate what SCDC plans to do.

19 THE COURT: Okay. Let me make sure I understand.
20 What you're saying is -- what I hear you saying is
21 that the plaintiff's position is every execution -- or
22 every protocol that we've ever heard of to perform this
23 kind of execution would be unconstitutional, SCDC says
24 ah-ha, but we have a constitutional way and you -- your
25 question is well, what is it? Maybe it is con -- we

1 don't know. I mean, we've never heard -- we don't
2 even know what you're talking about, so maybe you
3 have created some new, unique constitutional method of
4 doing it, but we need to know what it is so that we can
5 determine whether our argument applies to that method,
6 too. Like yeah, we were right, even that method is not
7 constitutional even though you claim that it is because
8 your method is special and new or different or something
9 we haven't hear of.

10 Am I hearing you correctly?

11 MS. VANN: Yes, Your Honor. And, you know, our
12 experts have said this is how it's typically done and if
13 -- if SCDC plans to do it in a different way, I think we
14 need to be able to compare from how it's typically done
15 around the country and what their opinions are based on
16 and be able to see how SCDC plans to carry out the
17 execution.

18 THE COURT: Continue.

19 MS. VANN: Thank you.

20 And the lethal injection protocol I would say is
21 also is relevant and necessary, especially to the
22 ex post facto claim that is still a part of this
23 litigation, this isn't solely about the underlying
24 just constitutional issue, so the ex post facto claim
25 requires a comparison between the old default method,

1 which is lethal injection, and the new methods that
2 they're saying are the only way they can carry out
3 executions, which is electrocution and firing squad,
4 and so that requires a comparative analysis between
5 lethal injection and firing squad.

6 If there aren't other -- other questions on that,
7 I'll move to the attempt to obtain lethal injection
8 drugs. I think the arguments on this issue are an
9 attempt to relitigate the motion to dismiss. You know,
10 we -- these arguments were all made at the motion to
11 dismiss hearing, the Court denied the motion to dismiss
12 and let all of the claims go forward and ordered us to
13 carry out discovery and so we have asked for discovery
14 on the claims that are still part of this litigation,
15 which is all of the claims that we initially raised.

16 Count 4 of the complaint alleges that SCDC has
17 failed to comply with the requirements of the statute
18 by not making sufficient efforts to obtain lethal
19 injection drugs. Obviously their efforts to obtain
20 lethal injection drugs are directly relevant and
21 necessary to litigate that claim. The defendants have
22 made statements in the -- their certification documents
23 and in other pleadings that they have made numerous and
24 diligent efforts to obtain lethal injection drugs, so
25 there must be some responsive documents that they have

1 not turned over and that needs to be turned over to be
2 able to litigate this claim.

3 In terms of the burden shifting argument that
4 Mr. Plyler raised, I think there are two points there.
5 So the argument that we have to prove an available
6 alternative is the standard under the Federal Eighth
7 Amendment to the U.S. Constitution. That's not been
8 stated to be a requirement under the State constitution
9 and the State constitutional claims are what are before
10 this Court and so there is no precedent for there being
11 a burden that we demonstrate that there is an available
12 alternative, although we do argue that a single dose of
13 pentobarbital is a -- a less burdensome meth -- method
14 and -- and simply put it is not our burden to prove
15 that there is a supplier, that there is a way for SCDC
16 to get the drugs. The question is have they put forth
17 any effort to get the drugs and they've said they have,
18 but we have no documentation to prove that.

19 Similarly, I think the arguments over future
20 litigation on this issue are overblown. This is a
21 unique case. This is a case where this Court and the
22 Supreme Court have recognized that there are novel issues
23 under this new statute that was just adopted a year ago
24 and those circumstances will not exist in future cases
25 and so, you know, this is a case that has gotten past

1 the motion to dismiss stage, this is a case where we've
2 been ordered to go forward with factual development and
3 a trial and so this, too, is unique and different from
4 what cases will look like in the future and so I think
5 it's not accurate to say that necessarily discovery in
6 this case is going to lead to the same amounts of
7 discovery in other cases.

8 And then in terms of the execution team members,
9 we have specifically said that we understand that you
10 would redact the identities and -- of individuals who
11 are on the execution team and -- but we have asked for
12 information on efforts to recruit, identify, select and
13 train individuals for carrying out the execution methods,
14 and for the same reason that the protocols are relevant
15 to this litigation, the training and the selection of
16 people who are on the execution team is relevant to how
17 SCDC plans to carry out the executions and to whether
18 that creates a constitutional violation, and so we don't
19 think that it's true that every single piece of
20 information about who's on the execution team or how
21 they were recruited or what training they were provided
22 after they were recruited would necessarily lead to their
23 identification, but the statute also provides -- and the
24 statute is 24-3-580, that if there is information that
25 would lead to the disclosure of the identities it can be

1 provided under seal under a court order and so that
2 information could still be provided, you know, with
3 protections of the identities of who is on the team.

4 I also wanted to respond to something that
5 Mr. Lambert said about communication efforts that we
6 have made with third parties to obtain -- or to find
7 suppliers of the lethal injection drugs and our response
8 was not an objection to that information or an argument
9 that it was irrelevant, we said no documents responsive
10 to the request exists, so we did not provide anything
11 but that's because we have not made those efforts. It's
12 not our duty to find the lethal injection drugs, it is
13 SCDC's. They have been tasked with carrying out the
14 executions.

15 THE COURT: I want to go back to your argument
16 about the qualifications or -- I guess the qualifications
17 of people who would carry out the executions. I think
18 maybe I didn't understand your argument. How is that
19 relevant to whether the protocol, the method, is
20 constitutional?

21 MS. VANN: Well, in the same way that, you know,
22 how they plan to carry out the executions, the protocols,
23 are relevant, I think who and what training they have
24 of the execution team members is also relevant. For
25 example, you could imagine that maybe like somebody who

1 is just hired by SCDC straight out of college, has no
2 marksmanship training is selected for the firing squad
3 and they receive no training, that would be relevant
4 to how the execution is carried out and the
5 constitutionality of that method, you know, however,
6 there could be some training provided, perhaps you're
7 hiring expert marksmen, that you are training them to
8 prepare for carrying out the executions themselves and
9 so, you know, it -- it basically comes down to how does
10 SCCD -- SCDC plan to carry out the executions and the
11 training of the personnel involved is relevant to that.

12 THE COURT: So are you looking for individual
13 histories or the training, skill and experience of each
14 individual or more broadly the qualifications for this
15 job? Like if they were putting an ad in the -- I
16 started to say in the newspaper. Do people still do
17 that? I doubt it, but, you know, if they were listed
18 on Indeed, what you have to -- what the requirements
19 are to fill this position. Is that what you're looking
20 for? You must have, you know, a college education,
21 you must have forty hours of training in firearms,
22 tactical, whatever is -- which of the two is it?
23 Specific people's training? Do you want to know that
24 John Doe went to USC and graduated on this date and
25 then he went to the Academy and did this and -- which

1 category of things are we looking for?

2 MS. VANN: I -- I think it's the -- the first
3 category that we're looking for, kind of the general
4 qualifications, but perhaps it's kind of in the middle
5 of the two categories that you provided, that, you know,
6 the specific training that is given to those individuals
7 is relevant. You know, what is the training to carry
8 out the execution method? They're -- you know, in the
9 botched executions that we've reviewed, operator error
10 is one of the things that has led to botched executions
11 and so the training that SCDC is providing to be able
12 to fulfill the tasks that they are recruited for is
13 necessary to this litigation.

14 THE COURT: But if the allegation is that
15 execution -- or I'm mixing up my words -- the firing
16 squad. Sorry. The firing squad is not a constitutional
17 method, then what does it matter? Your -- your claim is
18 not one of, I don't know, negligent hiring, training,
19 supervision. It's not that this specific person is
20 not qualified to do it, it's that whoever does, you
21 could have the most qualified person do it and it's
22 still not constitutional, so what does it matter what
23 the individual qualifications of the -- the personnel
24 are?

25 MS. VANN: I think that goes back to our earlier

1 discussion of, you know, we've said it's unconstitutional
2 in all circumstances, they say they've come up with a
3 constitutional way to carry it out, and part of how it's
4 carried out is who they select to do it. I mean, the
5 execution team has to carry out the firing squad and
6 carry out -- put together the electric chair, strap the
7 person in, what kind of training they had to do that
8 falls into how SCDC plans to carry out the execution
9 and how it compares to kind of the typical training that
10 our experts are assuming in the protocols that we have
11 seen from other states around the country.

12 THE COURT: Maybe. Maybe. I mean, because as I
13 see it, if your argument is shooting somebody to death
14 is unconstitutional, if -- I don't know if it matters
15 who shoots them. I could do it, you could do it, you
16 could hand a toddler the gun, I don't know, you know,
17 not that you would, of course, but if the shooting is
18 what is unconstitutional, then I -- I don't see how
19 the qualification of the person matters unless SCDC
20 is saying what makes our shootings constitutional is
21 that we have Army Rangers doing it or, your know,
22 sharpshooters that are the top of the government or
23 whatever, if that is their response, well, you don't
24 know who we have doing it and how they can do it
25 differently than you've ever heard, then that might be

1 relevant, but unless that's their argument, how do we
2 get to qualifications?

3 MS. VANN: Well, I think two answers to that. One
4 is we don't know what SCDC's reasoning is for saying
5 that their method is constitutional. We -- because
6 haven't seen the protocol, we don't know what the
7 qualifications of these people are, so we don't know
8 the answer to that question. And I think the second
9 answer is that without this kind of information, the
10 question before you at a trial would be assuming the
11 least competent people, assuming the worst possible
12 protocol, you know, is this constitutional or not? And
13 so I think that if you -- you know, if we want to make
14 those assumptions that this is gonna be an unqualified
15 team of executioners, that the protocol is, you know,
16 kind of the worst we've seen around the country, then,
17 you know, maybe it's not relevant, but if they are
18 saying that there is a way to carry this out with
19 qualified people with sufficient protocols and
20 sufficient procedures, then that needs to be disclosed
21 and something that, you know, can be before the Court
22 to give you a full factual basis to determine.

23 MR. MILLS: Your Honor, if I -- if I might just
24 make a -- a point on that. Using your example about
25 giving a toddler or an inexperienced person the gun,

1 despite us taking the position that it's always
2 unconstitutional, the Court would want to hear the
3 evidence. Well, if you really do have inexperienced
4 people and the chance of missing or not doing a
5 successful thing, then that would be unconstitutional
6 as you do them even though there could potentially be
7 a way. So even though our argument there, that does
8 not mute out the relevance of what they do because if
9 you take the position oh, no discovery that means we
10 could have anybody doing it and it's cool and it is not
11 subject to review and so I think the issue's gonna be
12 is who you've got, how are they trained, can they do
13 it in the way that you're claiming you can do it. It's
14 not gonna be the first time in my experience where
15 people have listed down here's our qualifications and
16 the people who do it don't actually have that training
17 or don't even have that, you know. I see that all the
18 time. So I just think that's part of the discovery
19 here that they're gonna have to respond to and make the
20 proof of that they've got there, and it could be that
21 instance. I know in one of our instances we have an
22 inmate with specific physical attributes that could
23 cause complications, so there are certain things that
24 could be peculiar to an individual that causes a -- a
25 firing squad to be more risky or a higher level.

1 THE COURT: I hear you. I just feel -- I'm
2 trying to get to where you are, Mr. Mills and Ms. Vann,
3 but with your discovery response that no, under no
4 circumstances is it constitutional, I think that sort
5 of moots anything else, you know?

6 MR. PLYLER: It does.

7 THE COURT: We're talking about protocol,
8 procedure. If you were making, I don't know, let's --
9 let's say that you are -- oh, goodness, what was the
10 man's name? Giddeon? Was it Clearance Giddeon and the
11 Miranda v. Ar -- no, I'm mixing --

12 MR. MILLS: Last time we got into right to counsel.
13 It's Giddeon.

14 THE COURT: Exactly. Thank you. Not Miranda, but,
15 yes, right to counsel is Giddeon. Right if you're --
16 it's one thing if your issue is the right to counsel,
17 the protocol of how we treat the detained person, the
18 accused, it's something else to say well, the person
19 that is representing Mr. Giddeon is not competent,
20 that's a whole separate case; is the not? The question
21 of a right to counsel is one thing, and you have a right
22 to competent counsel, but if -- if you're talking about
23 the competence of the counsel that is appointed, you're
24 in a different court in a different kind of case on a
25 different time.

1 So I don't know if that's a good analogy or a bad
2 analogy. You-all help me to understand. I mean, I'm --
3 because I'm really -- I'm following SCDC and I'm not yet
4 persuaded by plaintiffs, and maybe I won't be. I mean,
5 maybe that's my -- my ruling, I don't know, but I'm --
6 I'd like you-all to help me.

7 MR. KENDRICK: Judge, and I hate to jump in and
8 jump around with people, but -- but your analogy kind
9 of struck me as something to explore. You are correct
10 if you intend to rule in our favor. That it really
11 makes no difference. If you are going to find that
12 these methods are always unconstitutional, then it
13 really makes no difference how they do it. The concern
14 is if you rule the other way and that goes up to the
15 Supreme Court and what they are left with is you finding
16 the general idea of a firing squad or electrocution is
17 constitutional on claims that are relatively novel based
18 on what this Court and the Supreme Court have said, then
19 how do they have a record to review that decision, and
20 I think -- I think that's the problem; that whether or
21 not it is unconstitutional has to do with how the person
22 dies and if we don't know the answer to that question,
23 then the only ruling that would logically follow the
24 lack of facts would be an agreement that I don't care
25 how it happens, it's just not unconstitutional. In

1 other words, if we're right, you may be correct; however,
2 if we are wrong, then what record would you base it on
3 other than kind of a philosophical idea that this method
4 of execution without any details is constitutional, which
5 hasn't been decided.

6 So I -- I think that's why the analogy is -- and I
7 don't mind telling you, it works if we're winning. It
8 works if you're ruling in our favor because if you're
9 ruling in our favor it doesn't really matter. If you
10 agree with us, there's no set of facts. If you wanted
11 to go and do anything else, which means consider their
12 side, I think you have to know how they're gonna do it;
13 otherwise, I don't think that any court has ever said
14 execution is fine, it doesn't matter how you do it,
15 just it's fine. The question then --

16 MR. PLYLER: Well, Your Honor, I'm biting my tongue
17 over here. I'm trying.

18 MR. KENDRICK: That's -- I mean, I'll be quiet. I
19 don't mind getting interrupted. I'll be quiet and let
20 -- let Daniel --

21 THE COURT: I would like for you to finish your
22 thought. Mr. Plyler knows better. He's --

23 MR. PLYLER: And --

24 MR. KENDRICK: I think that that's the real issue
25 here is that we all know that the -- the sort of the

1 elephant in the room, if you will, is that the Supreme
2 Court is expecting us to send them a record that they
3 can do something with. So if we get up there and the
4 Supreme Court says well, firing squads might or might
5 not be unconstitutional, just -- just like other methods
6 have likely been found or could be found and if they get
7 that and say well, we don't -- we don't agree that it's
8 always constitutional no matter what, then we come back
9 here and I think the opportunity that we've been given
10 is to develop the facts this time. It actually gets rid
11 of -- of the concern that I think the other side has
12 about ongoing litigation. Will there be further
13 litigation? Sure, we're lawyers, but as we resolve
14 issues we end up with clear case law so that if it's
15 in front of you, you can say based on this case, here
16 are the factors the Supreme Court has given me, case
17 dismissed, case not dismissed, but without that
18 development we don't have a record and we don't have
19 any resolution to these issues. It just doesn't --
20 again, it makes sense if we're gonna win and you're
21 going to agree and the Supreme Court's gonna says it's
22 never constitutional, but there's no way that the
23 opposite could be true where it would say it's always
24 constitutional. In other words, no matter how you do
25 it, you let them go and shoot each other, any -- any

1 definition of firing squad, and I'm not being flippant
2 and I don't mean to sound that way, but if -- if there
3 is no floor to the way it could be done and -- and
4 that's why I think we have to know where is the floor
5 so that there is some guidance moving forward -- you
6 know, we win and there's -- this is never an issue again
7 or we lose and you have given SCDC some understanding of
8 how they can correctly do it.

9 That's -- that's all I had to say. I'm sorry we're
10 jumping all the around, but it's just to save from going
11 back and forth. I'll be quiet.

12 THE COURT: That was very helpful actually. I
13 appreciate that, but the wheels are turning.

14 Mr. Plyler, now you.

15 MR. PLYLER: Thank you, Judge. I apologize. I --
16 I literally bit my tongue. It was a blurt. That's why I
17 normally keep myself on mute, so apologies, Your Honor.

18 THE COURT: Yes, sir.

19 MR. PLYLER: First off, they're confusing two
20 issues and that's why I tried to start this argument with
21 two different categories of information. They're right.
22 We've produced protocols to them. In the protocols, we
23 give you the general sense of, you know, SCDC is not
24 planning on shooting this person in the foot and watching
25 them bleed out. Like that information would be in there,

1 but that's not what you were asking about a moment ago.
2 What you were asking about is detailed information about
3 the individual members of the execution team, which is
4 what they're seeking, and which they should never be
5 allowed to have.

6 They didn't bring a case. They could have pled in
7 the alternative. It's not hard. It's allowed by the
8 rules. They, first off, we say under all circumstances
9 firing squad and electrocution is unconstitutional and
10 here's the reasons; however, even if there is some way
11 that the courts believe it is constitutional, the way
12 SCDC is planning on doing it, we believe, is
13 unconstitutional. They could have pled that. They
14 didn't. They could have said it in their interrogatory
15 answers. They didn't. And they keep saying that we're
16 gonna have to come in and prove that we've created a new
17 way of doing this that is constitutional, it's different
18 than anything you've ever heard. That is not -- that's
19 not the case, Judge. The U.S. Supreme Court has said we
20 have never -- that's their word -- never struck down a
21 method of execution as unconstitutional. Never. They've
22 reviewed hanging, they've reviewed firing squad, they've
23 reviewed electrocution, they've reviewed multiple
24 protocols of lethal injection. They have never struck
25 down a method of execution as unconstitutional. Because

1 when -- this case is about statutory interpretation as
2 well, Judge. It starts with a basis of we're assuming
3 and we -- we -- we will give the benefit of the doubt to
4 the General Assembly that it is constitutional, that
5 what they passed, the legislation they passed, is
6 constitutional. You're gonna have to come and prove
7 that it's not. So this idea that oh, well, you know, if
8 you're gonna agree with us and just strike it down all
9 together, then, of course, it's not relevant, but we
10 should be able to explore all the nitty gritty details
11 of how they plan on doing this because that's the burden
12 they have to establish at trial is patently false. I
13 don't have to prove anything at trial, Judge. I'm the
14 defendant. That's the way this works. That's the way
15 our system of justice works. Just like their clients
16 didn't have to prove anything at their criminal trials.
17 We didn't -- this is not an affirmative defense case.
18 We didn't raise some affirmative defense that says here's
19 why we win even if you're right. That's not what this
20 case is about. This case is about methods of execution
21 that have been around -- firing squad for hundreds of
22 years in the United States. Hundreds of years that
23 method of execution has been around and never struck
24 down as unconstitutional. Electrocution since 1912 in
25 the United States. Approximately -- I don't want to

1 misquote numbers, but my memory is approximately 5,000
2 executions by electrocution in the United States. This
3 is not some new method, either one of these. They're
4 not new. Firing squad was never the State of South
5 Carolina's statutorily approved method of execution,
6 but it's been used in the military for hundreds of
7 years, so we're not talking about novel issues. It's
8 never been struck down in South Carolina nor by the --
9 the United States Supreme Court, either one of these
10 methods that we're talking about, okay, so there is a
11 presumption that it is constitutional. They have a
12 burden to show it's not constitutional, not a burden on
13 our part to show that it is, nor do we -- are we under
14 any burden to say well, yeah, you know, well, we have a
15 special way of doing it in South Carolina, you know, we
16 hired Chris Kyles, the American sniper to come in, and
17 he's gonna do it. I mean, that is not the burden and
18 for them to continually try to flip the burden is
19 exactly why we've had to be in here with this discovery
20 fight. That -- that is everything they're doing. They
21 are trying to flip the burden and that is not what we
22 have.

23 Now I have another point I need to address in what
24 they said. You know, they -- she said that the ex post
25 facto claim is gonna require you to compare the relative

1 pain of each method of execution for you to be able to
2 make a decision about ex post facto. That is not what
3 the case law says. The case law -- and we talked about
4 this when you ruled against them on the motion for
5 preliminary injunction. The case law says the penalty
6 is death. That's what they were given. That penalty has
7 not changed. The rest of this is not a constitutional
8 issue, at least not an ex post facto claim constitutional
9 issue. And you've already looked at that information
10 and -- and that's just not true that you're gonna have
11 to do that.

12 The -- she claimed in her argument that the
13 statute required a burden on us to make lethal injection
14 available. That -- that is not what the statute says
15 and the statute even recognizes in the language that
16 lethal injection might not be available. If you read
17 the sentence, it says if it is available, so they
18 recognized that it would be unavailable because they're
19 well aware, just like all of us, of the issues across
20 the country with availability to lethal injection
21 drugs.

22 She says there's no requirement on their part to
23 provide evidence of an available alternative. She said
24 that South Carolina hadn't ever found that, and she's
25 probably right, but the -- the Federal courts have and

1 they've established an analysis that we would -- we
2 would hope Your Honor's going to adopt. They've
3 already done this, there's no reason to reinvent the
4 wheel, but regardless of whether that be would the --
5 the analysis required on the claims she brought, they
6 pled it. They pled that the only constitutional method
7 would be a single does of pentobarbital. That was their
8 pleading. So -- and they say they -- they're not aware
9 of any source that -- that can provide it to us.

10 She also mischaracterizes what Mr. Lambert was
11 talking about with our discovery requests. She says
12 that -- that he tried to tell you that their efforts to
13 obtain the drugs. That's not everything that request
14 says. It also says any communication, correspondence
15 or other evidence of corres -- excuse me -- e-mails,
16 letters or other evidence of correspondence from
17 plaintiffs or their counsels to the General Assembly
18 or any member thereof lobbying -- lobbying against
19 the passage of any legislation that would protect the
20 identity of suppliers of lethal injection drugs. That
21 was part of our request for production as well and
22 they objected and said it wasn't relevant because we
23 say without a secrecy statute, which is where these
24 other states have been able to get those lethal injection
25 drugs, we're unable to get the drugs and they -- some of

1 the lawyers on the screen with you here today lobbied
2 specifically against that statute to keep the drugs
3 from being available. They know the issues. They know
4 it's not available, so this idea that they get to do
5 discovery into what they -- I mean, it -- it starts to
6 become circular, Judge.

7 But lastly, and I -- I want to make sure that I
8 flesh this out, they pled that firing squad and
9 electrocution is unconstitutional period. They answered
10 interrogatories that there is no way to carry out a
11 firing squad execution or electrocution execution that
12 would be constitutional under South Carolina's cruel
13 or unusual punishment provision. That were their
14 pleading. They -- they did not -- they did not plead
15 that firing squad has a high rate of -- of being botched
16 or, you know, people messing it up because of their
17 qualifications and that's why it's unconstitutional.
18 They didn't plead that. That's not their claim.

19 And, Judge, when we're dealing with statutory
20 interpretation, we start with a presumption that it's
21 constitutional. They then have the burden to prove
22 that it's not and it's -- the General Assembly passed
23 a methods of execution statute that included
24 electrocution, firing squad and lethal injection, so
25 there's a presumption that those methods of execution

1 are constitutional and they've got to prove that it's
2 not. We're not under a burden to say well, the way we
3 plan on doing it is just so much better than anybody's
4 ever done it in the history of the world that we win.
5 That's not the case.

6 And the protocols which, Your Honor, if you issue
7 a strong confidentiality order, they'll be produced
8 and they'll know the general protocols of how these
9 methods are planned on being carried out in South
10 Carolina, but to -- to allow them to -- to get to the
11 -- the actual applicant -- I mean, listen to what she
12 said. She wants the biographical background of each
13 member that's actually gonna be on the team. It would
14 not be hard to figure out who that person was if you
15 allowed that, Judge, and the -- the -- the General
16 Assembly has recognized those people have a right to
17 protection. In fact, they made it a criminal offense
18 to willingly provide that information.

19 So I -- don't let them sit here and confuse the
20 issues and shift the burden in front of you. Don't let
21 them muddy the waters the way they're trying to, okay?
22 What the Supreme Court might be looking for is a clear
23 record on the case they pled. If they wanted to plead
24 a different case, they're the masters of their own
25 complaint. They've had three opportunities to get it

1 right. We're on the third iteration of the complaint
2 in this matter.

3 So I think that addressed all the issues that --
4 that she brought up. I'm happy to answer any questions
5 that the Court may have. I know Mr. Mills has something
6 to add and I've been in his position not five minutes
7 ago, so I'll step out of the way if you're -- if you'd
8 like to recognize him on the floor.

9 Thank you, Judge.

10 THE COURT: Mr. Mills.

11 MR. MILLS: Thank you. If I (inaudible)
12 I apologize.

13 A couple of things just -- and they're kind of
14 more observations about the centuries of doing things.
15 Well, for centuries we executed teenagers, for centuries
16 we executed mentally ill. We don't do that anymore,
17 okay, so that's a little bit disingenuous. Beyond that,
18 he's talking a lot about Federal law. This case was
19 remanded back to State court because it doesn't deal
20 with Federal law. Now the Court may decide to adopt
21 that reasoning, but this is being brought under the
22 South Carolina State Constitution, so that's a limited
23 issue, and so those are the only issues I wanted to kind
24 of bring up to the Court is that, you know, kind of
25 largely the State has passed a statute that says we're

1 gonna change the way we execute and kill people and
2 they've added on firing squad, which on the face of it
3 seems retrograde, but, you know, maybe not, but in any
4 of our civil cases when we do a pleading things come
5 up in discovery which allows you to change your argument,
6 adapt your argument. This idea that a pleading has
7 locked you into this forever space is just nonsensical.
8 Pleadings are notice pleadings of essentially what we
9 intend to prove and if other issues came up, we could
10 bring those up to -- to so prove. If we -- we got in
11 there and the protocols were doing something crazy, I
12 don't expect them to, but if they were doing something
13 crazy, we could certainly say well, by the way, they're
14 using, you know, Citadel cadets to do the firing squad
15 or something stupid, you know, so we wouldn't know that
16 thing. That's what discovery's about. So my only
17 comments.

18 Thank you.

19 MR. LAMBERT: Judge, if we're gonna go to hand
20 raising, can I make a couple of points just -- as you
21 say as we wrap this up?

22 THE COURT: Yes, sir.

23 MR. LAMBERT: Yeah, I feel like good preachers
24 have three, I'm gonna be dangerous, I've got five, but
25 I promise they are very, very short. I can do each of

1 them in probably less than a minute.

2 Number one, procedural rules apply. This isn't
3 about putting together some record and giving it to
4 the Supreme Court in the first instance. The rules of
5 procedure exist, we follow them in every case. You
6 should apply the discovery rules here as you do
7 everywhere.

8 Number two, when it gets into the members of
9 the execution team and -- and how far let you let
10 plaintiffs go down that road, if at all, I would go --
11 point you back to the statute. It talks about disclosing
12 information under seal. That presents a problem for
13 trial and if you're actually going to close courtroom
14 and not have an open courtroom for that part of the
15 trial, that's the anesthetic on the judicial process
16 generally. I don't think there's a need to have those
17 names involved. I don't know that we want to have a
18 situation in which reporters are filing motions to keep
19 the court open.

20 Number three, in terms of -- this sort of takes
21 discovery back to what's the case about, what does the
22 statute mean that we're talking about in the sense of
23 what's really relevant, the availability issue in the
24 trial going forward, the Supreme Court has obviously put
25 this case on an expedited schedule and wants something

1 tried. The points that the defendants have been
2 consistently making is that if you read the word
3 "available" to impose a challengeable obligation on the
4 Department such that any condemned inmate may judicially
5 challenge a determination of availability, every single
6 condemned inmate will, if the director's certification
7 of available methods says a method is not available, go
8 into court and challenge it and you're creating a new
9 round of litigation in every single capital case. That
10 is our point and that point has nothing to do with the
11 fact that the Supreme Court has set this particular
12 case for trial.

13 Number four, Your Honor, in terms of Mr. Mills'
14 last comment about this is State law, not Federal law,
15 is absolutely right we're arguing State constitutional
16 law, but a couple of points on that. One, the State
17 constitution as we pointed out in previous motions is
18 governed by the intent of the framers and the ratifiers
19 of that provision. There's an originalism approach in
20 our State law -- or our State constitution and our State
21 Supreme Court has never adopted the evolving standards
22 of decency test for Article 1, Section 15. When it has
23 discussed that language, it has been in the context of
24 Eighth Amendment challenges, so -- point one.

25 Point two, if the Court's not going to strictly

1 apply an originalism test to Article 1, Section 15, there
2 is a reason the U.S. Supreme Court has adopted under
3 Federal law this idea that you have to show a significant
4 reduction of a substantial risk of severe pain that the
5 State won't adopt without a legitimate penological
6 interest. It has to be readily available. The idea is
7 preventing death row inmates from challenging the method
8 they have and then leaving the State in a position of
9 well, what else could we use. There's a -- the idea is
10 we're trying to avoid a backdoor attack on the death
11 penalty itself when the General Assembly has permitted
12 the death penalty to be a form of punishment.

13 And, fifth, Your Honor, and finally, since we have
14 been on this -- this video hearing, the United States
15 Supreme Court has issued a decision in a case called
16 Nance v. Ward, not directly relevant here, but that's a
17 case out of Georgia in which a condemned inmate who is
18 subject to lethal injection is trying to challenge the
19 method and his alternative method is firing squad and
20 the Supreme Court of the United States just not -- about
21 thirty-five minutes ago gave him a procedural mechanism
22 to do that. If the firing squad were so offensive, it
23 seems unlikely the U.S. Supreme Court would be letting
24 that litigation continue dragging on in the Federal
25 courts.

1 So I think that was five points. I think I did
2 it in less than five minutes. If you have questions,
3 I'm happy, of course, to answer them, but I recognize
4 we've had you on this video conference now for far
5 longer than you probably wanted to be.

6 THE COURT: It's not a question of want, it's a
7 question of my expectation. It -- it has lasted longer
8 than expected. And actually I have another conference
9 behind you-all.

10 Tell me this though because I -- I really just
11 need to sort of mull over some of those arguments this
12 evening. I want to know what's outstanding. What --
13 what is there -- aside from those things, I know there's
14 some motions to compel, one that's mostly moot --

15 MR. PLYLER: Yeah.

16 THE COURT: -- we have one, but let's talk about
17 that.

18 MR. PLYLER: Judge, and I'll -- let me jump in. I
19 do -- I'm gonna test your patience though. I'm sorry.

20 THE COURT: I don't know who's talking.

21 MR. PLYLER: This is Dan Plyler.

22 THE COURT: Oh, yes. Okay. I see. Go ahead.

23 MR. PLYLER: I didn't realize -- I didn't realize
24 that my lovely mug wasn't popping up on your screen. I
25 apologize.

1 THE COURT: It's there. I just -- I think you were
2 frozen and I couldn't see your mouth moving.

3 MR. PLYLER: My apologies. I'm gonna test your
4 patience though, I apologize, to go back to one point
5 about this Federal versus State law and we cited to this
6 way back when you dealt with the motion for preliminary
7 injunction. I'll have to grab the case at some point
8 and we can supplement because I can't pull it up that
9 quick, but our South Carolina Supreme Court has previously
10 said although our cruel -- our -- our provision in the
11 constitution has an "or", we treat it the same as the
12 Federal court, and they -- they said that in a -- in a
13 case, we'll find it and we'll --

14 MR. KENDRICK: State v. Wilson.

15 MR. PLYLER: State v. Wilson. Thank you.

16 So this idea that it's novel for us to suggest
17 that we'll probably be looking at this the same way the
18 Federal courts have looked at it, that's just -- we're
19 going with what our -- our Supreme Court has done
20 previously.

21 Speaking of the motion to compel, the one -- the
22 one issue that I think that's still -- I mean, there --
23 there were -- there are things in there that I could
24 bicker about. If this was your normal litigation case,
25 I might have a long laundry list of yes, they did answer,

1 but it was late and here are all the things that we
2 think should have been more complete, I'm not doing
3 that, but this is the answer they gave to the question
4 about witnesses, okay, Judge? Plaintiffs may call
5 any witness listed by the defendants, as well as any
6 employee or agent of either defendant who becomes
7 relevant to this case based on knowledge of the facts
8 asserted in the complaint or answers filed in the case.
9 That's it. That does not put me on notice in any way,
10 shape or form of who you intend to call as a witness in
11 the case. So either they need to be prevented from
12 calling anybody that we didn't specifically list or
13 they need to give me a more complete response and tell
14 me exactly who it is they are -- they plan on calling
15 as a witness at this trial.

16 I mean, we are -- we are essentially five weeks,
17 probably more like four weeks away from this trial, and
18 I don't even have the names of their witnesses. That's
19 not fair.

20 MR. MILLS: We can address --

21 MR. PLYLER: They've had a long time to provide
22 their case -- prepare their case before they even filed
23 it. We are the ones playing catch-up and on the most
24 basic interrogatory in the book, I don't have a clear
25 answer.

1 MR. MILLS: Because you've provided no discovery
2 for us to be able to identify the witnesses, so --

3 MR. PLYLER: That's a lie, sir. I've given you
4 over 800 pages of discovery. You know that.

5 THE COURT: Hold on.

6 MR. MILLS: Well, I don't want to get into tit for
7 tat about this. We do have some outstanding discovery
8 issues. We've got depositions coming up. We've got a
9 deadline of the 8th. Mr. Plyler is saying he wants to
10 do those in person, we think it should probably be done
11 on Zoom for convenience of all the parties and everything
12 else, so we're gonna have some upcoming -- we don't want
13 to drag the Court into that, but I think we're going to
14 have to get some guidance from the Court on how to deal
15 with that. If the Court orders some discovery, we've
16 got to get that to our experts, give them time to review
17 it. You know, he keeps talking about the late discovery,
18 Your Honor. We told them we had an interpretation
19 that it was due a different time, they said no, we got
20 together, we told them we'd have it out on Monday, they
21 filed their motion on Friday, they got it Monday, so I
22 -- you know, I'm really not, you know, here or there on
23 that, but --

24 MR. PLYLER: Yeah, we --

25 MR. MILLS: -- we do have that issue of the

1 depositions coming up and I think we'd probably like
2 the Court's input on that.

3 MR. PLYLER: And I -- I appreciate that and I'm
4 happy to discuss it, but I -- I would like -- I want
5 to make sure that my -- my point doesn't get lost here.
6 They haven't provided who their witnesses are and if
7 the answer is we don't have any fact witnesses, we only
8 plan on putting up the experts, that's fine, but you've
9 got to tell me that. I can't be sitting here over the
10 next four to five weeks guessing about who you might
11 call as a fact witness, so that -- that -- that is the
12 one out of the motion to compel that we had filed that
13 I believe is still outstanding and that we need a
14 complete answer to.

15 As -- as with regards to depositions, Mr. Mills
16 is right. We e-mailed and said hey, we'd like to go
17 ahead and get the two experts you identified because
18 that's the only -- they only identified two experts in
19 their interrogatory answers. Dr. Wikswo, and I may be
20 butchering his name, but I'm doing my best, and
21 Dr. Arden. I do want to take those in person. I'm
22 happy to travel to the expert if that's more convenient
23 or if the expert wants to travel here, we'll figure out
24 how to make it work. I am -- I -- I like Zoom, but it
25 creates problems. It creates problems for court

1 reporters, especially in -- in scientific sort of
2 -- and, I mean, there's gonna be some highbrow
3 conversations. It makes it difficult for them to get
4 the -- the -- the information down and transcribed and
5 there's just something different about being in front
6 of somebody and -- and taking their deposition versus
7 being on a video screen just like, Your Honor, if we
8 were in your courtroom, it feels different. And we
9 have a -- we believe we have a right to do that. It
10 will not delay anything. If they're available to
11 attend via Zoom, then we can set up a Zoom link wherever
12 it's happening in person and they can jump in on a Zoom
13 link and participate as allowed under the rules. So
14 this idea that doing it virtually will make it so much
15 more convenient than in person, I don't know that I agree
16 with it and I think I have a right to depose the person
17 the way I feel it should be done in the best interest of
18 my client. There's only two experts at this point.
19 That's all we've asked for and we haven't been -- I was
20 -- in fairness to him, he said we can talk about it at
21 the hearing and after the hearing, so, you know, I knew
22 we were gonna have the conversation today.

23 MR. MILLS: Your Honor, again, not to prolong it,
24 but he also -- they've identified some experts, too, and
25 they have provided no reports from those experts at all

1 and then they're saying well, we want to depose --
2 before we even let you talk to our people, we want to
3 depose your people first, so they're not gonna provide
4 their expert reports claiming they're rebuttal experts.
5 I don't know what a rebuttal expert is. I haven't
6 seen that category of an expert. The defense has their
7 experts, we have an expert. They may bring them onto
8 counter that and you can call that rebuttal if you'd
9 like. Rebuttal is usually something a plaintiff does
10 after the defense has put up their defense, but, you
11 know, so I'm -- I'm not really sure of that argument,
12 but I think we have a right -- because we have to provide
13 it to our experts to see what their people are saying.
14 They've reviewed stuff and they're gonna be able to
15 question our people without ever producing their expert's
16 report?

17 MR. PLYLER: Your Honor, there's no requirement
18 under State law to do an expert report. We're not in
19 Federal court. There's no requirement under State law
20 to have a report from your expert.

21 MR. MILLS: Well, there is a responsi --

22 MR. PLYLER: They don't produce reports.

23 THE COURT: Right.

24 MR. MILLS: -- the substance of testimony and
25 everything else.

1 THE COURT: Well, this is a strange sort of
2 situation, I mean, because typically, you know, you
3 like to exchange information as close in time as
4 possible, but with the plaintiffs having the burden
5 of proof, plaintiffs identify their experts, then
6 defendants identify their experts and usually the
7 deadline for identification of experts and production
8 of expert reports, the plaintiff comes first in time,
9 those deadlines, then the defendants because you have
10 the burden of proof and they're -- they call them
11 rebuttal experts, they're really reply experts because
12 they don't have the burden of proof. So they need to
13 know what your experts are saying so that they can take
14 it to their experts and say hey, talk about this, refute
15 this if you can or --

16 MR. MILLS: And it's -- and we've certainly given
17 them affidavits where they know in detail what our
18 experts are gonna be saying, so it's not like we're,
19 you know, sandbagging them on this.

20 THE COURT: Right.

21 MR. PLYLER: And I'm not -- and I'm not arguing
22 about it, Judge. I -- I'm not sure I understand
23 Mr. Mills' point. There's no requirement under State
24 law to have my expert produce a report. There is a
25 requirement under the Federal rules of civil procedure

1 for -- to that matter. Our experts haven't provided
2 any reports. I'm not holding onto reports that I'm
3 just not willing to give them. They haven't --

4 MR. MILLS: Well, you're not --

5 MR. PLYLER: -- done reports, nor are they required
6 to. And we answered their interrogatory specific to our
7 experts.

8 THE COURT: There you go.

9 MR. PLYLER: I don't -- I don't understand the
10 point. We -- we just want to take the guys -- the two
11 doctors' depositions. We're happy to do it as soon as
12 they can make them available.

13 THE COURT: And I will allow those to be done in
14 person. I mean, if they can appear for a Zoom --
15 particularly if Mr. Plyler is willing to travel to the
16 expert, you know, I -- I don't know which is more
17 convenient. The expert may prefer coming here, but --

18 MR. MILLS: Well, that's about three days' of travel
19 for an expert; a day to travel here, a day to do the
20 deposition, travelling back, so that's three days of
21 that expert's, you know, thing, so -- I mean, if the
22 Court says -- we'll -- we'll work that out.

23 THE COURT: Yeah.

24 MR. MILLS: If that's the Court's ruling, we'll work
25 it out.

1 THE COURT: Well, and -- and I'm ruling this way
2 knowing that if that's the case that those three days
3 are so inconvenient, then let's have Mr. Plyler take
4 the three days, he will travel one day, go to the
5 expert and the same time the expert would have spent on
6 the Zoom is the time that Mr. Plyler will be across the
7 table from him and so it minimizes the inconvenience.
8 I'm not ordering that they be done in Columbia, South
9 Carolina. I'm just allowing him to do them in person
10 and you-all work out the -- the logistics.

11 MR. MILLS: And that's fine. That's the main
12 concern we had, Your Honor. Just the expense and the
13 time for coming here.

14 THE COURT: Understood.

15 So does that take care of depositions? I mean, he
16 tells --

17 MR. MILLS: I think you've taken care of it.

18 THE COURT: Yeah? Okay. Good.

19 Is there anything else? Other than the bulk of
20 what we discussed at the beginning, is there anything
21 that we've not discussed?

22 MR. MILLS: It --

23 MR. PLYLER: Well -- sorry. Go ahead, Chris.

24 MR. MILLS: I was saying just it depends on the
25 Court's ruling on the discovery and all that, that when

1 they'll get it to us, when we can get that to our
2 experts so they can review it so when they have the
3 depositions they're prepared to answer those issues.
4 That's -- that's the only concern we have.

5 THE COURT: Okay. Like I said, I'd like to sort
6 of mull over it because we've sort of volleyed back
7 and forth and my brain has gone back and forth. I would
8 like to get you a decision by close of business tomorrow.

9 I would also like Mr. Plyer -- Mr. Plyler, to have
10 -- for you to e-mail me a proposed protective order or
11 confidentiality order. You know, your contention is
12 that it needs some teeth to it and I want to see in
13 writing what you mean and you can e-mail it in Word
14 format so that I can manipulate and edit it.

15 MR. PLYLER: I'm happy to do so, Judge.

16 THE COURT: Okay.

17 MR. PLYLER: And without interrupting your train
18 of thought, you asked if there was anything else.

19 THE COURT: Yes, sir.

20 MR. PLYLER: I don't think we can handle it today.
21 I mean, I did ask plaintiffs if -- if it's something
22 Your Honor would want to take up today if -- if they
23 would consent to it and was basically told no, so
24 there's no notice and -- and that's fair, but there
25 are pending motions for cross -- excuse me -- pending

1 cross motions for summary judgment out there. They,
2 quite frankly, would narrow the discovery in this case
3 quite a bit either way you rule to be honest. And
4 obviously by filing a motion for summary judgment,
5 plaintiffs are admitting there's no issue of fact here;
6 otherwise, why would they be moving for -- they -- they
7 just want you to rule the opposite direction of the way
8 we're asking you to rule. So they're clearly saying
9 these are legal issues and I think they would narrow
10 down the -- the discovery, especially on the efforts
11 for the Department to obtain lethal injection drugs
12 since one of the arguments I think is about the word
13 "availability", but I -- I don't know. Grayson drafted
14 those, so I should probably stay -- stick in my lane.
15 But those are out there and I think we all just want
16 some guidance. You know, if Your Honor's plan is to
17 take that up at trial, I mean, you're -- you're the --
18 you are the trial lawyer and the motions -- excuse me --
19 the trial judge and the motions judge, you know, so if
20 that's your plan, that's fine. We can all kind of adapt
21 and -- and proceed accordingly. If it's something you
22 think would be beneficial to you and the parties to get
23 them heard sooner, you know, we'll make ourselves
24 available. But it's more of a yeah, we still have those
25 out there. I know as chief administrative judge, which

1 I believe you still are for Richland County, you have a
2 lot on your plate and this case is important, I know
3 it's got your attention, but it's -- it's sometimes even
4 hard for us to keep up with all that's going on, so I
5 wanted to make sure that was out there kind of on your
6 radar.

7 THE COURT: Okay. What -- and that leads me to my
8 next question, and that is how long will this case take
9 to try? I know some of that depends on my ruling on
10 motions for summary judgment, but worse case scenario
11 if -- if both motions for summary judgment are denied,
12 we're trying everything, do we know how long this will
13 take to try?

14 MR. PLYLER: We've briefly had conversations about
15 that and I think we're all in agreement that we can be
16 done in less than a week and I -- I think we're all
17 agreement on that. If I've misstated plaintiffs'
18 position, I'm sure they'll correct me. I think when
19 you take out the fact we don't have to do a jury
20 selection, there won't be as many breaks in the trial
21 as you normally would have because it's not like we've
22 got to wait for them to leave the courtroom and then
23 come back in and all that stuff. We might accelerate
24 that to three days, but, you know, it's -- it's probably
25 a four-day trial in my mind absent some, you know, sort

1 of legal rulings in the middle. I'm not gonna get my
2 hopes up, but, you know, I probably will file a motion
3 for directed verdict -- or argue a motion for directed
4 verdict in the middle, I don't think that surprises
5 anybody, but that's -- that's my best guess is about
6 four days.

7 THE COURT: Okay. And I'm asking because I -- I
8 need to go ahead and plan for the trial because I will
9 have to alter my court schedule to be able to do it
10 given the Supreme Court's deadline and I may even ask
11 them for leave to add one additional day. As I
12 calculate it, the deadline for the completion of the
13 trial would be August 3rd.

14 MR. PLYLER: I counted it as August 4th because I
15 always rely on that little line in Number 6 -- in
16 Rule 6 that says not the day -- the triggering event,
17 so.

18 THE COURT: Okay. Good. I was wondering when --
19 if I had considered that when I calculated the deadline.
20 So maybe it is August 4th. Okay. So I may not need any
21 extra time if we can get it done in four days. It might
22 just need to be that August 1st that we begin the trial
23 unless we can do it July 25th, but I -- I feel like
24 you-all need as much time as possible, so that extra
25 week...

1 MR. PLYLER: I kind of feel like --

2 MR. KENDRICK: I think that's one thing we all
3 can agree on.

4 MR. PLYLER: Judge, we did the P&A trial back in
5 2012, it was six weeks, we took a one-week break so
6 everybody's law practices didn't fall apart, and
7 literally while trial was going on, a subset of us
8 were going and deposing one of the experts --

9 THE COURT: Jeez.

10 MR. PLYLER: So I mean, it -- you know, we -- I
11 don't want to do any of that, but, you know, we will
12 -- you've got good trial lawyers here. I've -- I've
13 got the utmost respect for Chris Mills and Josh, we've
14 tried cases against each other, we don't like to do
15 it, but we understand the jealous mistress that is
16 litigation, but, yeah, in my personal opinion that
17 August 4th probably gives us all the best chance of
18 getting this stuff accomplished, but if -- you know,
19 we -- we are at your mercy when it comes to that.

20 THE COURT: Okay. So I need to talk to Court
21 Administration and -- and hopefully we can begin on
22 August 1st and it will just be the 1st through the 4th,
23 we'll get it in in four days right before the deadline,
24 that's my plan. The backup plan if that just can't
25 work for any reason, would be July 25th, but I will work

1 on that today and let you know because they will either
2 have to cancel my August 1st term of court or find
3 another judge to sub in for me because I'm supposed to
4 be in Horry County that week, so -- but I'll -- I will
5 talk to the court scheduler and try to figure that out
6 and make that happen so we can be here in Richland County
7 August 1st in this case and I'll let you-all know via
8 e-mail.

9 Mr. Plyler will send me a proposed confidentiality
10 order.

11 MR. PLYLER: By close of business today. We'll get
12 it to you as soon as possible, Judge.

13 THE COURT: Perfect. And I will try my best to
14 have you a decision on these motions by close of business
15 tomorrow. It will be Monday at the latest though.

16 MR. PLYLER: Thank you, Judge. And it will be
17 JNewman -- JNewmanJ, right?

18 THE COURT: Yes.

19 MR. PLYLER: And you want me to send it JNewmanSC
20 and JNewmanLC and all that stuff, too?

21 THE COURT: Please.

22 MR. PLYLER: And obviously I'll copy all the
23 compatriots.

24 THE COURT: Yes.

25 MR. PLYLER: Thank you, Judge.

1 THE COURT: Sounds good. Thank you-all.

2 MR. MILLS: Thank you, Judge Newman.

3 THE COURT: Thank you. Thank you.

4 MR. KENDRICK: Thank you, Judge.

5 THE COURT: Good to see you-all.

6 MR. LAMBERT: Take care.

7 (Whereupon, the proceedings were concluded.)

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C E R T I F I C A T E

1
2
3 I, Stacy S. Johnson, Official Court Reporter
4 for the Eleventh Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing
6 is a true, accurate and complete transcript of record
7 of all the proceedings had and the evidence introduced
8 in the hearing of the captioned case in Circuit Court
9 on the 23rd day of June, 2022, recorded by WebEx
10 Videoconferencing, and transcribed by me to the best of
11 my ability, and may contain unintelligible or inaudible
12 indications due to dropping of voices, not speaking into
13 the microphone, paper shuffling, extraneous courtroom
14 noises, et cetera.

15 I do further certify that I am neither of kin,
16 counsel, nor have an interest to any party hereto.

17
18 October 10, 2022

19
20 *Stacy S. Johnson*
21 STACY S. JOHNSON
22 CIRCUIT COURT REPORTER
23
24
25

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.

**MOTION FOR PROTECTIVE ORDER TO
PROTECT RESPONSES TO ORAL
DEPOSITION QUESTIONS POSED TO
DIRECTOR BRYAN P. STIRLING AND
COLIE RUSHTON**

**TO: LINDSEY S. VANN, ESQUIRE, EMILY PAAVOLA, ESQUIRE, HANNAH
FREEDMAN, ESQUIRE, BRENDAN VAN WINKLE, ESQUIRE, J.
CHRISTOPHER MILLS, ESQUIRE, JOSHUA S. KENDRICK, ESQUIRE, JOHN
H. BLUME, III, ESQUIRE, AND ELIZABETH FRANKLIN-BEST, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS:**

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for Defendants South Carolina Department of Corrections (“SCDC”) and Bryan P. Stirling, in his official capacity as the Director of SCDC (collectively, “Defendants”), will move, pursuant to Rules 26(c) and 30 of the South Carolina Rules of Civil Procedure, for an Order protecting the responses to oral deposition questions posed by Plaintiffs’ during the depositions of SCDC witnesses Director Stirling and Mr. Colie Rushton.

Rule 30 of the South Carolina Rules of Civil Procedure governs the conduct of depositions of witnesses upon oral testimony. Under Rule 30(j)(3):

Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds shall move the court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP, within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.

Rule 30(j)(3), SCRCP. The requirement that a party move for a protective order within five business days of the conclusion of the deposition is mandatory. *See id.*; *Crawford v. Henderson*, 356 S.C. 389, 401, 589 S.E.2d 204, 211 (Ct. App. 2003).

On June 9, 2022, Defendants filed a Motion for Protective Order requesting the Court prohibit or limit the scope of discovery in this litigation. On June 14, 2022, Plaintiffs filed a Response in Opposition to the Motion and also moved to compel discovery from Defendants, requesting the production of execution autopsy records which Defendants had previously lodged objections to.

Following argument on these motions, the Court issued a Form 4 Order on July 5, 2022.

The Court held:

Defendant's Motion for Protective Order (filed 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 at 1). SCDC and Director Stirling produced the protocols to Plaintiffs under the Confidentiality Order as directed by the Court. Because that was the only part of the Motion for

Protective Order that was denied, the protocols were the only additional documents that SCDC and Director Stirling produced after the Court's July 5 Order was entered.

Subsequently, on July 14, 2022, Plaintiffs took the depositions of SCDC witnesses Director Stirling and Mr. Rushton. (Exhibit A – Notices of Deposition). During the depositions of both witnesses, Counsel for SCDC was forced to instruct Director Stirling and Mr. Rushton not to answer certain questions posed by Plaintiffs' Counsel pursuant to the directives of this Court's Order and the statute protecting the identity of current or former members of the execution team.¹

Both witnesses were asked lines of questions concerning information that could reasonably reveal the identities of members of the execution team and other backwards-looking discovery concerning both historical accounts and information related to execution autopsy records. Responses to these questions are shielded by this Court's Order and the governing law. To provide an example, Plaintiffs' counsel asked a witness whether the witness had been "present at an execution" and then attempted to question the witness about his observations if the witness had indeed been present for an execution. Defense Counsel, not knowing the witness's responsive testimony, objected and directed the witness not to answer. As another example, Plaintiffs' counsel asked a witness whether a "current" employee of SCDC has ever witnessed an execution. Defense Counsel again objected and directed the witness not to answer. This questioning was an attempt to elicit information that could reasonably identify members of the execution team. Because the execution protocols identify roles in the execution process only as the warden and the

¹ S.C. Code Ann. § 24-3-580 ("A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team. However, this information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a willful violation of this section, punitive damages.").

director of SCDC, any question asking about any other person present for an execution (other than a witness under section 24-3-560) is necessarily going to disclose someone who is a member of the execution team.

Therefore, pursuant to this Court's Order and S.C. Code Ann. § 24-3-580, Counsel for Defendants instructed the SCDC witnesses not to answer these questions. Furthermore, Counsel for SCDC and Director Stirling provided detailed reasoning on the record to explain the objections to Plaintiffs' questions. Due to the confidentiality and security concerns presented, rather than producing excerpts from the deposition contemporaneously with this Motion, SCDC and Director Stirling are willing to produce the deposition transcripts upon the Court's request for *in camera* review.

Based on the foregoing, for good cause shown, SCDC and Director Stirling respectfully request this Court issue a protective order shielding the responses to oral deposition questions posed by Plaintiffs and objected to on the record by SCDC and Director Stirling's Counsel during the depositions of SCDC witnesses Director Stirling and Mr. Colie Rushton.

(Signature page to follow)

Respectfully submitted,

SMITH | ROBINSON

s/Daniel C. Plyler

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Counsel for Defendants Stirling and SCDC

Columbia, South Carolina

July 19, 2022

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
MCMASTER,** in his official capacity as
Governor of South Carolina,

Defendants.

Civil Action No. 2021-CP-40-02306

**Motion for Ruling on Plaintiffs’
Motion to Compel and for
Clarification of the Scope of
Discovery Order**

Plaintiffs Owens, Sigmon, Terry, and Moore, through undersigned counsel, respectfully request this Court issue a ruling on their Motion to Compel discovery, filed on June 14, 2022 (“Plaintiffs’ Motion to Compel”), and for clarification of the scope of this Court’s Form 4 Order on Defendant’s Motion for Protective Order and the South Carolina Department of Corrections’ (SCDC’s) Motion to Compel, filed on July 5, 2022 (“Discovery Order”).

Specifically, because this Court has not yet ruled on Plaintiffs’ Motion to Compel, and because the Discovery Order does not offer an explanation for its holding or describe the order’s scope, there is no consensus between the parties about what is or is not a proper subject of discovery. As a result, Defendants have taken the position that anything not expressly addressed in the Discovery Order is not subject to discovery, while Plaintiffs have continued to seek relevant, material information about the topics raised in their Motion to Compel. Significantly, experts for both sides agree that certain classes of material—autopsies from previous executions in South

Carolina’s electric chair and other factual information about those executions—would assist them in forming opinions about South Carolina’s specific execution process. Nevertheless, Defendants, citing the Discovery Order and an untenable reading of the term “execution team members” in South Carolina Code section 24-3-580,¹ have declined to produce written discovery on those subjects and instructed their witnesses not to respond to Plaintiffs’ questions during depositions. Because the information Plaintiffs seek is relevant to the claims raised in this case and would aid experts for all parties in providing opinions on South Carolina’s execution methods, Plaintiffs move this Court to rule on their Motion to Compel and issue a written order explaining the basis for and scope of the July Discovery Order.

I. Procedural History

As relevant here, the parties filed the following motions related to discovery:

- Defendants’ Motion for Protective Order to Prohibit or Limit the Scope of Discovery, June 9, 2022 (“Motion for Protective Order”);
- Defendants SCDC and Director Stirling’s Motion to Compel Discovery Responses from Plaintiffs and Request for Expedited Consideration, June 10, 2022 (“Defendants’ Motion to Compel”); and
- Plaintiffs’ Motion to Compel Discovery, filed on June 14, 2022 with Plaintiffs’ Respond in Opposition to Defendants’ Motion for Protective Order.

At a hearing held via WebEx on June 23, 2022, the parties agreed Defendants’ Motion to Compel was mostly moot, with the exception of Defendants’ assertion that Plaintiffs had failed to disclose fact witnesses. Plaintiffs also consented to a confidentiality order, under which Defendants agreed to provide execution protocols. At the same hearing, the Court heard arguments on Defendants’ Motion for Protective Order and Plaintiffs’ Motion to Compel.

¹ Section 24-3-580 states: “A person may not knowingly disclose the identity of a current or former member of the execution team or disclose a record that would identify a person as being a current or former member of an execution team.”

On July 1, 2022, this Court entered a Confidentiality Order. On July 5, 2022, this Court issued a Form 4 Order. The Discovery Order reads as follows:

Defendants' Motion for Protective Order (filed on June 2, 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.

The Discovery Order did not address Plaintiffs' Motion to Compel, nor did it elaborate on "the remaining topics" or whether granting Defendants' Motion for Protective Order effectively quashed Plaintiffs' interrogatories seeking "all documents related to the electric chair maintained by the Defendants, to include all autopsies from prior executions by electrocution." Pltfs.' First Discovery Requests at 6 ¶ 12 (May 13, 2022).

Since this Court's ruling, the parties have taken five depositions:

- Dr. John Wikswo, Plaintiffs' Expert – July 6, 2022
- Bryan P. Stirling, Director of SCDC – July 14, 2022
- Collie Rushton, Director of Security for SCDC – July 14, 2022
- Dr. Jonathan Arden, Plaintiffs' Expert – July 16, 2022
- Dr. Ronald Wright, Defendants' Expert – July 18, 2022

Depositions of Defendants' three other experts are scheduled to occur over the next week.

SCDC has confirmed the existence of autopsies and other records related to prior executions in South Carolina, and both parties' experts have relied on autopsies and related documents from other states in the past and indicated that they would be relevant and helpful in forming opinions in this case. Nevertheless, Defendants' counsel have taken the position that because they objected to the production of the autopsies and because the Court has not ruled on Plaintiffs' Motion to Compel, the autopsies are covered by the portion of the Discovery Order that

granted Defendants' protective motion. Consistent with that position, they have not produced any autopsies or other historical records about executions in South Carolina. Defendants' counsel also instructed SCDC Director Bryan Stirling and SCDC Director of Security Collie Rushton not to answer deposition questions on a broad range of topics (including their personal experiences witnessing executions in South Carolina) based on their reading of the term "execution team member" in South Carolina Code section 24-3-580.

To address these issues prior to trial and in an attempt to fully develop the record for determination of the constitutionality of South Carolina's execution methods, Plaintiffs file this motion to seek clarification of what is properly the subject of discovery in this matter.

II. Argument

a. Autopsies and Records of Prior South Carolina Executions

Although the parties addressed Plaintiffs' Motion to Compel at the June 23 hearing, and although that motion explicitly sought production of autopsies from executions by electrocution, the Discovery Order did not grant or deny the motion. Accordingly, the parties continue to debate whether the Discovery Order implicitly relieves Defendants from producing them.

Defendants' Motion for Protective Order did not address the issue of autopsies and execution records. It was for that very reason Plaintiffs filed a motion to compel upon Defendants objection to discovery requests on those subjects. Defendants' Motion for Protective Order asked this Court to limit production of three types of discovery: (1) "information about execution protocols," (2) "discovery regarding lethal injection," and (3) "any inquiries as to the identities of members of the execution team and into facts that are reasonably calculated to lead to, or may result in, discovery of their identities." These categories of materials do not include the specific

discovery requests for autopsies and execution records.² As a result, the Discovery Order denying in part and granting in part the Motion for Protective Order did not rule on the question of whether Defendants must produce “all documents related to the electric chair maintained by the Defendants, to include all autopsies from prior executions by electrocution.” Pltfs.’ First Discovery Requests at 6 ¶ 12.

The necessity of a ruling on this issue has been clearly demonstrated during depositions conducted so far by the parties. During their depositions, Plaintiffs’ experts Drs. Wikswa and Arden opined that autopsies from South Carolina executions would more fully inform their opinions on judicial executions in South Carolina. Indeed, experts for both parties have relied on hundreds of autopsy reports from executions in other states in developing their opinions. Defendants’ expert Dr. Wright testified during his July 18 deposition that autopsy reports are among the most important and significant sources of information for his opinions about electrocution and that he could not opine on the severity of burns in South Carolina without reviewing autopsies from prior executions. Despite this, Plaintiffs’ experts (and apparently Defendants’ experts as well) have not been able to review and consider South Carolina execution autopsies because they are in the sole possession of Defendants.

Second, notwithstanding Defendants’ position at the June 23 hearing that the specifics of how SCDC plans to carry out executions are not relevant because Plaintiffs have raised facial

² Footnote 1 of the Motion for Protective Order states: “Defendants hereby incorporate by reference all of the objections set forth in their Responses to Plaintiffs’ First Set of Interrogatories and First Set of Requests for Production (Exhibit 3), as well as the arguments set forth in Defendants’ Motion for Partial Summary Judgment.” This incorporation is not sufficient to include autopsies and execution records in their request for a protective order because merely objecting to a discovery request does not demonstrate good cause for a protective order. *See* Rule 26(c), SCRCP.

challenges to the electric chair and firing squad, Defendants have put the question squarely in play during depositions by asking Plaintiffs' experts about a unique piece of equipment used in South Carolina electrocutions—a copper mesh helmet as opposed to a ring electrode. Defendants' counsel asked both of Plaintiffs' experts whether their opinions about the effects of electrocution on the human body accounted for South Carolina's use of a copper mesh cap instead of a ring electrode (the equipment that is used in most other states). Both experts indicated that their opinions would be better informed if they had access to South Carolina autopsy reports.

In short, Plaintiffs' discovery request sought autopsy reports and related materials; Defendants objected to the production of that information but did not move for a protective order with respect to it; the Court has not yet ruled on Plaintiffs' Motion to Compel; experts for both parties have cited records similar to those Plaintiffs seek as a primary basis for forming their opinions; and Defendants have put into play the question of whether South Carolina has identified a way to carry out executions by electrocution that is unique and possibly more humane, while simultaneously declining to produce the only records that experts might use to assess the veracity of that position. The Court should grant Plaintiffs' Motion to Compel.

b. Scope of "Execution Team Members"

The Discovery Order granted Defendants' Motion for Protective Order as to "members of the execution team," but it did not provide a definition for the term. Following this Court's order, counsel for Defendants have instructed Stirling and Rushton not to answer deposition questions based on an overly broad interpretation of "members of the execution team." Plaintiffs seek a ruling on the scope of the term.

As specific examples, Defendants' counsel have prohibited witnesses from answering the following types of questions:

- Whether “there is a way for [Director Stirling] to review what has happened in prior executions before [his] time as Director,” whether “there are reports” documenting the same, and whether “there’s a person who would know the answer to that question,” Dep. of Bryan Stirling (July 14, 2022) at p. 9:20-25, p. 10:1-20;³
- Whether “there are employees at the Department of Corrections who have witnessed an execution,” *id.* at p. 13:10-12, p. 14:13-19;
- Whether Director Stirling has “ever had someone in the South Carolina Department of Corrections relay their observations of what occurred in an execution,” *id.* p. 13:14-17;
- Whether Director Stirling has “any knowledge of the prior executions that have occurred in the South Carolina Department of Corrections,” *id.* at p. 13:19-24;
- Whether the protocols in question were “developed by members of the execution team as opposed to members of the administration,” *id.* at 33:18-22
- “[W]ho on behalf of the South Carolina Department of Corrections” “consulted with the State of Utah” about developing the South Carolina firing squad, *id.* p. 34:25, p. 35:5-25, 36:1-22;
- Whether Director Stirling has “asked an expert” or “asked a consultant” about “how [the firing squad] will physically affect the inmate’s body,” *id.*, p. 47:21-25, p. 48:1-10;
- Whether anybody in SCDC has knowledge about how the firing squad will impact a condemned person’s body, *id.* p. 50:20-25, p. 51:1-25, p. 52:1-25, p. 53:1-4;

³ Portions of Stirling and Rushton’s depositions are confidential pursuant to the Court’s Confidentiality Order and the agreement of the parties. If the Court would like to review the transcripts, counsel can provide them directly to the Court got *in camera* review pursuant to the Confidentiality Order.

- Whether Collie Rushton, in his capacity as Director of Security, would “be present at an execution,” Dep. of Collie Rushton (July 14, 2022) pp. 8-13;
- Whether, given that the fact of Rushton’s appearance at previous executions is a matter of public record, *see* Ex B. Dep. of Terry Wendell Bracey (Jan. 21, 2008), *Baxley v. Ward*, No. 3-07-cv-4067-CMC, ECF No. 47-3 (June 8, 2009); Ex. C. Dep. of Ira Craig Baxley (Jan. 24, 2008), *id.*, ECF No. 47-6, Rushton “could describe to [counsel] what happened during an execution, how many he’s seen, what has happened in each of those, the details, the sights, the sounds, the smells, the things that—,” Dep. of Collie Rushton p. 13:6-15;
- Whether Rushton “ha[s] knowledge of whether an electrocution would burn someone, whether it would cause physical injury, visible physical injury, whether they would be in pain, if there’s a way to tell, if you could see that, [i]f any of those things exists during an electrocution,” *id.* p. 22:19-25, p. 231:10; and
- Whether the physician who places the target on a condemned person’s heart “has specific training in target anatomy, different than [general] anatomy,” or whether they “have any experience in targeting, shooting, gunshot wound, anything like that,” *id.* p. 38:1-7, p. 40:9-15.

As these examples reveal, Defendants take an overly broad view of the term “execution team member” and the scope of that term with respect to the Discovery Order. Their interpretation of the statute has not been accepted by any court, goes significantly beyond the Attorney General’s opinion about the meaning of the statute, and is inconsistent with the statute’s plain language and purpose. *Compare* S.C. Code § 24-3-580 (“A person may not knowingly disclose the identity of a current or former member of the execution team or disclose a record that would identify a person as being a current or former member of an execution team.”) *with* S.C.A.G. Letter to Bryan P.

Stirling, No. 2015 WL 4699337 (July 27, 2015) (opining that Section 24-3-580 “prohibits the disclosure of both the identity and identifying information of individuals and companies involved in the process of preparing chemical compounds for the purpose of carrying out an execution via lethal injection”). Defendants’ reading of the statute and the Discovery Order has resulted in an unduly constrained discovery process that is undermining the basic goal of discovery in South Carolina to put before the fact-finder “any matter, not privileged, which is relevant to the subject matter involved in the pending action” or any information that “appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1), SCRCF.

Plaintiffs’ counsel have not sought the identity of execution team members. They have instead asked questions about how SCDC developed its current execution protocols and what information the Director of the agency and Director of Security (identified by Defendants as witnesses) have about prior executions. This is not barred by the statute and this information should be disclosed. Accordingly, Plaintiffs seek clarification of the Court’s Discovery Order to define “execution team member” and establish the scope of the protective order.

CONCLUSION

For the reasons stated above, this Court should issue an order ruling on Plaintiffs’ Motion to Compel and clarify the scope of its Discovery Order.

[Signature block appears on the next page.]

Respectfully submitted,

Dated: July 19, 2022

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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.

Defendants’

**Motion to Exclude, or Alternatively, to Limit
Expert Testimony of John P. Wiksw**

Defendants Bryan P. Stirling, in his official capacity as Director of the South Carolina Department of Corrections (“Director Stirling”); the South Carolina Department of Corrections (“SCDC”); and Henry McMaster, in his official capacity as Governor of the State of South Carolina (“Governor McMaster”) (collectively, “Defendants”), move to exclude, or alternatively, to limit the proposed expert testimony of John P. Wiksw under Rule 702, SCRE.

INTRODUCTION

Plaintiffs offer John P. Wiksw, a professor at Vanderbilt, as an expert in biomedical engineering, molecular physiology and biophysics, and physics. They seek to have him offer testimony about judicial electrocutions. *See* Ex. 1 (Wiksw Aff.). Wiksw is not a physician but has extensive academic credentials and a long resume; however, that is not sufficient for his testimony to be admissible in this case. That testimony still must meet the requirements of Rule 702.

His testimony does not clear that mandatory threshold. His testimony is not reliable, from his inability to clearly define when someone dies to his inability to cite scientific studies that substantiate his claims to his inability to quantify ambiguous phrases like “some period of time.” At bottom, his testimony is mere speculation that electrocution *might* be painful. But such testimony is not admissible under South Carolina law.

At the very least, Wikswo’s testimony should be limited. He never claimed to be an expert on pain or consciousness. Therefore, he should not be permitted to testify on either topic.

LEGAL STANDARD

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE. “All expert testimony must meet” these requirements. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (emphasis added). The trial court serves a critical “role as gatekeeper” of expert testimony. *Id.* at 75, 735 S.E.2d at 656.

This gatekeeper role has a three-part inquiry. “First, the court must determine whether the subject matter is beyond the ordinary knowledge of the [factfinder], thus requiring an expert to explain the matter to the [factfinder].” *Id.* at 74, 735 S.E.2d at 655 (internal quotation mark omitted). “Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he need not be a specialist in the particular branch of the field.” *Id.* (internal quotation marks omitted). “Finally, the substance of the testimony must be reliable.” *Id.* “Expert testimony is not admissible unless it satisfies all three requirements.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

The “final requirement of reliability which is the central feature of the inquiry.” *Graves*, 401 S.C. at 74, 735 S.E.2d at 655. In assessing reliability for scientific testimony, a court “must consider” four factors: “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” *Id.*

ARGUMENT

The issue with Wikswow’s testimony—and thus the focus of this Motion—is its reliability. Assuming the Court determines that it must undertake some analysis of how South Carolina’s methods of execution work, there is no doubt that parts of the Court’s inquiry will involve subject matter that is appropriate for expert testimony. And Defendants do not challenge that Wikswow is qualified generally as an expert in biomedical engineering, molecular physiology and biophysics, and physics, but instead challenge the admissibility of Wikswow’s testimony based on its unreliability and speculation.

I. Wikswow’s testimony should be excluded because it is unreliable.

There are multiple reasons why Wikswow’s testimony is unreliable and must therefore be excluded. For any of these reasons, the Court should exclude his testimony.

A. Wikswow speculates throughout his opinions.

Throughout his testimony, Wikswow speculates about what happens during an execution by electrocution. Each time he speculates, he gives the Court a reason to exclude his testimony. *See, e.g., Payton v. Kearsse*, 329 S.C. 51, 61, 495 S.E.2d 205, 211 (1998) (speculative expert testimony is inadmissible). Consider three of the most glaring examples of his speculation.

First, Wikswow uses the vague phrase “some period of time” on five key occasions in his affidavit. *See* Ex. 1, at 4, 5, 9. In his deposition, when asked what “some period of time” meant, Wikswow forthrightly admitted that he did not know. Ex.2, at 112–13. He was pushed whether “some period of time” could be less than “ten seconds,” “five seconds,” or “two seconds.” Ex. 2, at 113. Each time, he replied, “I don’t know.” Ex. 2, at 113. He acknowledged that there are no scientific studies that would allow him to know the answer to this question. Ex. 2, at 113. Without any way to quantify “some period of time,” this vague phrase is of no use to the Court in this case. Perhaps it means ten seconds. Perhaps it means milliseconds, given the tremendous speed at which electricity travels and the high voltage used in the first shock that is applied. *See Watson*, 389 S.C. at 450–51, 699 S.E.2d at 177 (An expert witness “offered no evidence to support this conclusion. Thus, his testimony on this matter lacked any scientific basis and contained no indicia of reliability”). Because Wikswow admittedly does not know what “some period of time” really means, his testimony is unreliable and inadmissible. *See Arthur v. Dunn*, 195 F. Supp. 3d 1257, 1274–75 (M.D. Ala.) (refusing to admit speculative expert testimony about timing of the effect of lethal injection drugs), *aff’d sub nom. Arthur v. Comm’r, Alabama Dep’t of Corr.*, 840 F.3d 1268 (11th Cir. 2016).

Second, Wikswow claims that the “skull presents significantly greater resistance for the current than does the prisoner’s skin.” Ex. 1, at 6; *see also id.* (“the skull effectively insulates the brain from the electrical current”); *id.* at 9 (the skull “would have prevented substantial current from passing through the brain and the spinal cord”). According to Wikswow, this resistance means that the condemned inmate “can remain alive, conscious, and sensate during at least a portion of the” execution. *Id.* at 6. Yet Wikswow pointed to nothing to substantiate his claim about the skull’s “significantly” greater resistance, and he could not begin to quantify this claim during his

deposition. Prior studies were done on dry skulls. Ex. 2, at 86. Wikswow admitted that a dry skull will have a greater resistance than a wet one (which a skull is in a living person), so those studies are of little value here. Ex. 2, at 86. Wikswow's failure to appreciate and account for this critical distinction undermines his credibility as an expert and the reliability of his opinions.

Notably, Wikswow had previously studied this very topic and written a manuscript on it, but that manuscript was rejected from the "premier journal in the field," and remains unpublished. Ex. 2, at 80, 186. Wikswow explained his study and resulting paper was attempting to identify in general terms the path of the current in a judicial execution with regard to the insulating properties of the skull. Ex. 2, at 83. Although the conclusions in his previous paper are quite analogous to his instant testimony, Wikswow disclaimed any reliance on that discredited work here. Ex. 2, at 87, 136. It is "instructive" for a court when an expert's theory "was rejected in the scientific community." *Watson*, 389 S.C. at 452, 699 S.E.2d at 178; *see State v. Jones*, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001) (expert testimony was improperly admitted when an expert "candidly acknowledged that earlier work in this area had been discredited"); *cf. State v. Jones*, 423 S.C. 631, 639, 817 S.E.2d 268, 272 (2018) (expert testimony was properly admitted when the opinions "were supported by peer-reviewed professional journals and trade publications, all of which were uniformly accepted and recognized by" other experts in the field). Like Wikswow's colleagues, the Court should reject his unreliable opinions.

Third, and relatedly, Wikswow contends that due to the skull's resistance, "the vast majority 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." Ex. 1, at 6 (emphasis added). Wikswow was adamant that those were his words. Ex. 2, at 144; *see also* Ex. 2, at 24, 25. Yet, Wikswow cannot quantify—or really even justify—the use of the term "vast" in his affidavit.

In fact, “vast” was initially inserted into a draft of Wikswow’s affidavit by Plaintiffs’ counsel, not by Wikswow. Ex. 2, at 144–50. That Plaintiffs’ counsel chose that word isn’t surprising, given that Plaintiffs’ counsel sent Wikswow a draft affidavit “laying out how [Plaintiffs’ counsel] think[s]” electrocution “works and the problems.” Ex. 2, at 148. To Wikswow’s credit, in a comment on the draft, Wikswow initially expressed concern regarding Plaintiffs’ counsel’s proposed testimony, asking Plaintiffs’ counsel, “What do we have to prove ‘vast?’” Ex. 2, at 147. Wikswow also communicated to Plaintiffs’ counsel that he had some “problems” with his statement. Ex. 2, at 150. At his deposition, Wikswow was asked what specifically Plaintiffs’ counsel showed him or what he found to alleviate his concerns regarding the use of the term in the affidavit. Ex. 2, at 149. Wikswow could not identify anything specifically. Ex. 2, at 149. Eventually, Wikswow claimed he could support “vast” “with evidence,” but he admitted it was “not scientific evidence.” Ex. 2, at 151; *contra* Rule 702, SCRE (an expert must have “scientific, technical, or other specialized knowledge”). Adding to the trouble with this word, Wikswow also testified he did not have a “quantification for vast.” Ex. 2, at 151. Yet, for some reason, “vast” remains, wholly unsupported, in his affidavit filed with this court with each of the complaints that Plaintiffs have filed.

B. Wikswow lacks a reliable method for his opinions.

In addition to his speculation (as proposed by Plaintiffs’ counsel), Wikswow is also unable to establish that his opinions are based on reliable methods. Look at four prominent examples of his methodological problems.

First, Wikswow uses the words “death” or “deaths” seven times in his affidavit. *See* Ex. 1, at 1, 2, 5, 8. Yet, despite being offered to opine on South Carolina’s *death* penalty, Wikswow repeatedly struggled to define “death” and the point at which it occurs. At this deposition, he candidly admitted he was having difficulty defining “pre-mortem versus post-mortem as a state.”

Ex. 2, at 63. Importantly, Wikswow was asked how he defined “death.” Ex. 2, at 65. At first, he defined death to mean the “[c]essation of all physiological function.” Ex. 2, at 66. Wikswow continued to struggle to provide a succinct and acceptable definition of “death” over the next 12 pages of transcript, Ex. 2, at 63–75, offering at least five different definitions, Ex. 2, at 63–75, before finally settling on “brain death and heart death beyond clinical intervention to recover.” Ex. 2, at 75. And aside from his own evolving and amorphous definition of “death,” Wikswow was completely unaware of South Carolina’s statutory definition of death and was completely unaware that such a definition existed. Ex. 2, at 64; *see* S.C. Code Ann. §§ 44-43-450, -460 (codifying South Carolina’s adoption of the Uniform Determination of Death Act).

That Wikswow struggled so mightily to define a critical term used throughout his affidavit is both telling and concerning. At times, Wikswow wants to treat death as the “cessation of physiological function beyond the point of recovery.” Ex. 2, at 67. At other times, Wikswow wants to treat death as an issue of the brain. *See, e.g.*, Ex. 1, at 5–6. At other times, he wants to treat death as an issue of the heart. *See, e.g.*, Ex. 1, at 8. Ultimately, he insists it must be both, given his final definition of “death.” Ex. 2, at 75 (“brain death and heart death beyond clinical intervention to recover”). But under South Carolina law, “death” is legally defined as either/or: “An individual who has sustained irreversible cessation of circulatory and respiratory functions *or* irreversible cessation of all functions of the entire brain, including the brain stem, is dead.” S.C. Code Ann. § 44-43-460 (emphasis added). By way of illustration, Wikswow’s repeated inability to define or discuss “death” with any precision or certainty—either from a temporal or medical standpoint—critically undermines his purportedly decisive opinion that “there is zero scientific evidence to support the fact that electrocution produces an instantaneous and painless death.” Ex. 2, at 91.

Because the opinions offered by Wikswow, who again is not a physician nor any form of medical professional, are based on an imprecise and evolving understanding and definition of death that conflicts with South Carolina law, they are not reliable. *Cf. State v. Griggs*, 184 S.C. 304, 192 S.E. 360, 364 (1937) (“We do not find where any witness, not a physician, there being some doubt which one of two injuries caused a death, has been permitted to give an opinion as to the cause of death. This is as it should be.”).

Second, Wikswow opines that “[t]here is evidence of tortuous executions in thirty percent of all electrocutions in South Carolina’s history for which there is any reliable information.” Ex. 1, at 8. This claim suffers from multiple problems. For one, Wikswow defined “tortuous” as an execution where there was any anecdotal evidence of “muscle motion,” “body contortions,” “screaming,” “twitching,” “burning,” or “jumping.” Ex. 2, at 174. This definition, however, does not account for involuntary movements that can occur even after death.¹ For another, Wikswow struggled to articulate what made information “reliable.” In fact, when questioned about the criteria he used for determining which executions had “reliable evidence” and which did not, he testified that, as with other key portions of his affidavit, “[t]hose criteria came from Justice 360.” Ex. 2, at 172. He then conceded that he could not explain the criteria for “reliable evidence” because he did not set the criteria himself. Ex. 2, at 172, 174.

Third, Wikswow acknowledged that he relied heavily on anecdotal evidence that was provided to him by Justice 360, which he admits is an anti-death penalty advocacy group. *See, e.g.*, Ex. 2, at 89, 164, 168, 179. In certain limited situations, anecdotal evidence may be fair to consider

¹ On a related note, Wikswow—who admitted he is neither a medical examiner nor a forensic pathologist—has no way to know if burns in autopsy photos are pre- or post-mortem. Ex. 2, at 27, 63, 206. Indeed, he conceded he was not qualified to say one way or the other. Ex. 2, at 207–08.

in some circumstances,² but an expert must control for the inherent bias in anecdotal evidence and otherwise confirm its reliability. *See, e.g., Wade-Greaux v. Whitehall Lab'ys, Inc.*, 874 F. Supp. 1441, 1483, 29 V.I. 206, 271 (D.V.I. 1994) (“anecdotal human data . . . have inherent biases that make them unreliable”). Yet Wikswow did not do so. Ex. 2, at 178. He apparently just took what he had been given at face value, going so far as to admit that “[i]t is beyond [his] expertise to hypothesize on the design of the study to designed to avoid reporter bias.” Ex. 2, at 110.

Fourth, Wikswow’s criticism of electrocution relies heavily on purported evidence of “botched” executions. Consider the following exchange:

Q. What’s your basis for saying that the view that applying an electric current can cause an instantaneous and painless death, what’s your basis for saying that view has been discredited?

A. Largely reports of electrocutions that did not proceed as intended.

Ex. 2, at 89. The term “botch” or “botched” appears over 20 times in Wikswow’s deposition. *See generally* Ex. 2. In support of his opinions, Wikswow concluded “intense pain” is evidenced through “botched electrocutions.” Ex. 2, at 92. Taking it even further, he readily admitted that his use of

² *But see State v. Pittman*, 373 S.C. 527, 578–79, 647 S.E.2d 144, 171 (2007) (summarizing the trial court’s decision to exclude “other anecdotal evidence regarding incidents which occurred in connection with the use of Zolofit” because “[a]mong other things, the court was concerned about the reliability of the anecdotal reports compared with the reliability of reports from clinical studies done in a controlled environment” and “was also concerned with the trustworthiness of the sources of the anecdotal testimony, as well as the ability of experts to establish the causal link between the Zolofit and the incidents” and holding that the “trial court did not err in excluding the anecdotal evidence” where the record reflected “a conscientious decision on the part of the trial court to not admit evidence with questionable reliability where there was an abundance of other admissible evidence found to be reliable” and “the prejudicial effects outweighed the probative value of the anecdotal evidence”); *State v. Cope*, 385 S.C. 274, 289, 684 S.E.2d 177, 185 (Ct. App. 2009) (affirming trial court’s decision to exclude expert testimony “regarding specific cases of false confession unless they were ‘on all fours’ with this case,” where the trial court “ultimately refused to allow the testimony” and “conscientiously considered the proffered anecdotal evidence before excluding this testimony”), *aff’d*, 405 S.C. 317, 748 S.E.2d 194 (2013).

the term “substantial risk” as is prominently displayed in his affidavit is “the probability of a botched execution using the term of the trade.” Ex. 2, at 102. Plaintiffs, however, have not pled a case based on botched executions. They have alleged (and in their interrogatory answers confirmed) that electrocution is always unconstitutional. Thus, for Wikswo to be of any help to them, his opinions must apply to electrocution generally, including when an execution by electrocution proceeds exactly as intended. Wikswo’s focus on botched executions is an insurmountable flaw.

* * *

For all of these problems with Wikswo’s testimony, perhaps the biggest issue with this testimony is the high-level way he tries to frame his opinions. Wikswo is adamant that “there is zero scientific evidence to support the fact that electrocution produces an instantaneous and painless death.” Ex. 2, at 91. Indeed, he expresses this opinion multiple times. Ex. 2, at 91, 94–95, 202.

Separate and apart from the reliability and qualification concerns discussed above, this contention matters only if Defendants have the burden of proof to show that electrocution is not painful. But Defendants do not have that burden. Under South Carolina law, when a plaintiff challenges the constitutionality of a statute, the Court “begins with a presumption of constitutionality.” *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). And the Court must, “if possible,” interpret a statute “to render [it] valid.” *Id.* Only when a statute’s “repugnance to the Constitution is clear and beyond a reasonable doubt” can it be declared unconstitutional. *Curtis v. State*, 345 S.C. 557, 570, 549 S.E.2d 591, 597 (2001). And if the Court here adopts the federal rule for method-of-execution challenges, Plaintiffs must “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 v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Either way, it’s Plaintiffs’ burden.

That means that to be reliable (or even relevant), Wikswow must be able to opine that electrocution involves a substantial risk³ of significantly increased severe pain. He has not—and cannot—do so. Therefore, the Court should exclude his speculative and unreliable testimony.⁴

II. At the very least, Wikswow’s testimony should be limited to fields in which he is an expert.

If the Court does let Wikswow testify on issues related to biomedical engineering, molecular physiology and biophysics, and physics, the Court should ensure Wikswow’s testimony stops there. To explain briefly, Wikswow is not a medical doctor or other form of medical professional. He is admittedly not an expert on pain and suffering. Ex. 2, at 96. He is admittedly not an expert on consciousness. Ex. 2, at 180. He is not a medical examiner nor a forensic pathologist and has never performed an autopsy. Ex. 2, at 27. Therefore, any testimony on these subjects would be outside of Wikswow’s qualifications and would constitute opinions cemented in nothing more than a layperson’s speculation. *See Graves*, 401 S.C. at 74, 735 S.E.2d at 655, *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.

³ A term he has admitted he cannot quantify and only defines, vaguely, as “the probability of a botched execution.” Ex. 2 at 102.

⁴ Before Plaintiffs reflexively claim “of course Wikswow is qualified because he’s been an expert in other electrocution cases” and point to a Nebraska case adopting his theories, it’s worth noting that nothing in the Nebraska case indicates the issues raised by this Motion were raised there. *See Nebraska v. Matta*, 745 N.W.2d 229 (2008). Moreover, multiple courts have rejected claims based on Wikswow’s testimony or ideas. *See, e.g., United States v. Council*, No. 4:17-CR-00866-RBH, 2021 WL 4137537 (D.S.C. Sept. 10, 2021); *Jones v. Florida*, 701 So. 2d 76 (Fla. 1997).

CONCLUSION

The Court should grant the Motion to Exclude, or Alternatively, to Limit Expert Testimony of John P. Wikswo.

Respectfully submitted,

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Counsel for Director Stirling and SCDC

July 21, 2022
Columbia, South Carolina

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

COUNTY OF DAVIDSON)
)
STATE OF TENNESSEE)

Affiant John P. Wiksw, 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 Electrocutation 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 Electrocutation 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 Electrocutation 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 Electrocutation 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.

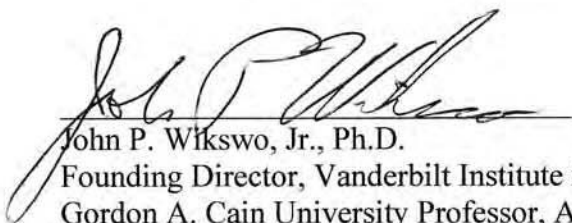
ii. Some autopsy reports describe thermal burns to the hands, lower back, thighs, and other regions of the body, including between tissue folds. These burns suggest that in those electrocutions, the electric current found an alternative path between the head and calf electrodes.

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



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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

Freddie Eugene Owens, et al. v. Bryan P. Stirling, et al.

**Dr. John Wikswow, Jr.
July 6, 2022**

All depositions & exhibits are available for downloading at
www.brookscourtreporting.com
Please call or e-mail depo@brookscourtreporting.com if you need a
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Dr. John Wiksw, Jr. 7/6/2022

ELECTRONICALLY FILED - 2022 Jul 21 2:49 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND
Case 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

DEFENDANTS

AND

HENRY MCMASTER, IN HIS
OFFICIAL CAPACITY AS
GOVERNOR OF THE STATE OF
SOUTH CAROLINA

INTERVENOR-DEFENDANT

DEPOSITION OF JOHN P. WIKSWO, JR., PH.D.

Taken at the instance of the Defendants at
Vanderbilt University,
Stevenson Center Lane,
Physics Building 6,
Nashville, Tennessee, on
Wednesday, July 6, 2022,
beginning at 10:05 a.m.

REPORTED BY:
DAWN DILLARD, CCR #1763

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1 INDEX

2 Style and Appearances.....1

3 Index4

4 Certificate of Deponent212

5 Certificate of Court Reporter213

6 EXAMINATIONS

7 Examination By Mr. Plyler5

8 Examination By Ms. Vann204

9 Examination By Mr. Plyler206

10 EXHIBITS

11 Exhibit 1 Answers to Interrogatories16

12 Exhibit 2 Exhibit I - Sworn17

13 Statement of John P. Wiksw,

14 Jr., Ph.D.

15 Exhibit 3 Flash drive55

16 Exhibit 4 John Wiksw's Responses to56

17 Subpoena Attachment dated July

18 5, 2022

19 Exhibit 5 Sworn Statement of John P.76

20 Wiksw, Jr., Ph.D.

21 Exhibit 6 E-mail chain - Subject:98

22 FW: Urgent need for

23 information about levels of

24 anesthesia

25

Dr. John Wikswo, Jr. 7/6/2022

ELECTRONICALLY FILED - 2022 Jul 21 2:49 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

1	Exhibit 7 E-mail chain - Subject:	144
2	Re: SC EC Challenge	
3	Exhibit 8 The SC Electrocution	145
4	process	
5	Exhibit 9 E-mail chain - Subject:	187
6	RE: Additional Records -	
7	Client Gary Terry	
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
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Dr. John Wiksw, Jr. 7/6/2022

1 JOHN P. WIKSWO, JR., PH.D.,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION BY MR. PLYLER:

5 Q. Could you state your full name for the
6 record please?

7 A. John Peter Wiksw.

8 Q. And if you wouldn't mind just giving us
9 a real thumbnail sketch of all the titles you've
10 got after your name and your -- just your
11 educational background.

12 A. I have a bachelor's in -- Bachelor of
13 Arts in Physics from the University of Virginia, a
14 master's and a PhD in Physics from Stanford
15 University. I was a Research Associate in the
16 Division of Cardiology or Search Fellow in the
17 Division of Cardiology at Stanford and have been
18 on the faculty at Vanderbilt University since
19 1977. I -- around 2000 I became University's
20 first university professor, which means I am
21 tenured in Physics, Biomedical Engineering, and
22 Molecular Physiology and Biophysics.

23 Q. And in your free time -- no, I'm just
24 kidding. It seems like you've done a gracious
25 plenty in your professional career. Appreciate

Dr. John Wiksw, Jr. 7/6/2022

1 you sharing all that with us.

2 A. And I do plumbing, carpentry, and wiring
3 at home.

4 Q. There you go. All right.

5 A. I do plumbing, carpentry, and work --
6 plumbing, carpentry, and wiring, at work as well.

7 Q. Right. In addition to being married for
8 50 plus years you shared with us earlier, correct?

9 A. That's right.

10 Q. All right. Well, Dr. Wiksw, my name is
11 Daniel Plyler. I know we met briefly off the
12 record. I'm an attorney out of Columbia, South
13 Carolina, and I represent the South Carolina
14 Department of Corrections and its Director, Brian
15 P. Stirling in a lawsuit that's been brought by,
16 it's now four condemned individuals with Justice
17 360. They have two attorneys here today
18 representing you in the deposition. They, along
19 with some other lawyers have brought that lawsuit
20 challenging, among other things, the methods of
21 execution in South Carolina. And you're aware
22 there's a lawsuit pending, correct?

23 A. Yes, I'm aware of that.

24 Q. This particular one we've been calling
25 it Owens, et al because Freddie Owens is the first

Dr. John Wiksw, Jr. 7/6/2022

1 named plaintiff versus the defendants I mentioned.

2 And then Grayson Lambert here is from
3 the Governor's office. He represents the other
4 defendant, Henry McMaster, as Governor of the
5 State of South Carolina, okay?

6 A. All right.

7 Q. I know you've already had your
8 deposition taken before in other cases but the way
9 the rules work in South Carolina even if it was
10 yesterday, I'd still have to go over these kind of
11 ground rules with you, so I'll just get through
12 them as quick as I can, all right?

13 A. That's fine.

14 Q. Have you ever been deposed in South
15 Carolina before or in a South Carolina case?

16 A. No.

17 Q. Okay. All right. Well, primary thing
18 is this is a question and answer session. The way
19 this works it's probably the only time I'll get to
20 talk to you about this case before we try it, so
21 it's important to me that you understood what was
22 being asked of you because we're going to rely on
23 those answers that you give, so if you will please
24 let me know if there is something about my
25 question you don't understand or need me to

Dr. John Wikswo, Jr. 7/6/2022

1 clarify because I don't want you answering
2 questions that you didn't fully understand. Given
3 your educational background I don't think that's
4 going to be a problem, but I'm more worried if I'm
5 misusing terms and you need to set me straight
6 because the way I'm wording isn't making sense so
7 that we're singing from the same sheet of music if
8 that makes sense.

9 A. Okay.

10 Q. Great. We have a court reporter here.
11 She's taking down everything that's being said in
12 the room. She does that phonetically so we need
13 to speak a little more formally than we might
14 otherwise and try to avoid the uh-huhs
15 (affirmative) and uh-uhs (negative) and the head
16 shakes and head nods that we all do in normal
17 conversation. If that happens today I might say
18 was that a yes or was that a no. I'm not trying
19 to be rude. I just want to make sure we get a
20 clean record, okay?

21 A. Okay.

22 Q. Great. Try speak one at a time. I'll
23 do my best today to try to make sure you finish
24 your answer before I ask my next question and if
25 you could just let me finish the question before

Dr. John Wiksw, Jr. 7/6/2022

1 you start your answer it will make our court
2 reporter's job a lot easier, okay?

3 A. Okay.

4 Q. Great. This is not an endurance
5 contest. I know we have a time limit. I believe
6 you have got to be out of here no later than 5,
7 and I'm hoping we don't push up on that upper
8 limit of our parameters; but it's not an endurance
9 contest, so if you need to take a break at any
10 point today, you're welcome to do so, okay?

11 A. Okay.

12 Q. Two things about a break -- the breaks,
13 one is a rule, the other is a favor that I always
14 like to ask. The rule is you're not supposed to
15 talk to anybody about the testimony or the lawsuit
16 during the breaks. I know they're not actually
17 your attorneys so you don't normally have an
18 attorney/client privilege, but if y'all talk about
19 things during the break, I get to ask you about
20 it, and I just have to make sure you know that
21 before we start the deposition, okay?

22 A. Okay.

23 Q. The favor I always ask is if we've just
24 asked a question, let's try to get the answer to
25 that question absent some sort of emergency, it

Dr. John Wikswo, Jr. 7/6/2022

1 will just make things more efficient. We won't
2 have to try to figure out where we were and where
3 we left off and all that, so if we can try to
4 answer the question that's on the table before
5 taking the break I'd appreciate that.

6 A. Okay.

7 Q. Great. Is there anything going on with
8 you today personally that you think might affect
9 your ability to understand my questions or tell
10 the truth?

11 A. No.

12 Q. I didn't think so. I know I asked you
13 if you'd ever been deposed in a South Carolina
14 case before, but how about any other lawsuits?
15 About how many times do you think you've been
16 deposed as an expert witness in any lawsuits?

17 A. I don't have the list in front of me but
18 it's probably a half dozen times that I've been
19 deposed.

20 Q. Okay. Of those half dozen times were
21 they all in the role as an expert that had been
22 named in the lawsuit?

23 A. Yes.

24 Q. So not as a party to a lawsuit or a just
25 a fact witness in general, they would be in your

Dr. John Wikswo, Jr. 7/6/2022

1 role as a consulting expert, testifying expert?

2 A. That's correct.

3 Q. I know you've done a lot in your career
4 that you gave us the thumbnail sketch of at the
5 beginning, but how long have you been providing
6 expert witness either consultation or services in
7 support of litigation?

8 A. I don't have the exact date handy, but
9 it's since the 1980's.

10 Q. Okay. And in those, I guess it works
11 out to about 42 years, how many times have you
12 provided courtroom testimony as a testifying
13 expert?

14 A. Probably a half dozen.

15 Q. So pretty much every time you've been
16 deposed you later end up testifying in court?

17 A. Yes. Yes, that's right.

18 Q. Okay. Can you tell me the states that
19 you've testified in court as an expert witness?

20 A. Tennessee, Florida, and Nebraska.

21 Q. Okay. I'll come back to those in a
22 minute. How many of the cases that you've worked
23 on as an expert --

24 A. I've also --

25 Q. Go ahead.

Dr. John Wiksw, Jr. 7/6/2022

1 A. I know I've been deposed, I can't
2 remember if there is testimony in Pennsylvania.
3 I'm pretty sure it was Pennsylvania or Ohio.

4 Q. Was that the Allegheny Power case?

5 A. Yes. I was trying to remember where
6 that was, where that was tried.

7 Q. Yeah. That was in, like, 2012, '13
8 timeframe, somewhere in that neighborhood?

9 A. It was something like that.

10 Q. Okay. Is that the case that you just
11 mentioned, Allegheny Power, and I know there's a
12 report that you produced in your subpoena response
13 that we got yesterday --

14 A. Right.

15 Q. -- the estate of, and I can't remember
16 the man's last name but it started with a P?

17 A. Patricio or something?

18 Q. That sounds right.

19 A. Something like that.

20 Q. And we'll look at it at some point
21 today, I'm sure. In that case, that was not a
22 methods of execution case or a death sentence or
23 judicial execution related case, correct?

24 A. It was an industrial accident.

25 Q. Right. How many of the cases that you

Dr. John Wiksw, Jr. 7/6/2022

1 you've worked on as a testifying expert have been
2 related to the judicial executions or death
3 penalty methods of execution versus, like, the
4 case you just described out of Pennsylvania?

5 A. There are two accident cases, three --
6 one was a -- there have been two accident cases
7 with a telephone company employee and a civilian.
8 Those two separate cases were injured. There were
9 three industrial electrocution cases so that's
10 five.

11 Q. All right. And with regards to the --
12 I'm calling them judicial electrocution cases
13 because that seems to be the term that I see you
14 use in your reports on the matter, so I'm trying
15 to -- trying to use a term that I believe you're
16 familiar with but if I misuse it, you let me know.

17 A. Okay.

18 Q. In those judicial execution cases, do
19 you know how many of those cases you've been
20 identified as an expert?

21 A. The -- there are a number of cases for
22 which I have filed affidavits but I was never
23 called to testify.

24 Q. Okay.

25 A. And so I was -- I was retained, prepared

Dr. John Wiksw, Jr. 7/6/2022

1 an affidavit, but for one reason or another I was
2 never either deposed or called to testify.

3 The ones that I testified in were in
4 Tennessee, and there was a -- it was one capital
5 case involving time of death calculation, had
6 nothing to do with electricity. And then there
7 was the Florida and Nebraska cases.

8 Q. Okay. And that Nebraska case is that
9 the Motta case?

10 A. There were -- there were at least two
11 case in Nebraska. The Motta is the one that I
12 included the findings on. There was another case.
13 I can't remember the name of it. So there have
14 been two cases in Nebraska.

15 Q. And one in Tennessee?

16 A. And I'm trying to remember whether I've
17 actually testified in Tennessee or filed
18 depositions. I know I've testified in Tennessee,
19 but I'm not sure if it was a judicial
20 electrocution.

21 Q. Okay. And do you -- the Florida case,
22 that was a challenge to the death penalty statute
23 in Florida or the methods of execution in Florida?

24 A. Yes. That was Tom -- Tommy Provenzano.

25 Q. All right. In those judicial execution

Dr. John Wikswo, Jr. 7/6/2022

1 cases where you've been named as an expert or
2 provided either a report, deposition testimony,
3 trial testimony, you know, that -- that sort of
4 level of involvement, was Justice 360 the --
5 involved in all those cases?

6 A. None of them. This is the first
7 involvement I've had with Justice 360.

8 Q. What about John Bloom's clinic out of
9 Cornell? Were they involved in the other ones?

10 A. No.

11 Q. And this particular case that we're here
12 to talk about, the contract that's produced to us
13 through your subpoena response is with Cornell,
14 the -- I always get the name of the clinic wrong
15 and I want to give it justice so give me one
16 second here -- the Cornell Death Penalty and
17 Juvenile Justice Projects out of Cornell
18 University, Ithaca, New York. Do you remember
19 signing a general services agreement with them?

20 A. Yes, I do.

21 Q. And that would have been in February of
22 last year that you engaged in that contract with
23 them?

24 A. Yes.

25 Q. What was your understanding of what you

Dr. John Wikswo, Jr. 7/6/2022

1 were being asked to do, what services you were
2 being asked to provide when you engaged in that
3 contract?

4 A. Review materials regarding protocols,
5 autopsies if available and the literature, and
6 provide arguments for or against the level of pain
7 and suffering with judicial electrocution.

8 (Exhibit 1 marked for identification.)

9 Q. Okay. Before we got started and to
10 build off of, you know, kind of the path we're
11 going on here, I had two things marked as
12 exhibits. I'm going to put them in front of you.
13 I'll represent to you that Exhibit 1 are the
14 Answers to Interrogatories that we received from
15 the plaintiffs in this case. And if you flip to
16 the last page of that document you'll see they
17 were dated June 13, 2022; do you see that?

18 A. Okay.

19 Q. And I know you're probably, because of
20 your work in litigation, you're generally familiar
21 with what interrogatories are; is that right?

22 A. Yes.

23 Q. Okay. One of the interrogatories that
24 we ask, Interrogatory No. 3, or excuse me,
25 Interrogatory No. 4, which can be found on page 3

Dr. John Wiksw, Jr. 7/6/2022

1 of Exhibit 1 was for the -- for plaintiffs to
2 identify essentially your expert witnesses and
3 then tell us their name, occupation, title, you
4 know, business address, area of specialization,
5 professional relationship to plaintiff, and the
6 manner in which the person became familiar with
7 the facts of this case. Do you see that on
8 page 3?

9 A. Yes.

10 Q. All right. And as you'll see here, the
11 second paragraph in the response they've got John
12 P. Wiksw -- Wiksw, excuse me, Jr. PhD. And then
13 information responsive to this request is in
14 Exhibit I to Plaintiffs' Third Amended Complaint.
15 Do you see that?

16 A. Yes.

17 (Exhibit 2 marked for identification.)

18 Q. All right. And that's why I had marked
19 Exhibit 2. So Exhibit 2 is Exhibit I to the Third
20 Amended Complaint. And my understanding is this
21 is a -- an affidavit that you provided that is
22 dated April 27 of 2021?

23 A. Correct.

24 Q. When you provided this affidavit was it
25 your understanding you were providing it

Dr. John Wikswow, Jr. 7/6/2022

1 specifically for the Owens, et al. litigation that
2 we're here to discuss today?

3 A. I do not recall whether Owens et al. was
4 stated at the time.

5 Q. Okay. Do you know sitting here today if
6 the affidavit we're looking at that's Exhibit 2 to
7 your deposition has been --

8 A. Exhibit 1 or Exhibit 2?

9 Q. It's Exhibit 2?

10 A. Oh, Exhibit 2, yes. Down here, I got
11 it.

12 Q. Exhibit 1 is the Answer to
13 Interrogatories but because they referenced this
14 document we made it Exhibit 2.

15 Do you know if Exhibit 2 has been used
16 in any other litigation in South Carolina?

17 A. I do not know. I know there is at least
18 one more case running that I have contributed
19 information to, so I don't know whether this has
20 been used elsewhere.

21 Q. Okay. Do you keep a testimonial list
22 for the last four years of testimony you've
23 provided?

24 A. I keep a list of testimony but there
25 have been no testimony since the Kennedy case,

Dr. John Wikswo, Jr. 7/6/2022

1 which I didn't realize until this morning started
2 in 2015, ended in 2017. So I believe you have
3 that in my list of prior testimony, but that was
4 not in the interrogatories that I responded to
5 under the subpoena.

6 Q. Okay.

7 A. So, yeah, sorry. I've had no
8 testimonies in the past four years.

9 Q. All right. And I'm not trying to play
10 lawyer games here, but you do understand affidavit
11 is sworn testimony, right?

12 A. Yes.

13 Q. Okay. Are there any other affidavits
14 that you've issued as a consulting or testifying
15 expert in the past four years that weren't on your
16 testimonial list?

17 A. Other than this one, no.

18 Q. Okay. Are there any other --

19 A. Not that I can recall.

20 Q. Are there any other cases, and I want to
21 make it broader because, for instance, your
22 affidavit shows up in a case called Council
23 C-O-U-N-C-I-L, I think it was June or September of
24 last year, I'm working off memory, a motion for a
25 re-sentencing that was filed on behalf of a

Dr. John Wikswo, Jr. 7/6/2022

1 condemned man, a man who received the death
2 penalty in 2019, and what I'm starting to
3 understand --

4 A. With what jurisdiction?

5 Q. South Carolina, federal court.

6 And what I'm starting to understand is
7 that you're engaged to challenge -- or your
8 testimony with -- through that engagement contract
9 is being used to support allegations challenging
10 electrocution as a method of execution in
11 South Carolina regardless of who the plaintiff or
12 moving party is. So has it been your
13 understanding and practice that you might provide
14 an affidavit or testimony regarding judicial
15 executions in a given venue or jurisdiction and
16 then that testimony might get used in more than
17 one lawsuit?

18 A. I have provided a sworn affidavit to
19 Justice 360, and I'm aware of the fact that it is
20 being used in at least two proceedings.

21 Q. Okay. Are the two proceedings that
22 you're aware of the one we're here to talk about
23 today and the one I just mentioned Council?

24 MR. PLYLER: You can answer for him.

25 THE WITNESS: I don't know the name of

Dr. John Wiksw, Jr. 7/6/2022

1 the -- I mean, we talked about it because
2 there was a particular e-mail that I was
3 looking at.

4 MS. VANN: Right. Do you mind if I
5 answer?

6 MR. PLYLER: If it's the Council case,
7 if it's a different one I just want to know
8 about it.

9 MS. VANN: It's not the Council case.
10 It's the First Amendment lawsuit that's in
11 the Fourth Circuit.

12 MR. PLYLER: Okay. Well, his affidavit
13 was used in the Council case, so I understand
14 that motion was denied, but that is --

15 Q. (By Mr. Plyler) I'm just trying to get a
16 sense of how many different lawsuits you've provided
17 testimony about, you know, like you have here in
18 Exhibit 2, you've provided testimony about your
19 opinions regarding judicial execution and the
20 methods for those executions in South Carolina.

21 And I'm trying to get a feel for how many
22 different lawsuits an affidavit like Exhibit 2 has
23 been used in, and if we go to any other
24 jurisdictions is it the same practice where you
25 might have originally been engaged for a specific

Dr. John Wikswow, Jr. 7/6/2022

1 lawsuit but then your testimony is getting used in
2 other cases that are arguing the same points? Does
3 that make sense?

4 A. I am aware of the fact that I provide
5 testimony in the form of an affidavit and it is
6 presented to courts in South Carolina, so I have a
7 vague recollection of the fact that there was the
8 Council case, but I don't -- I don't have that in
9 my records.

10 And I know that I have provided
11 affidavits for Tennessee, or at least -- no, I
12 haven't even provided affidavits. I've had
13 conversations with Tennessee and they say we will
14 call you when this -- when and if this case goes
15 to court and it has not, the Tennessee cases have
16 not yet gone to court. So I'm effectively being
17 held in reserve in Tennessee.

18 Q. Okay.

19 A. And the several times that I've, you
20 know, I've been contacted once or twice and it has
21 never gone to court.

22 Q. All right. Tell me what you remember
23 about the process for creating Exhibit 2, that
24 affidavit. What -- tell me about that process.

25 A. I have been studying in great depth the

Dr. John Wikswo, Jr. 7/6/2022

1 scientific literature, autopsy reports, and other
2 documents regarding judicial electrocution since
3 at least the early 1990s. I created lengthy
4 reports for both Tennessee and Florida. I
5 provided you with a copy of the Florida report,
6 and that Florida report had at its end, because
7 I'm doing all the typing, it had the sections of
8 the Tennessee report that were not in the Florida
9 report. I don't have a digital copy of the
10 original 1990 something Tennessee report. So
11 there exists in my computer a file that has
12 evolved over the years. And when I prepare the
13 affidavit I draw from that file the appropriate
14 prose and add to it typing on my own the
15 information that is relevant to the case.

16 Q. Okay.

17 A. So the basic technical facts regarding
18 judicial execution have not really changed in the
19 past 30 or -- 30 years. The specifics of an
20 individual case do differ.

21 Q. Okay. And I appreciate that
22 information. I probably asked a bad question. I
23 was thinking more when you created this document
24 did you just start from scratch making your own
25 document, did you have information you were

Dr. John Wiksw, Jr. 7/6/2022

1 working from that was provided to you, were there
2 back and forths with whoever engaged you about how
3 to, you know, what to include or tweaking it,
4 those sort things? Was it a collaborative
5 process, or was it just solely John Wiksw
6 drafting an affidavit?

7 A. These are my words, and information in
8 the document was provided to me by Justice 360.
9 So, for example, I would not have otherwise known
10 the details of the South Carolina protocol because
11 they provided me with the information on the
12 South Carolina protocol, which was consistent with
13 what I subsequently learned when I was allowed to
14 see the -- I had signed the confidentiality
15 agreements and got to see that.

16 So this affidavit are my words and
17 information contained in was provided to me. For
18 example, under item 10, the list of the
19 documentation, that was provided to me. And the
20 Excel Spreadsheet, the description of the Excel
21 Spreadsheet, basically states -- there's a
22 Microsoft Excel spreadsheet prepared by Justice
23 360 attorneys and I read the description -- I
24 looked at -- studied the spreadsheet, read the
25 description, and edited as necessary to fit that

Dr. John Wiksw, Jr. 7/6/2022

1 paragraph into my larger body of prose, but this
2 affidavit are my words.

3 Q. Okay. So that first paragraph describes
4 your educational background and in the last
5 sentence, I guess it's only two sentences long, so
6 about three lines up from the bottom of that first
7 paragraph halfway across the page it starts, I am
8 the Gordon A. Cane, University Professor A.B.
9 Learned Professor of Living State Physics?

10 A. Correct.

11 Q. Was that the title you were describing
12 earlier that --

13 A. Yes, I have two chairs. I hold two
14 chairs. One is the University Professorship and
15 the other is the original chair I had, which
16 contains the endowment that pays my salary.

17 Q. Okay. What is A.B. Learned?

18 A. Andrew Brown Learned was a Vanderbilt
19 graduate who donated \$50,000 to complete a
20 building that you can't see over there and it was
21 known as Learned Laboratory and his granddaughter
22 came to Vanderbilt wanting to honor her
23 grandfather and gave the money and wanted it to go
24 to me, so that's why I have the Learned Chair for
25 many, many years.

Dr. John Wikswow, Jr. 7/6/2022

1 Q. It was one of those names that I didn't
2 know if they were describing your educational
3 level or if it was just a name?

4 A. No, it's actually kind of cute but, no,
5 it's Andrew Brown Learned.

6 Q. One of the most famous jurist that we
7 deal with in law school is a guy named Learned
8 Hand, and I thought what a great name for a judge,
9 so I get it but that helps me understand what that
10 means?

11 A. Yes.

12 Q. So I appreciate it. All right. And
13 then the remainder of the sentence, and a
14 Professor of Biomedical Engineering, Molecular
15 Physiology and Biophysics, and Physics?

16 A. That's correct. So I am a tenured
17 faculty member with full voting rights in the
18 Department of Biomedical Engineering. I am a
19 tenured faculty member with full voting rights in
20 Molecular Physiology and Biophysics. And I'm a
21 tenured professor of Physics in the Department of
22 Physics and Astronomy.

23 Q. Okay.

24 A. With full voting rights.

25 Q. Do you have any medical degrees?

Dr. John Wikswo, Jr. 7/6/2022

1 A. No, I do not.

2 Q. Neither do I. Do -- have you ever been
3 trained as a medical examiner or forensic
4 pathologist?

5 A. No, I have not.

6 Q. I'm assuming then you've never performed
7 any autopsies?

8 A. No, I have not.

9 Q. And I broke it into three categories
10 based on, you know, the Interrogatory Answers
11 saying that Exhibit -- what has now been marked
12 Exhibit 2 to your deposition contains the
13 information I was asking for.

14 A. Okay.

15 Q. And it appeared to me there were three
16 categories you were being offered as an expert in.
17 One, biomedical engineering. Are you an expert in
18 biomedical engineering?

19 A. Yes, I am.

20 Q. Two would be molecular physiology and
21 biophysics. And you're an expert in those fields?

22 A. Yes, I am.

23 Q. And are they just interrelated fields or
24 is that one field? For instance, could I be a
25 molecular physiologist but not be a biophysicist?

Dr. John Wikswa, Jr. 7/6/2022

1 A. Yes, you could.

2 Q. You are both?

3 A. Yes, I am.

4 Q. Do you consider them one field when
5 you're teaching on it or working in that area; is
6 that one field of study to you?

7 A. Molecular physiology and biophysics is
8 the title of the department.

9 Q. Okay.

10 A. And it reflects the breadth of the
11 department.

12 Q. All right.

13 A. So there are people in that department
14 consider themselves molecular physiologists
15 because, you know, they consider molecular
16 physiologists; and other people in the department
17 would consider themselves biophysicists. I
18 consider myself qualified in both.

19 Q. Okay. Do you teach courses in both?

20 A. Yes. I teach courses in all -- I don't
21 think my courses are actually listed in molecular
22 physiology and biophysics. They are listed in
23 biomedical engineering and physics. Vanderbilt
24 discourages cross listing, but I have students
25 from all across the University in all of my

Dr. John Wikswo, Jr. 7/6/2022

1 classes, which means students from the medical
2 school, engineering school, and arts and science.

3 Q. I get it. I was a Marine Science Major
4 and they made me take economics. I'm thinking
5 what does that have to do with Marine Science
6 but --

7 A. A lot.

8 Q. Yeah. Resource management and a good
9 reason I took a course. All right. And then the
10 third one there is physics, and you're an expert
11 in the field of physics, correct?

12 A. Yes.

13 Q. Is there any other fields that you hold
14 yourself out as an expert in?

15 A. I'm trying to run through the list of
16 the seven professional societies for which I am a
17 fellow and I think that pretty well spans those
18 fields.

19 Q. Okay. Have you ever --

20 A. I may have left it -- part of the issue
21 is how do you define a field.

22 Q. Well, that was going to be my next
23 thing. I was going to start with you telling me
24 what the fields are that you're an expert in and
25 then you tell me what those fields -- what the

Dr. John Wikswow, Jr. 7/6/2022

1 terms to describe those fields mean, but --

2 A. Okay.

3 Q. -- you're jumping ahead and I apologize
4 if I'm moving to slow on that, but first thing
5 I've got to figure out is what are the fields that
6 you're an expert in.

7 Sitting here today, to your knowledge,
8 what fields have -- has any court in the country
9 found you qualified to provide expert testimony in
10 and then accepted testimony from you in that
11 field?

12 A. All of the above.

13 Q. Okay. So that would be biomedical
14 engineering, molecular physiology and biophysics,
15 and physics?

16 A. Correct.

17 Q. All right. Are there any other fields
18 that you have been offered as an expert in and a
19 court has found you qualified and then accepted
20 testimony from you in that field?

21 A. Not to my recollection.

22 Q. Any there any fields that you've been
23 offered in as an expert witness and a court found
24 you not qualified in?

25 A. No.

Dr. John Wikswa, Jr. 7/6/2022

1 Q. All right. Well, I'm going to try to
2 get smarter here. So describe it to -- like I was
3 a first year student, a freshman or maybe you can
4 even go further back and pretend I'm an 8th
5 grader. What does the term biomedical engineering
6 mean? What is that field?

7 A. Biomedical engineering is the
8 application of engineering principals, practices,
9 theory, and methods to the study of biomedical
10 problems.

11 Q. Okay. My understanding is you hold
12 several patents, several might be underestimating
13 it but we'll get there.

14 A. Yes, it's underestimating it.

15 Q. It's like 40 something patents.

16 A. Right now it's 40. About to be a few
17 more.

18 Q. Okay.

19 A. Or at least one more.

20 Q. Are any of those patents that you hold
21 in the field of biomedical engineering?

22 A. Yes.

23 Q. All right. Would most of them be in the
24 field of biomedical engineering?

25 A. What you have is a Venn diagram, and so

Dr. John Wiksw, Jr. 7/6/2022

1 biomedical engineering would love to claim all of
2 my patents.

3 Q. As in their college here?

4 A. Not -- intellectually, intellectually.

5 Q. Okay.

6 A. The economics, a separate issue.

7 Q. Sure. Although it does seem to drive a
8 lot of things, I guess.

9 A. Yes.

10 Q. So give me an example just to help me
11 understand of work you've completed in the
12 biomedical engineering field. What would be a
13 good example, that kind of drives home the
14 point --

15 A. So I want to be careful because in the
16 American Physics society, which is one of the
17 professional societies I am a fellow, there are
18 divisions. And the division that I am most
19 strongly associated is the division of biological
20 physics, so I am a professor of living state
21 physics, which is a term that I coined at the time
22 I came to Vanderbilt. And the American Physics
23 Society chose to adopt the term biological
24 physics, people have called it the physics of the
25 living state and it was somewhat distinct from

Dr. John Wiksw, Jr. 7/6/2022

1 biophysics. What I have been doing for my entire
2 career is operating at the interface between
3 various disciplines. And so I have extensive work
4 and publications in the cardiology literature,
5 cardiac electrophysiology literature. And so one
6 could ask is my expertise in cardiology beyond
7 what might be expected of a biomedical engineer,
8 and there are biomedical engineers with broad
9 expertise in cardiology.

10 So that's why I'm being a little
11 cautious on the trying to put things into boxes
12 because I've been trying very hard in my career to
13 span boxes.

14 So when I was at Stanford I was working
15 with cardiologists to make electric and magnetic
16 measurements of cardiac electrical and mechanical
17 activity. And so I've been working with
18 cardiologist very, very, closely since 1971. So
19 that's 50 years of working with cardiologists.

20 When I came to Vanderbilt -- and so I
21 was working on and had patents issued on my
22 doctoral work, issued and subsequently licensed.
23 When I came to Vanderbilt I decided that I needed
24 to measure the magnetic field of an isolated
25 neuron because it had never been done. There had

Dr. John Wikswo, Jr. 7/6/2022

1 been claims that it had been done but they were
2 incorrect.

3 So in terms of biomedical engineering
4 and biophysics there were biophysicists working on
5 electric and magnetic fields of nerves. There
6 were neurophysiologist, neuroanatomists, I worked
7 with a neuroanatomist on that, and much of the
8 theoretical underpinning for that work was
9 established by electrical engineers and
10 particularly biomedical engineers.

11 So in many ways my entry in the field
12 was before the really explosive growth of
13 biomedical engineering. So the work that I did on
14 measuring the magnetic field of the nerves ended
15 up working with neurosurgeons and developing a
16 clinical tool for a study in nerve conduction, but
17 it spanned both biomedical engineering and
18 biological physics. I published in the
19 Biophysical Journal, which is the premier journal
20 for biophysics. And I've published in other
21 physics literature and in neurological literature.

22 So the problem is to say this is
23 biomedical engineering. Biomedical engineering
24 overlaps with the fields that I'm working in, and
25 there's a substantial component of the research in

Dr. John Wiksw, Jr. 7/6/2022

1 the area that I've been working that has been done
2 by biomedical engineers, but it's also been done
3 by other types of engineers and other types of
4 physiologists.

5 Q. Is there an umbrella term you would use
6 that encompasses all three of these fields? Is
7 one more broader than the other? I'm trying to
8 get you to help me understand your fields of
9 expertise.

10 A. I think that physiology, biomedical
11 engineering, and physics pretty well span my
12 breadth of expertise.

13 Q. Okay.

14 A. And the physiology would include
15 neuroscience and cardiology.

16 Q. But are you an expert in neuroscience
17 and cardiology?

18 A. I am an expert in areas of cardiology
19 and neuroscience. My group created the foundation
20 for the current understanding of cardiac
21 defibrillation.

22 Q. Okay.

23 A. Which was a 20 year quest by a large
24 number of people and we laid the primary
25 foundation. A former student of mine working with

Dr. John Wikswa, Jr. 7/6/2022

1 biomedical engineers put down the next layer of
2 the wall, and a group at Cornell and in Germany
3 put the capstone on using data that -- using in
4 part data that a biomedical engineering graduate
5 student of mine and I took.

6 Q. Okay.

7 A. So I consider myself quite knowledgeable
8 about the process of cardiac both fibrillation and
9 defibrillation having published in those
10 literatures and having been funded by
11 defibrillator companies to understand how
12 defibrillators work.

13 Q. And would that be the application of
14 electrical currents to the heart muscle?

15 A. Yes.

16 Q. Okay. Now, you also said, and I don't
17 want to get the term wrong, but did you say
18 neurosciences? Is that the term you used?

19 A. Correct.

20 Q. What does the term neurosciences mean?
21 I mean, I know what cardiology is but --

22 A. It's the application of scientific
23 principals, theories, and models to understand
24 neurological phenomena.

25 Q. When you say neurological phenomenon,

Dr. John Wikswo, Jr. 7/6/2022

1 I've always thought of the nerves as kind of, you
2 know, you have your peripheral nervous system and
3 you have your central nervous system, and then
4 your automatic or autonomous nervous system?

5 A. Autonomic.

6 Q. So have you studied all three of those?

7 A. Yes.

8 Q. Okay. What studies have you done and
9 published with regards to the brain?

10 A. There were a series of papers, without
11 having my CV in front of me I won't be exact on
12 the numbers or the dates. The brain generates a
13 magnetic field and the reason why I wanted to
14 measure the magnetic field of an isolated neuron
15 was to understand the mechanisms by which the
16 brain produces a magnetic field. So in one
17 instance I was approached by a funding agent in
18 the Air Force to run a conference to do a detailed
19 analysis of the relative merits of
20 magnetoencephalography, which is magnetic measure
21 of brain activity; and electroencephalography,
22 electrical measurement of brain activity. And we
23 published a paper analyzing the relationship of
24 those measurements where one of the co-authors was
25 a physicist from New York University, one of the

Dr. John Wikswo, Jr. 7/6/2022

1 co-authors was a -- I don't know what his
2 background, he was a very famous neuroscientist
3 electroencephalographer from probably UCSF, and I
4 were the three authors on that paper.

5 Students and I have made -- published
6 papers on the spatial resolution of techniques on
7 the spatial sensitivity of electric and magnetic
8 measurements of brain activity. Yes, those are
9 examples.

10 Q. Okay. Now, one of the things you talked
11 about there was what call an EEG?

12 A. Correct.

13 Q. Because most us can't pronounce what the
14 electricencephalography is?

15 A. That's right.

16 Q. Okay. So EEG, thank you. How does that
17 work? How does an EEG work?

18 A. The nerves in the brain all have a
19 transmembrane potential. So a nerve is like a
20 insulating tube with a conductive media on the
21 inside in a bucket of salt water. The length of
22 the nerves and their architectural connections
23 primarily by synapsis varies across the brain, but
24 basically electrical activity in one region of the
25 brain through chemical synapsis can trigger

Dr. John Wikswo, Jr. 7/6/2022

1 electrical activity in another region of the
2 brain.

3 Electric current applied to the brain
4 can also trigger this activity. So nerves carry
5 signals, signals contain information, and I've
6 studied a bit of that.

7 Q. Right. And I think sometimes you jump
8 past the building block that I might need to help
9 me understand some of this a little better. I
10 mean, just generally speaking is that where they
11 put the electrodes on your scalp and try to
12 measure the electrical activity in your brain or
13 to stimulate it using electrical currents. Like,
14 how does it work?

15 A. You can put electrodes on the scalp to
16 measure the electrical activity of the brain. To
17 put electrodes on the scalp to stimulate the brain
18 is extraordinarily painful and is not generally
19 done. The alternative to that is to use a pulsed
20 magnetic field. And one of my graduate students
21 after he left Vanderbilt developed the theoretical
22 understanding of magnetic stimulation of the brain
23 from outside, which I've have referred to in at
24 least one of my depositions.

25 Q. Okay. So the EEG is reading the

Dr. John Wiksw, Jr. 7/6/2022

1 electrical activity inside of your brain?

2 A. Yes.

3 Q. Okay. And how does it pick up the
4 electrical -- I mean, how does it pick up those
5 electrical signals? How does that work?

6 A. Okay. So if you think of -- the easiest
7 way to think of a nerve is a very small battery.
8 And effectively that battery is moving depending
9 on what nerve you're talking about and how big it
10 is, you can think of the battery as moving with
11 time. That battery induces currents that flow on
12 the inside of the nerve and currents that flow on
13 the outside of the nerve.

14 The currents that flow on the outside of
15 the nerve because the media -- typically you would
16 think of it as -- well, the interstitial fluid is
17 electrically conducted, it has electrical
18 resistance and that creates voltages. Those
19 voltages can be measured on the surface of the
20 scalp. They are quite small because of the
21 insulating properties of the skull. So what
22 you're effectively doing is you're taking a
23 battery, putting it inside of a container that's a
24 reasonable insulator, wrapping it with a layer of
25 conductor, which is the scalp and whatever

Dr. John Wikswo, Jr. 7/6/2022

1 superficial muscles, putting electrodes on that
2 and measuring the electric voltage distribution
3 associated with this battery deep inside the
4 brain.

5 Q. And those voltage -- the voltage
6 distribution penetrates and gets to the electrodes
7 somehow?

8 A. Yes.

9 Q. Okay.

10 A. By the laws of physics.

11 Q. What's the -- what sort of voltages are
12 we talking about? You said they're small but can
13 you put them into perspective?

14 A. Typically microvolts, could be smaller.

15 Q. All right. I think -- I think I need to
16 get back on my script a little cause I'm going to
17 get lost in technical land as I try to learn this
18 stuff, but I know I asked you about biomedical
19 engineering. Let me divide molecular physiology
20 and biophysics into two categories even though you
21 cover both. What, to you, does molecular
22 physiology mean? Help me understand it.

23 A. Let's first define physiology.

24 Physiology is the function of a living system.

25 Whether it's at the level of -- basically at the

Dr. John Wiksw, Jr. 7/6/2022

1 level of an organ or an animal. So cardiac
2 electrophysiology is the electrical aspects of the
3 physiology of the heart. Neurophysiology is the
4 physiology of nerves. And it's a matter of
5 spatial scale in that molecular physiology came to
6 the fore when people realized that genetics were
7 driving specific nature of specific molecules.

8 And so the explanation of physiological
9 phenomena was extended down to the molecular
10 level. It says here we have a particular ion
11 channel that is made up of different parts and if
12 one of those parts is a mutation, the ion channel
13 will have a different property than the identical
14 channel without one of those mutations.

15 Q. Would that be like channelopathy of the
16 heart. Is that a form of what you're talking
17 about?

18 A. If you want to use channelopathy that's
19 fine, but the bottom line is molecular physiology
20 is basically understanding physiology at the
21 molecular level. That also includes molecular
22 metabolic and signaling dynamics, so you have this
23 is molecule triggers that molecule or this
24 molecule triggers this gene to produce that
25 molecule, and so you have complicated networks of

Dr. John Wikswo, Jr. 7/6/2022

1 biochemical reactions, and molecular physiology is
2 drilling down into the molecular scale. Initially
3 physiology was whole animal. You know you put an
4 electrode on a frog leg and it twitches. You put
5 a piece of zinc or you put a battery on a frog leg
6 and the frog leg jumps. First electric
7 physiological experiment by Galvani. That -- that
8 was electrophysiology at the scale of the attacked
9 animal.

10 It then went to cellular
11 electrophysiology. And now it's gone to molecular
12 physiology, so it's really -- the modifier is
13 really a matter of the scale.

14 Q. Okay.

15 A. And the biophysics on molecular
16 physiology and biophysics is basically
17 understanding the physical principals that govern
18 those processes.

19 Q. All right. And then physics is just the
20 study of the natural forces, basically those
21 interplays?

22 A. I think in the most general description,
23 physics is the study of the four fundamental
24 forces that create the world as we know it and
25 hence physics encompasses almost everything.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. Okay. And --

2 A. Physics explains chemistry, but luckily
3 chemists have figured out how not to wait for the
4 physicists to make progresses.

5 Q. Got it. All right. The next paragraph
6 will lead me to kind of the next set of questions.
7 It says, I began investigating considering
8 judicial electrocution protocols and electrocution
9 equipment in 1992. I have continued to do so for
10 the past 29 years. I think math wise we can call
11 that --

12 A. What line are we at?

13 Q. Paragraph 2?

14 A. Paragraph 2, yes. Okay.

15 Q. So what -- what made you decide to start
16 considering and investigating judicial
17 electrocution protocols and electrocution
18 equipment?

19 A. In 1992, Paul Botay who was a public
20 defender in Nashville called the physics
21 department and said I would like to speak to a
22 physics professor who understands electricity.
23 And the secretary who answered the phone said, oh,
24 you need to talk to Professor Wikswo. And he
25 asked me to review the documentation of the

Dr. John Wiksw, Jr. 7/6/2022

1 Tennessee electric chair that had been modified by
2 Frederick Leuchter. And when I reviewed the
3 documentation and checked with the literature, I
4 concluded the Tennessee electric chair would not
5 work, and that was passed up the chain of command.

6 And I proposed that they had to do a
7 test on the electric chair. They hired an
8 electrical engineer who did the test and the
9 electric chair failed the test and then that
10 electric chair -- that electrical engineer then
11 modified the Tennessee electric chair so that it
12 would pass the test. That's how I got into it.

13 Q. What was the primary issue that you
14 discovered that led you to believe it would fail
15 and then the result was it did fail?

16 A. It would blow a fuse.

17 Q. So they -- was it they over calculated
18 the resistance or under calculated the resistance?

19 A. The resistance was smaller than they had
20 anticipated, and they had a -- and some of this is
21 one of my -- in the Florida report that was part
22 of the material requested by the subpoena. At the
23 end there is a discussion of parts that were
24 removed because they were not relevant to Florida
25 and I was keeping the document, you had my working

Dr. John Wikswo, Jr. 7/6/2022

1 document. And in there there's discussions of the
2 shortcoming of the magnetic amplifier saturable
3 reactor technology that Leuchter was using and
4 fuses. So this testimony postdated my initial
5 observation that the Tennessee electric chair
6 would not work as advertised by Leuchter.

7 Q. Because it blew a fuse?

8 A. Yes.

9 Q. Have you reviewed any electrical
10 equipment used in judicial electrocutions that
11 does not include an overload protector?

12 A. I only received the -- the only -- to my
13 knowledge right now, the only electric chairs
14 which I have reviewed the hardware were the
15 original Leuchter electric chair. And I had
16 looked at briefly this morning, but did not study
17 in detail, the circuit that you provided me last
18 night for the Florida electric chair. I believe
19 the Florida electric chair did have fuses.

20 Q. Okay.

21 A. But I can't be sure because I don't have
22 the image in front of me.

23 Q. But you can have a -- you can design an
24 electrical system without an overload protector
25 without fuses, correct?

Dr. John Wikswo, Jr. 7/6/2022

1 A. It is not clear whether a certified
2 professional engineer would be allowed to
3 construct that device.

4 Q. Because it wouldn't be safe?

5 A. That's right.

6 Q. It might kill somebody?

7 A. There are standards in electrical
8 engineering and Leuchter was put out of the
9 electric chair business because he was practicing
10 electrical engineering without a license.

11 Q. I appreciate that information, that
12 historical information about Mr. Leuchter, but I'm
13 asking specifically if you design an electrical
14 system that is unsafe it could kill somebody,
15 couldn't it?

16 A. What is your -- I don't completely
17 understand your question.

18 Q. What don't you understand about my
19 question?

20 A. Why don't you rephrase it and try it
21 again?

22 Q. If --

23 A. Because you were talking about an
24 electric chair and there's a question of whether
25 you have a properly designed electric chair or an

Dr. John Wiksw, Jr. 7/6/2022

1 improperly designed electric chair.

2 Q. Well, I'm glad you shared what you
3 didn't understand about it because that's actually
4 not what I said. I said could you design an
5 electrical system that did not have overload
6 protectors or fuses built into it?

7 A. Yes, you could.

8 Q. And then you followed up with that and
9 said, but you didn't think a certified
10 professional engineer or electrical engineer could
11 design that system?

12 A. Or would design that system.

13 Q. I think you said could, but that's why
14 we have a court reporter.

15 And my follow-up to that was because it
16 would be unsafe and you agreed. And then I said
17 and it could kill somebody, and that's when you
18 started talking about Mr. Leuchter's historical
19 background.

20 So my question is, if you design an
21 electrical system with no overload protector that
22 was unsafe, could that kill somebody?

23 A. An overload -- the presence or absence
24 of an overload protector does not ensure the
25 safety of an electrical -- piece of electrical

Dr. John Wikswo, Jr. 7/6/2022

1 equipment. Overload protection is designed to
2 protect the equipment and the building and the
3 power distribution system more than the user.

4 Q. What about a ground fault interruptor,
5 isn't that a form of overload protection?

6 A. Actually not per se. Overload -- it's
7 not a matter of overload, it's a question of
8 whether the current is going in the current
9 location on the correct path or not, so I do not
10 personally consider a ground fault circuit
11 interruptor as overload protection as ground fault
12 protection.

13 Q. Okay. And that's -- but that's a safety
14 design, correct?

15 A. That's a safety design.

16 Q. And your position is the overload
17 protectors were primarily designed to protect the
18 equipment and/or building that it's attached to?

19 A. Correct.

20 Q. Does it provide any protection for the
21 individuals that might encounter the system?

22 A. My hesitancy in answering this is that
23 we are discussing the creation of an instrument
24 designed to kill people, and so I'm trying to
25 figure out how do you put safety measures in an

Dr. John Wiksw, Jr. 7/6/2022

1 instrument that is designed to kill people.
2 That's why I'm not sure I exactly understand how
3 to answer your question because we're talking
4 about -- are we talking about a consumer, an item
5 of consumer or industrial electrical use or an
6 instrument whose objective is to kill someone.

7 Q. Well, can the consumer or industrial
8 systems that you're describing, can the electrical
9 currents in those systems kill somebody?

10 A. Yes.

11 Q. Because -- I mean, electricity can kill
12 people, can't it?

13 A. Yes.

14 Q. It's done that before and will do that
15 in the future?

16 A. Yes.

17 Q. But the failure of the Leuchter designs
18 electrical chair specifically in Tennessee,
19 although I think he had similar designs that he
20 pandered across the country, but let's talk about
21 Tennessee specifically. The overload protector
22 blew because he had over calculated what the
23 resistance would be of the body?

24 A. He overestimated the resistance. And so
25 with a realistic value for the resistance that

Dr. John Wiksw, Jr. 7/6/2022

1 electric chair would deliver more current than his
2 circuitry could support.

3 Q. Okay. And the -- do you know if that
4 Leuchter design in Tennessee was used on anyone
5 prior to the testing that showed it was going to
6 fail?

7 A. I do not recall but I believe it may not
8 have been tested. It may not have been used in an
9 execution.

10 Q. Okay. Do you know if a similar design
11 to the Leuchter design that you described in
12 Tennessee or that you reviewed in Tennessee has
13 been used in any other judicial executions across
14 the country?

15 A. I do not know.

16 Q. All right. From your review of the
17 information provided to you specific to this
18 litigation, so specific to the South Carolina
19 electric chair, electrical system, or execution
20 process, do you know whether or not it has
21 overload protectors built into the system?

22 A. As I said I spent ten minutes looking at
23 the schematic this morning and I'm not sure
24 whether or not the South Carolina system has
25 overload protection. I suspect it does, but I --

Dr. John Wikswow, Jr. 7/6/2022

1 I recollect it might but I can't be sure unless I
2 have the drawing in front of me.

3 Q. Okay. Well, whether it does or does
4 not, will that affect the opinions that you're
5 prepared to give in this litigation?

6 A. No.

7 Q. So it doesn't matter if it has overload
8 protection or it doesn't have overload protection
9 with regards to the opinions you're prepared to
10 give in this case?

11 A. That's correct.

12 Q. I've got a note here that I need to
13 follow-up on before I forget. I was asking you
14 about testimonial lists.

15 A. All right.

16 Q. Do you keep a list somewhere, and it
17 doesn't necessarily have to be the four year
18 requirement by the federal courts, but do you in
19 your practice as an expert or a consultant keep a
20 list of cases that you've worked on?

21 A. I try to. It may not be complete, but I
22 try to.

23 Q. But you do have that case somewhere -- I
24 mean, that list?

25 A. I have that list. I think you have a

Dr. John Wiksw, Jr. 7/6/2022

1 copy of it.

2 Q. Okay. Have you ever worked with
3 Dr. Jonathan Arden on any other cases?

4 A. Not that I know of. He may have been on
5 a case that I would -- he may or may not have been
6 on a case that I was associated with. The name
7 does not ring a bell.

8 Q. Okay. To your knowledge, have you
9 reviewed anything prepared by Dr. Jonathan Arden
10 in this litigation?

11 A. Not to my knowledge.

12 Q. Okay. And I'll represent to you that
13 Dr. Arden is a forensic pathologist and medical
14 examiner that's been offered by plaintiffs as an
15 expert in this case. His name is listed right
16 under yours on Exhibit 1.

17 A. Okay.

18 Q. I'm just -- have you been provided any
19 of his work --

20 A. No.

21 Q. -- his opinions? Have you collaborated
22 with him at all?

23 A. No, I have not.

24 Q. All right. How many -- you mentioned
25 earlier in your testimony that you reviewed

Dr. John Wiksw, Jr. 7/6/2022

1 autopsies and autopsy reports?

2 A. I've reviewed autopsy reports.

3 Q. And I'm assuming some of those had
4 photographs, others were just descriptions?

5 A. Yes, they did.

6 Q. How many autopsy reports have you
7 reviewed specific to the issues of electrocution
8 and judicial execution?

9 A. In excess of 40.

10 Q. And who provided you those autopsy
11 reports?

12 A. Attorneys from Tennessee and Florida and
13 the attorneys in the civil cases where there was
14 an industrial accident.

15 Q. In your subpoena response one of the
16 autopsy reports that was included is the autopsy
17 of a -- just a second, let me get a name -- an
18 inmate by the last name of Medina out of Florida.
19 If you'll recall this is one where the synthetic
20 sponge had caught fire during the process.

21 A. Yes.

22 Q. Do you recall reviewing that autopsy
23 findings?

24 A. If I stated it on the list of autopsies
25 that I had, one of the attachments was a list of

Dr. John Wiksw, Jr. 7/6/2022

1 autopsies that I had read, and if Medina was on
2 that list, yes, I have read Medina's autopsy
3 reports.

4 Q. So it's a list of autopsies. I mean,
5 you were -- I tell you what, this might be a good
6 time to do this. Trying to save some trees, but I
7 did bring a flash drive of your subpoena response.

8 MR. PLYLER: Why don't we -- might be a
9 good time for a two-minute break. Everybody
10 can maybe refresh themselves while I get this
11 cranked up.

12 (A brief recess was taken.)

13 (Exhibit 3 marked for identification.)

14 Q. (By Mr. Plyler) Dr. Wiksw, all right, so
15 we're just back from a short break. During the
16 break I had asked you to start kind of just
17 reviewing the flash drive that we're going to mark
18 as Exhibit 3 to your deposition. I represented to
19 you these were the documents produced to us by
20 plaintiffs' counsel as responsive to the subpoena we
21 sent to you for your file and other materials. The
22 one caveat being there is PDF on the flash drive
23 that is a combination of all those documents that we
24 called Wiksw subpoena response, that's included on
25 the flash drive and is a, you know, as I said a

Dr. John Wiksw, Jr. 7/6/2022

1 combination of the other documents.

2 Additionally, Dr. Wiksw, we had marked
3 Exhibit 4 to your deposition a document that was
4 included in the subpoena response --

5 A. What is Exhibit 3? You've not given me
6 Exhibit 3 yet.

7 Q. The flash drive is Exhibit 3.

8 A. Oh, okay.

9 (Exhibit 4 marked for identification.)

10 Q. The document Exhibit 4 I just gave you
11 appears to be you taking each category of our
12 subpoena and then putting a response to it. Do
13 you see that?

14 A. Yes, I see that.

15 Q. And I'm assuming that that's where we
16 get this numbering system for the different
17 documents that were produced, so like part 1 of
18 the subpoena, which was a numbered paragraph, the
19 response you have is 01-CV-Wiksw?

20 A. Underscore -- underscore, not dash.

21 Q. I appreciate, thank you. And then 2
22 would be the emails, which you denote with a 02
23 underscore. So was that your intention as you
24 were titling these documents they correspond to
25 the numbered parts of our subpoena?

Dr. John Wikswow, Jr. 7/6/2022

1 A. That is correct.

2 Q. Okay. And if there's not a document
3 with that leader, excuse me, if there's not a
4 either a document or set of documents with a
5 certain number in front of it to correspond with
6 the subpoena request, was that -- was that because
7 you did not have documents responsive to that
8 category?

9 A. No, that is not correct.

10 Q. Okay.

11 A. If there is no document, there is a
12 response in the prose that explains. So for
13 example, item 11. Item 11 you were asking me for
14 critical reviews of my work and I explained that I
15 could not provide that.

16 Q. Understood. But like the number 15 we
17 were asking for photographs, films, videotapes,
18 and any other visual representations generated for
19 the purpose of this case and your response is
20 none. So then if we go to your subpoena response
21 there will not be a category of documents that
22 starts with a 15 underscore?

23 A. That is correct.

24 Q. Okay. So with that caveat, if there's
25 not a number to correspond with one of the

Dr. John Wiksw, Jr. 7/6/2022

1 paragraphs in the subpoena, either you provided an
2 explanation in Exhibit 4 or you had no documents
3 responsive to it?

4 A. Right. And it turns out that I see an
5 error right now in that there is no answer under
6 19, but I provided --

7 Q. Sure, I see that.

8 A. I provided the information under 17.

9 Q. Understood. Thank you for the
10 clarification. And that would just be your
11 billing in this particular --

12 A. Correct.

13 Q. -- matter? Okay. All right. Now, when
14 we -- what kind of led us down this path was you
15 mentioning that you had an appendix that you had
16 provided listing the autopsies you had reviewed;
17 is that correct?

18 A. Correct.

19 Q. And I believe from our conversation off
20 the record we determined that would be the
21 document on Exhibit 3 that's entitled
22 05.07_Tennessee Death Penalty Affidavit 2014 5/29
23 autopsy appendix?

24 A. Correct.

25 Q. There's some underscores in there that

Dr. John Wikswow, Jr. 7/6/2022

1 for the sake of my tongue I skipped over. Is that
2 document that I just referenced your attempt to
3 keep a list of any autopsies you reviewed for any
4 of your work on judicial execution cases?

5 A. Yes.

6 Q. All right. When we see the number and
7 then a descriptor and then some text underneath
8 it, for each one of those numbered paragraphs, are
9 you the person that provided those descriptions?

10 A. Yes.

11 Q. And would that be from your review of
12 the actual autopsy report?

13 A. That report contains both analysis of
14 autopsies and as cited witness testimonies that
15 were provided to me.

16 Q. Okay.

17 A. And, yes, that is my -- those are my
18 words. So I am writing the précis of each autopsy
19 based on my --

20 Q. Okay.

21 A. -- reading of the autopsy report.

22 Q. There's also, and I don't remember if it
23 was in your subpoena response or if it was only in
24 the documents that were provided through discovery
25 and listed as having been provided to you, but one

Dr. John Wiksw, Jr. 7/6/2022

1 of the documents that I recall was a spreadsheet
2 that was put together by Justice 360's attorneys
3 regarding their review of information about, I
4 think it proclaims to be every judicial execution
5 by electrocution in South Carolina?

6 A. Yes, there was a spreadsheet that talked
7 about the voltage used and I failed to include
8 that in the package.

9 Q. No, that's fine. That's why I said it
10 may have been included in the documents referenced
11 in their discovery responses as having been
12 provided to you, but I'm just trying to get you to
13 confirm and I think you did, that is a document
14 you reviewed?

15 A. Yes, I have.

16 Q. Okay.

17 A. I don't remember the name of the
18 document but I have seen it.

19 Q. Yes. And one of the e-mails that we're
20 going look at I think you just described it as the
21 spreadsheet, but you remember being provided a
22 spreadsheet from Justice 360's attorneys that
23 purports to be some descriptions of every judicial
24 execution by electrocution in South Carolina? I
25 think it goes all the way back to, like, 1912 if

Dr. John Wiksw, Jr. 7/6/2022

1 I'm not mistaken.

2 A. Yes.

3 Q. Okay.

4 A. I recollect that document but not the
5 specific details.

6 Q. Did that document influence any -- or
7 provide the basis for any of the opinions -- did
8 that document provide the bases for any of the
9 opinions that you are prepared to give and have
10 listed in your report in this case?

11 A. No.

12 Q. Okay. The autopsy that I was asking
13 about was of a man by the last name of Medina from
14 1997 from an execution in Florida by
15 electrocution. I've only -- now that we've
16 identified this appendix of autopsies I've only
17 briefly looked through it, but I did not see
18 Mr. Medina listed on here?

19 A. That would suggest that I have either
20 not seen the Medina autopsy or did not write
21 précis of it.

22 Q. Okay.

23 A. And I do not have digital copies of the
24 autopsies so I would have to go through my files
25 to see whether Medina was in that file.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. I will represent to you that Medina's
2 autopsy report and the investigation that was
3 ordered by the governor of Florida by four
4 independent medical examiners, that that
5 information was included in the documents provided
6 by Justice 360 as having been provided to the
7 experts in this case?

8 A. Could be. I do not recollect having
9 seen that.

10 Q. Okay. Do you recall ever studying or
11 looking into the issues Florida was having in the
12 mid to late '90's with synthetic sponges that were
13 catching fire during the electrocution process?

14 A. I'm aware of that.

15 Q. And a lot of these that are in your
16 report and in a lot of those descriptions in the
17 autopsies that you provided you talk about
18 evidence of burns or thermal injuries to the
19 condemned person; is that right?

20 A. Correct.

21 Q. Do you have a way of determining a
22 pre-mortem burn or thermal injury from a
23 post-mortem burn or thermal injury? Let me -- let
24 me add one clarification. From looking at autopsy
25 findings, are you aware of any way of determining

Dr. John Wiksw, Jr. 7/6/2022

1 whether a thermal injury or burn occurred
2 pre-mortem or post-mortem?

3 A. There are autopsy reports that I have
4 read that describe, I believe -- correction. I do
5 not remember whether it was an autopsy report or
6 an analysis by a third party of an autopsy report
7 who makes the distinction between pre-mortem and
8 post-mortem burns. I do not personally know how
9 to make that distinction, and unless the medical
10 examiner made it I would not be able to state
11 whether or not a burn was pre-mortem or
12 post-mortem.

13 Q. If the burn or thermal injury occurs
14 post-mortem would you agree with me that the
15 deceased person would not feel the burn?

16 A. My problem in this context is trying to
17 define pre-mortem versus post-mortem as a state.

18 Q. Okay. What --

19 A. Basically what is the -- what is the
20 exact time of "death"? And what is the time that
21 the burn injury occurred beginning to end? And I
22 think that both of those are rather difficult to
23 define.

24 Q. You think death is difficult to define?

25 A. You have to have a definition of death

Dr. John Wiksw, Jr. 7/6/2022

1 and then you can decide given the definition of
2 death when death occurred if you can make the
3 appropriate measurements.

4 Q. What about in South Carolina? Do you
5 know what the definition of death is in
6 South Carolina?

7 A. I do not know of South Carolina's
8 definition of death.

9 Q. Are you aware that every state in the
10 nation has a statute that sets forth when someone
11 can be declared dead?

12 A. I was not aware of the fact that every
13 state had a statute to that effect.

14 Q. Okay.

15 A. I'm not surprised.

16 Q. Right.

17 A. But I was not aware of it and I have
18 not -- I'm not aware of the South Carolina statute
19 for death.

20 Q. Would you agree with me that
21 historically death had been described as
22 cessation -- cessation of a heart beat? That your
23 heart was no longer beating and therefore you
24 could be declared dead, would you agree with that?

25 A. Repeat the question.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Sure. Historically speaking in the
2 field of medicine that death had previously been
3 decided that you could be declared dead if there
4 was no discernable heart beat?

5 A. You said previously, so the difficulty
6 I'm having is what is the time period?

7 Q. I said historically?

8 A. Historically, so what is the historical
9 time period?

10 Q. Are you aware of any time in history
11 where in order for you to be declared dead your
12 heart had to have been stopped? Are you aware of
13 that sitting here today, sir?

14 A. I do not know for a fact the historical
15 basis of a definition of death as cessation of the
16 heartbeat. With the transplant era brain death is
17 of much greater interest.

18 Q. How do you define death, sir?

19 A. How do I define what?

20 Q. Death. I mean, it's a term you use in
21 your report, do you not?

22 A. Yes, I do.

23 Q. So how do you define it?

24 A. I have not previously stipulated a
25 formal definition for death.

Dr. John Wikswa, Jr. 7/6/2022

1 Q. Okay. So when you use it in your
2 report, what do you mean by it?

3 A. I would -- asking what I would mean when
4 I use it. Cessation of all physiological
5 function.

6 Q. So does that mean that from your
7 perspective there would have to be no signs of
8 brain activity, there would have to be no signs of
9 a heartbeat or cardiac activity, there would have
10 to be no signs of gastro intestinal activity,
11 there would have to be no signs of cellular
12 transport of any form inside the body before
13 somebody could be declared dead.

14 A. Those are your words, not mine.

15 Q. Well, you said any physiological
16 process, did you not?

17 A. I said physiological function, yes?

18 Q. Okay. Is cellular transport a
19 physiological function?

20 A. Yes.

21 Q. So if ADP or ATP, whichever one it is,
22 is moving back and forth from cell membranes, that
23 person is still alive?

24 A. The biochemistry -- biochemistry will
25 continue long after what would be considered

Dr. John Wiksw, Jr. 7/6/2022

1 clinically dead.

2 Q. And, again, I'm -- forget clinically
3 dead for a minute. We're talking about your
4 definition of death as you use in your report. So
5 for Dr. Wiksw, in order for somebody to be dead,
6 what has to occur?

7 A. Given your line of questioning I would
8 amend my definition to cessation of physiological
9 function beyond the point of recovery. So if you
10 shut everything down and you have ATP and ADP
11 moving back and forth in a physiological process
12 such as the Krebs cycle, the systems will not
13 recover.

14 Q. So it would have to be long enough that
15 you couldn't restart someones heart?

16 A. Yes. I think that probably would --
17 yes, I would accept that beyond recovery. So,
18 yes, you could not restart the heart.

19 Q. Are you aware --

20 A. But then you might still be brain dead,
21 and so then there's the question of what
22 definition of death are you wanting to use.

23 Q. We're using the one that's in your
24 report. You're the one using the term. I need to
25 understand what you mean by it when you use it in

Dr. John Wiksw, Jr. 7/6/2022

1 your report. For instance, are you aware of
2 situations where someone's heart has been
3 restarted 20 to 30 minutes after a cardiac event
4 and cessation of heartbeat?

5 A. Yes, I'm aware of that.

6 Q. Are you aware of anybody whose heart was
7 not functioning for 20 to 30 minutes, their heart
8 is restarted and they recovered any neurological
9 activity?

10 A. I do not recall a specific case of that.

11 Q. How long after your brain is deprived of
12 oxygen will brain damage start to occur?

13 A. Brain damage will begin to occur and
14 will accumulate with time after depletion of
15 oxygen.

16 Q. Instantaneously?

17 A. The issue is oxygen stored in the
18 hemoglobin and dissolved oxygen in the tissues
19 rate of consumption, and how long it takes for the
20 various biochemical processes to make irreversible
21 damage at the cellular level, and it's going to be
22 cumulative.

23 Q. So is the answer that you don't know?

24 A. I didn't say that.

25 Q. Okay. Well, I haven't heard an answer

Dr. John Wiksw, Jr. 7/6/2022

1 to it yet.

2 A. Why don't you repeat the question then.

3 Q. Sure. How long after your brain is
4 deprived of oxygen will brain damage start to
5 occur?

6 A. The issue I have with your question is
7 how do you define brain damage?

8 Q. How do you define brain damage?

9 A. Brain damage is -- could be as simple as
10 microscopic damage to cellular processes and
11 mechanisms, and I do not know explicitly how many
12 seconds the brain -- or minutes -- seconds or
13 minutes brain cells can exist with depleted oxygen
14 before irreversible damage occurs. It is not a
15 black and white the brain is alive and the brain
16 is dead. There is a steady accumulation of
17 damage. The longer the oxygen is deprived the
18 greater the damage to the brain.

19 Q. Have you ever heard that within three to
20 five minutes of your heart stopping your brain
21 will be irreversibly damaged? Have you ever heard
22 that?

23 A. I have heard that, but then there's also
24 a question of the -- there is a question of the
25 extent of irreversible damage. So it's not like

Dr. John Wikswo, Jr. 7/6/2022

1 the brain is in tact and the brain is damaged.
2 The quality of the recovered brain may be impacted
3 by a transient ischemic episode. And the duration
4 and extent of that transient ischemic episode
5 affects the degradation and capabilities of the
6 brain. So if -- it's not black and white. It
7 says the brain is irreversibly damaged. On the
8 microscopic level damage occurs fairly soon and it
9 then accumulates with time, and the longer the
10 brain is without oxygen the greater the damage.
11 And the greater the damage, the more likely it is
12 that the damage becomes irreversible. The body
13 has incredible abilities to recover from damage.
14 And so the reason I'm being cautious is that I
15 don't want to give a blanket statement that says
16 there is a black and white transition from a
17 non-damaged state to a damaged state.

18 Q. Fair. But the reason I'm asking you is
19 because you've made the statement that when you
20 use the word death or talk about death in your
21 report, it's the cessation of these physiological
22 processes beyond recovery?

23 A. Correct. I would accept that.

24 Q. So how long would someone's neurological
25 activity have to have been ceased before they're

Dr. John Wiksw, Jr. 7/6/2022

1 beyond recovery and therefore meet your definition
2 of death?

3 A. In my report I am using the term death
4 as a descriptor of an end state, and am not
5 discussing the intermediate steps that transpire
6 reaching that end state except to note that, for
7 example, the heart can be soon beating after the
8 electric -- after an electric shock and the
9 respiratory centers can resume breathing.

10 In one case in my testimony there's a
11 statement that it might be 30 minutes or longer
12 before the respiratory centers recover; and hence
13 the question on beyond recovery is when do you
14 want to put your clinical patient on a respirator
15 versus allow the clinical patient to expire.

16 So, again, it's not black and white and
17 it's not black and while until you get far enough
18 into the process of death that you can refer to it
19 as a state, this person is dead.

20 Q. Yeah, I'm just trying to figure out when
21 you use that term in here how far along into that
22 process are we? How much time has elapsed?

23 A. It depends upon the context, and if you
24 are -- it probably doesn't depend on the context.
25 It basically -- I would prefer that you would give

Dr. John Wiksw, Jr. 7/6/2022

1 me a specific example of my use of the word death
2 in one of my statements, so that I can speak with
3 a concrete example rather than a generality.

4 Q. Well, and I appreciate that, but I have
5 a right to understand the terms that you're using
6 and the way you are using them. For instance,
7 like the term biomedical engineering. I got a
8 right to know what you mean by that before I start
9 getting into the specifics of your report so that
10 I understand where you're coming from.

11 A. Okay.

12 Q. And one of the key terms I believe when
13 we're talking about, you know, judicial executions
14 is the term death, and you use that term in your
15 report, you opine on it, you opine on when it will
16 occur. And I'm asking you to define it so that I
17 know what you mean when you say death in your
18 report?

19 A. Given the fact that we have been
20 discussing molecular physiology and you brought up
21 ATP and ADP and effectively all of biochemistry, I
22 would amend the definition you've requested,
23 cessation of systemic physiological function
24 beyond recovery.

25 Q. And beyond recovery from a sense of

Dr. John Wiksw, Jr. 7/6/2022

1 without clinical intervention or beyond recovery
2 including clinical interventions?

3 A. Either without -- with or without
4 clinical intervention. In other words, is someone
5 dead when they have no heart beat but their starts
6 beating spontaneously, or they're not breathing
7 but they're breathing resumes spontaneously?

8 Is the person dead when -- suppose you
9 had a heart attack or in cardiac fibrillation, you
10 would have no detectable heartbeat. You would die
11 fairly quickly unless somebody cardio-verted you
12 either with a thump on your chest or
13 defibrillation electrodes. So then the question
14 is, were you dead, and there are comments in the
15 literature as in I came back from death, you know,
16 lay descriptions. So I am referring to death as
17 the terminal state. And we have --

18 Q. So when you say terminal state you mean
19 even with clinical intervention you would not be
20 able to recover?

21 A. Yes. But the difficulty with even that
22 precise a definition is that you could restart a
23 person's heart and find that their brain was dead,
24 so then you get into the fine points of the
25 definition of brain death and when are organs

Dr. John Wikswo, Jr. 7/6/2022

1 suitable for transplant.

2 Q. Okay. I'm going to press a little
3 further so we can get an answer to this. If
4 someone is brain dead and we cardio-vert them and
5 restart their heart but they're still brain dead,
6 there's no neurological activity detectable in
7 their brain, under Dr. Wikswo's definition, is
8 that person dead?

9 A. No.

10 Q. As long as their heart is beating you
11 consider them alive? I mean, I'm going to take
12 this to the ridiculous because we know for a fact
13 there are people walking around with transplanted
14 hearts but that's the dead person's heart that's
15 beating inside their chest, so who is alive?

16 A. That's an interesting question.

17 Q. Because the person walking around with a
18 transplanted heart, their heart is no longer
19 beating? Under your definition, who would be
20 alive?

21 A. A similar question, is the USS
22 Constitution the USS Constitution because every
23 board has probably been replaced?

24 Q. Yeah, that's fair.

25 A. I'll leave that to you.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Well, I need to understand from your
2 definition if -- if it requires both brain death
3 and heart death beyond clinical intervention to
4 recover, is that what you mean when you use the
5 term death?

6 A. I would accept your definition.

7 Q. It's not my definition. I am rephrasing
8 or trying to at least summarize your definition.
9 I can promise you that's not my definition of
10 death, but I'm not the expert and nobody is asking
11 me my opinions.

12 A. The difficulty I'm having is one of
13 context, and the context of the definition of
14 death is different in a transplant environment
15 than in a non-transplant environment.

16 Q. How about legally speaking?

17 A. I'm not a legal expert.

18 Q. Okay. Would you agree with me that a
19 transplant surgeon cannot transplant a heart from
20 a donor to a recipient before someone has been
21 declared legally dead?

22 A. I'm not aware of the specific legal
23 ramifications of transplant donations.

24 Q. Okay. I'm going to -- because this was
25 produced to us in two different forms, I need to

Dr. John Wiksw, Jr. 7/6/2022

1 confirm that it is either exactly the same or if
2 there is differences, I might need your help
3 explaining to me what those differences are.

4 (Exhibit 5 marked for identification.)

5 Q. Okay, sir, I've handed you what's marked
6 as Exhibit 5 to your deposition. And if you
7 notice at the bottom right hand corner it's got
8 the word Plaintiffs and then a series of numbers,
9 1 through 10?

10 A. Correct.

11 Q. I'll represent to you this was produced
12 to us during discovery and I believe it purports
13 to be your affidavit in this case. I'm assuming
14 because it has the same notary date on the last
15 page and it's the same page numbers and has the
16 same caption, that it is the same as Exhibit 2;
17 but, I mean, have you given a revised affidavit in
18 this litigation or have you only given one
19 affidavit in this litigation?

20 And just for the record I see you're
21 doing kind of a page by page analysis, which is
22 fine, and I'll let you complete the process; but
23 my question was, do you know if you gave a revised
24 affidavit at some point or have you only given the
25 one affidavit? Have you only signed one

Dr. John Wiksw, Jr. 7/6/2022

1 affidavit?

2 A. To the best of my recollection I've only
3 signed one affidavit.

4 Q. And you've got both exhibits in front of
5 you. On that last page of each one, that is your
6 signature and they're both dated 27th day of March
7 scratched out with the handwritten word April
8 above it, 2021, correct?

9 A. Correct.

10 Q. All right. Before we start going
11 through this in some considerable depth I do have
12 a question about the -- because you've referenced
13 a few times the Florida report that you did?

14 A. Right.

15 Q. If you look at Exhibit 4 and go to
16 page 5 of Exhibit 4. Let me know when you're
17 there. I can't see because of the computer
18 screen, okay. Thank you. There under 12, you say
19 not applicable and then you say, as a point of
20 clarification, in my 1998 Florida report, I stated
21 that, and then it goes on to page 6. When you've
22 been talking about your Florida report, is that
23 1998 Florida report the same report? There's not
24 more than one Florida report that you've been
25 discussing?

Dr. John Wikswo, Jr. 7/6/2022

1 A. There may be more than one Florida
2 report. The 1998 Florida report that I am
3 referring to is the one that I attached in this
4 set.

5 Q. Okay. Do you remember the name of any
6 individual and I'm talking about as a plaintiff or
7 the condemned person, because I don't know if it
8 was used in an appellate process or a sentencing
9 process or if it was used in a challenge to the
10 method of execution civil litigation. That's why
11 I'm being broad here on purpose. The name of the
12 condemned person that was involved in that lawsuit
13 or that legal proceeding, do you remember any of
14 their names?

15 A. Thomas Provenzano.

16 Q. Thomas Provenzano.

17 A. I'm pretty sure it was Thomas. I know
18 it was Provenzano.

19 Q. Okay. Do you know happened to
20 Mr. Provenzano?

21 A. I believe he was executed.

22 Q. You go on to talk about a -- and it
23 starts on page 6 of the same exhibit -- a document
24 that you co-authored with a Nestor Sepulveda?

25 A. Sepulveda.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. And you describe it as a manuscript
2 entitled A Finite Element Model of Execution by
3 Electrocutation?

4 A. Correct.

5 Q. And that you had attached it to your
6 1998 Florida report that you believe was used in
7 legal proceedings involving Mr. Provenzano and
8 that the attached version then was dated
9 September 22 of 1994; do you see that on page 6?
10 It's in that third line of the paragraph at the
11 top.

12 A. That's correct.

13 Q. Okay. The version that you produced,
14 and I believe you try to explain it in the second
15 paragraph on page 6, is dated February 17 of 1999?

16 A. That's correct.

17 Q. Did you do any additional work on that
18 manuscript from the time you submitted it for
19 publication and it was rejected until the
20 February 17, 1999 date that was produced?

21 A. Not to my recollection.

22 Q. Okay.

23 A. And the 17 February 1999 was the date on
24 the file on my computer. And the manuscript, the
25 law tech typesetting program that the manuscript

Dr. John Wiksw, Jr. 7/6/2022

1 was set in had a command slash today. And so when
2 I printed it out, it basically gave the 1st or 2nd
3 of a July as the date, so I went into the program
4 and edited it to put the date on the file because
5 that's the last possible date. Now, that's the
6 date that the file could have been e-mailed to me
7 by Nestor Sepulveda, but it's the only -- the only
8 dated piece of information until I can find a
9 xerox copy of the manuscript it's the best I can
10 approximate the date by.

11 Q. That helps me understand, but I trust
12 you understood my confusion?

13 A. That's fine.

14 Q. Because what I was trying to figure out
15 is after it was rejected from publication did you
16 do anything to work on that project or that
17 manuscript?

18 A. Did not. To my knowledge, we did
19 nothing on the project after it was rejected.

20 Q. Right. In fact, if you look at that
21 first paragraph on page 6 of Exhibit 4 you say, by
22 the time the reviews were returned Dr. Sepulveda
23 had left Vanderbilt and I did not have the time to
24 complete the additional work that would have been
25 required for acceptance?

Dr. John Wikswow, Jr. 7/6/2022

1 A. That's correct. That's what I said and
2 that's -- that's what I said in the report and
3 it's a statement of fact.

4 Q. Okay. Did you keep any of the reviews?

5 A. I have not been able to find them.
6 There is a chance that they're somewhere in the 30
7 or 40 filing cabinets that I have, but I have not
8 yet found them. I have looked for it but have not
9 yet been able to find it.

10 Q. I'm assuming in this paragraph at the
11 top of page 6 of Exhibit 4 when you type, because
12 the reviewers wanted clarification of rationale
13 for the study and because one reviewer objected to
14 certain simplifications inherent in the
15 calculation as reasons that it was not accepted,
16 that that was based on your memory of those
17 reviews?

18 A. Yes, that's correct. To be explicit,
19 one of reviewers thought it was unconscionable for
20 biomedical engineer to do -- one of the reviewers
21 stated that -- this is paraphrasing a 30 year old
22 recollection that it was unconscionable for a
23 biomedical engineer to do that calculation. I
24 would have been prepared to argue with the person.

25 The other person -- it was a statedly

Dr. John Wiksw, Jr. 7/6/2022

1 simplistic model designed to build intuition. And
2 they faulted us for it being overly simplistic and
3 not validated by experimental data. And I was not
4 prepared to -- because Sepulveda left and the
5 refinements they wanted to the model were
6 phenomenally complicated pushing the state of the
7 art of that type of calculation, which is why we
8 didn't do it. And the reviewer was also
9 suggesting that we confirm the model with
10 experimental measurements. That would have
11 involved cadaver experiments and I was not
12 prepared to do that either and Sepulveda was gone.

13 Q. Do you know if Dr. Sepulveda has done
14 any additional work in that field to try to
15 publish any data, findings, research, et cetera?

16 A. He is deceased and to the best of my
17 knowledge he did nothing with that calculation
18 when he returned to Colombia from the United
19 States.

20 Q. Okay.

21 A. Colombia, South America not Columbia,
22 South Carolina.

23 Q. Columbia. C-O-L-O, not C-O-L-U. I
24 mean, I was just there this morning, I was pretty
25 sure Columbia was still in the United States so I

Dr. John Wikswow, Jr. 7/6/2022

1 was following you.

2 What was the intent of that study? What
3 were y'all trying to analyze and study and
4 calculate?

5 A. We were trying to identify the fraction
6 of the current that would go from -- we were
7 trying to identify in general terms the path of
8 the current in a judicial electrocution
9 particularly with regard to the insulating
10 properties of the skull and the current
11 concentrating properties of the spinal cord --
12 spinal column not spinal cord.

13 Q. When you modeled the insulating
14 properties of the skull or the -- did you only
15 model the insulating properties of the skull or
16 did you also try to model the conductivity of the
17 skull?

18 A. They're one in the same.

19 Q. Aren't they inverse?

20 A. Well, yeah, but I mean -- yes.

21 Q. And they're measured differently, are
22 they not?

23 A. Not necessarily.

24 Q. Well, what is resistance measured in?

25 A. They have different units but they are

Dr. John Wikswo, Jr. 7/6/2022

1 the same measurement. They are a measurement of
2 the ability of a substance to conduct electricity,
3 and you can either do your arithmetic with
4 conductance or resistance.

5 Q. Okay.

6 A. And resistance is measured, and I got to
7 be careful because resistance is measured for a --
8 in a line as Ohms, but you have to get into more
9 careful units when you get into the resistivity of
10 a volume element because it depends upon the shape
11 of the element.

12 Q. Well, not just the shape but the
13 consistency of it too, right?

14 A. Yeah, that means if I have a homogeneous
15 element.

16 Q. Is the skull homogeneous?

17 A. No. And the model did not include the
18 presence of fissures.

19 Q. So when you adopted a resistance factor
20 to be used for the skull, I think you used 176 Ohm
21 meters?

22 A. Yes. Yes, that's -- if that's what the
23 number -- I don't have the manuscript handy but --

24 Q. Sure.

25 A. -- that sounds like a reasonable number.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. I mean, I read it last night. I may
2 have misquoted, but I'm pretty sure it was 176 Ohm
3 meters. You did not attempt to model the skull as
4 a non-homogeneous substance or structure and you
5 also didn't account for fissures in the skull?

6 A. That's correct. But that was one of the
7 stated simplifying assumptions of the calculation.

8 Q. And they're still trying to study that
9 to this day, there's no accepted model and value
10 to calculate the resistance of the skull?

11 A. I don't know that for a fact.

12 Q. You studied the literature, correct?

13 A. I have not studied the modeling of the
14 entire human.

15 Q. I'm just talking about the skull right
16 now?

17 A. Well, but it's -- fine, I have not
18 studied the state of computational modeling of the
19 scalp, skull, brain system.

20 Q. Okay.

21 A. At the time of that calculation what the
22 reviewers are asking for was pushing the state of
23 the art.

24 Q. Were you using Driscoll's numbers?

25 A. I don't remember.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. You don't remember?

2 A. I don't -- I mean, the source of the
3 numbers is cited in the manuscript. I don't
4 remember the source.

5 Q. Okay. Some of the early work on that
6 and published data on that was done with dried
7 cadaver skull, correct?

8 A. I don't know.

9 Q. Would you agree with me that a dried
10 cadaver skull has a different conductivity and/or
11 resistance to electricity than a in vito or in
12 vivo skull?

13 A. Could be. I would expect it would be a
14 difference.

15 Q. Kind of like difference between seasoned
16 firewood and a green sappling tree?

17 A. Fine.

18 Q. Right? Will dried firewood conduct
19 electricity?

20 A. Yes.

21 Q. Will it conduct electricity as easily as
22 a living green sappling tree will?

23 A. No, it will not.

24 Q. Did the calculations and experiments,
25 data, any of the information that you compiled to

Dr. John Wiksw, Jr. 7/6/2022

1 then create the manuscript entitled A Finite
2 Element Model of Execution by Electrocutation form a
3 bases for any of the opinions that you're prepared
4 to offer in this case?

5 A. No, it did not.

6 Q. Sitting here today are you aware of
7 anyone who has accomplished the goal that you set
8 out to accomplish in the studies and calculations
9 that resulted in the manuscript entitled A Finite
10 Element Model of Execution by Electrocutation?

11 A. Not to my knowledge.

12 Q. Did you believe it was important work?

13 A. I felt it was.

14 Q. Why not complete it then?

15 A. Because Dr. Sepulveda left and it was a
16 complicated project using software that he had
17 written and he was writing state of the art finite
18 element software on his own.

19 Q. Okay.

20 A. And when he left I did not have the
21 capability of reproducing the work. I also did
22 not have the funding to pay his salary because he
23 was paid on what -- he was paid off of grants and
24 contracts that I had.

25 Q. Okay. All right. Let's start working

Dr. John Wikswo, Jr. 7/6/2022

1 our way through Exhibit 5., and the reason I'm
2 going to use Exhibit 5 is it was the most recently
3 produced to me version of your affidavit. And I
4 didn't see any changes between the two but I just
5 want to be confident I was talking to you about
6 the most recent version. Okay.

7 All right. We already talked about
8 paragraphs 1 and 2. I'm going to move on to
9 paragraph 3 at this point.

10 Paragraph 3 says, American Juris
11 Prudence -- or excuse me, jurisdictions first
12 adopted electrocution as a means of execution in
13 the late 1800s early 1900s. Do you see that?

14 A. Yes.

15 Q. Are you aware of what jurisdiction first
16 adopted electrocution?

17 A. I believe it was New York.

18 Q. Have you reviewed any of the committee
19 that was impaneled to study electrocution and
20 offer recommendations about a process before New
21 York adopted it as a method of execution?

22 A. I may have read some of that literature
23 but it was many years ago, so I don't recall it
24 specifically. And I can't -- I don't remember
25 whether that literature is on my list of documents

Dr. John Wiksw, Jr. 7/6/2022

1 that I have in my files.

2 Q. I didn't see it, but if you did review
3 that committee's work and their findings, do you
4 have any criticisms of their findings?

5 A. I can't criticize something I haven't
6 read.

7 Q. So you just don't recall if you've read
8 it or not?

9 A. I don't recall if I've read it.

10 Q. Fair enough. You go on to say at the
11 time, and I'm assuming you're talking about the
12 late 1800s early 1900s, the prevailing view was
13 that a sufficiently strong current, when applied,
14 would result in an instantaneous and painless
15 death. And you go on to say that view has since
16 been discredited. Do you see that?

17 A. Yes.

18 Q. What's your basis for saying that the
19 view that applying an electric current can cause
20 an instantaneous and painless death, what's your
21 basis for saying that view has been discredited?

22 A. Largely reports of electrocutions that
23 did not proceed as intended.

24 Q. And the term we use for that is a
25 botched execution, correct?

Dr. John Wikswow, Jr. 7/6/2022

1 A. I don't like using the word botched, but
2 if you want to use that word, that's the word that
3 is used by many people.

4 Q. I mean, in this field when we look at
5 the study and reporting of instances of judicial
6 execution that is a terms that's used in the
7 field, is it not?

8 A. Yes, it is. I said I did not like using
9 it.

10 Q. And what don't you like about it?

11 A. That suggests that there can be a proper
12 judicial electrocution versus a botched one.

13 Q. Well, let's follow-up on that. Is it
14 your opinion that there is no way to accomplish an
15 instantaneous or nearly instantaneous, let me use
16 that term instead, nearly instantaneous and
17 painless death through the means of electrocution?

18 A. Define nearly. What's your time
19 interval?

20 Q. Okay. Well, I'll just go back to
21 instantaneous. You used the term instantaneous in
22 your report. What do you mean by the term
23 instantaneous?

24 A. That was the term in the literature at
25 the time, which was that various individuals

Dr. John Wikswo, Jr. 7/6/2022

1 reported that electrocution produced instantaneous
2 and painless death.

3 Q. Okay. Are you of the opinion that there
4 is no way to accomplish an instantaneous and
5 painless death through the use of electrocution?

6 A. It is very difficult to prove a
7 non-existence. What I believe is that there is
8 zero scientific evidence to support the fact that
9 electrocution produces an instantaneous and
10 painless death.

11 Q. None whatsoever?

12 A. I know of no scientific rationale, or
13 justification, or experiment that support that
14 position. It has been assumed from the late 1800s
15 that it is instantaneous and painless to the
16 extent that it has become dogma in some
17 communities but it is without any proof.

18 Q. So if there were published articles or
19 published studies concluding that it was an
20 instantaneous and painless death through the means
21 of electrocution, would that change your opinions
22 in this case?

23 A. This is a elephant -- what if elephants
24 could fly question, because as I stated, there is
25 no scientific evidence to support instantaneous

Dr. John Wikswo, Jr. 7/6/2022

1 and painless death from electrocution. There is a
2 substantial amount of evidence from both failed
3 judicial or -- let's using your term or the
4 industry term -- botched electrocutions as well as
5 industrial accidents where survivors from
6 industrial accidents, electrical accidents have
7 reported cognition and intense pain during an
8 electrocution event that did not kill them.

9 Q. Where they didn't die?

10 A. Where they didn't die, yes.

11 Q. They also weren't subjected to a
12 judicial electrocution either?

13 A. Well, there are reports in the
14 literature not particularly well-documented from a
15 scientific point of view, but there are reports in
16 the literature of failed executions where the
17 person was executed days later. There is a
18 Louisiana case if I remember correctly. I can't
19 remember the names right now.

20 Q. All right. So you're saying there's no
21 scientific evidence that suggests that
22 electrocution can produce an instantaneous and
23 painless death; did I understand you correctly?

24 A. That's correct.

25 Q. Are you aware of any scientific evidence

Dr. John Wiksw, Jr. 7/6/2022

1 that conclusively shows you can not produce an
2 instantaneous and painless death through the means
3 of electrocution?

4 A. As I said, it's very difficult to prove
5 a non-existence.

6 Q. So is that a yes?

7 A. Rephrase -- repeat your question.

8 Q. You said there's no evidence -- there's
9 not scientific evidence to conclude that you can
10 produce an instantaneous and painless death by
11 means of electrocution?

12 A. That's correct.

13 Q. And I'm asking the follow-up, the
14 reverse. Are you aware of any scientific
15 evidence, a study, a published article, peer
16 reviewed article, that conclusively showed it's
17 not possible to produce an instantaneous and
18 painless death through the means of electrocution?

19 A. The difficulty I'm having with the
20 question is that I can imagine a clever person
21 designing a protocol that might lead to death by
22 electrical means. I am not in a position to try
23 to design that and so I have trouble opining about
24 whether it is possible to do that or impossible --
25 possible or impossible to do that.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. When you say you're not in a position or
2 don't have the means to create this protocol that
3 you just mentioned, what do you mean? What are
4 you lacking to be able to come up with such a
5 protocol?

6 A. The will to design a technique to kill
7 people.

8 Q. So you're saying you're qualified to do
9 it, you just don't want to?

10 A. I don't know if I'm qualified to do it
11 because I don't know what it involves.

12 Q. Fair enough.

13 A. Again, this is the -- this is the proof
14 of non-existence. So, you know, do I want to
15 start a research program to create a painless
16 judicial execution? No, I don't want to do that.

17 Q. So when you say that view has since been
18 discredited here in paragraph 3, what you're
19 relying on there is your opinion that there's no
20 scientific evidence to support electrocutions
21 resulting in instantaneous and painless deaths?

22 A. As an expert in physiology, biomedical
23 engineering, and physics I have seen zero data
24 that supports the hypothesis that judicial
25 electrocution can be accomplished in an

Dr. John Wikswo, Jr. 7/6/2022

1 instantaneous and painless manner.

2 Q. Is there a field of science and/or
3 medicine that is the study of pain, the study of
4 the -- either the physiology of pain or the
5 psychology of pain that you're aware of?

6 A. Yes, there is.

7 Q. Are you an expert in that field?

8 A. I have worked in that field as part of
9 my research into neuroscience.

10 Q. Have you ever taught any courses on the
11 physiology or psychology of pain?

12 A. Not on the psychology of pain. I've
13 probably addressed the physiology of pain in some
14 of my systems, biology courses, or earlier
15 biomedical engineering courses.

16 Q. Have you ever treated somebody for pain?

17 A. I am not physician, so I don't treat
18 people.

19 Q. Do you know if all people feel --
20 experience pain in the same way?

21 A. I'm very sure they do not.

22 Q. Do you believe you're qualified to
23 provide expert testimony regarding the physiology
24 of pain?

25 A. Aspects of my training and expertise are

Dr. John Wikswo, Jr. 7/6/2022

1 relevant to the production and assessment of pain.

2 Q. The production and assessment of pain?

3 A. The production of pain and assessment of
4 pain.

5 Q. How is pain assessed?

6 A. Herein lies one of the problems is that
7 currently there are no, to my knowledge, there are
8 no accepted quantitative ways to measure a level
9 of pain.

10 Q. So when we go into a doctor's office and
11 they ask us questions about the pain we're
12 experiencing that's not an accepted way of
13 measuring your pain in the field of medicine?

14 A. It is the best the field can do, which
15 is on a scale of 10 how do you feel today.

16 Q. Are you aware of any work in the field
17 of medicine to develop criteria on assessing pain?

18 A. I would fully expect that there are work
19 in that direction.

20 Q. I understand you expect it. I'm asking
21 are you aware of it?

22 A. I'm not -- I'm not aware of any specific
23 work in that area.

24 Q. Are you aware of the work of Ronald
25 Melzack and Patrick Wall?

Dr. John Wikswo, Jr. 7/6/2022

1 A. No, not to my recognition.

2 Q. And their work into pain mechanisms?

3 A. I do not recall having looked at their
4 work.

5 Q. I asked you about physiology of pain, do
6 you feel your qualified to offer any opinions as
7 an expert witness regarding the psychology of
8 pain?

9 A. I am -- it is part of my expertise to
10 understand aspects of neuromodulation and the
11 extent to which psychology modulates
12 neurotransmitter and neurotransmitters can
13 modulate perception of pain is something that is
14 consistent with some of the areas that I am
15 working in or have worked in.

16 Q. So is that a, yes, you feel like you
17 could go in front of a jury and testify as an
18 expert on these categories and that a court should
19 allow you to do that?

20 A. The issue is the extent to which my
21 training in physiology and biomedical engineering
22 and physics informs me about mechanisms of pain.
23 I am not a "certified pain expert", but that does
24 not mean that I'm unable to present a
25 professionally valid opinion based on my areas of

Dr. John Wiksw, Jr. 7/6/2022

1 expertise.

2 Q. What about unconsciousness? Are you
3 qualified to provide expert testimony regarding
4 the concept of consciousness?

5 A. My same answer applies in that my
6 expertise in physiology, biophysics, and
7 biomedical engineering allows me to opine on
8 mechanism and phenomena that support consciousness
9 though consciousness itself is also hard to
10 measure and hard to define. But I am not a
11 certified expert on consciousness per se, but I am
12 certified to discuss the mechanisms that support
13 consciousness -- some of the mechanisms that
14 support consciousness.

15 (Exhibit 6 marked for identification.)

16 Q. Thank you. All right, Doctor, I'm
17 handing you what's been marked as Exhibit 6 to
18 your deposition. I'll represent to you that
19 Outlook puts that header of my name at the top.
20 I'm not aware of any other way to print this, but
21 is one of the e-mails or e-mail chains that was
22 produced to us in response to our subpoena that
23 purports to be an e-mail from you to Ms. Vaughn --

24 MR. PLYLER: I'm sorry, is it Vann or
25 Vaughn?

Dr. John Wikswo, Jr. 7/6/2022

1 MS. VANN: Vann.

2 MR. PLYLER: I apologize. The skier is
3 Vonn, right?

4 MS. VANN: Yes.

5 MR. PLYLER: At least it wasn't like an
6 insult.

7 Q. (By Mr. Plyler) From you to Ms. Vann
8 dated June 29 of 2022. And in this e-mail chain
9 you're -- you're telling her about a "excellent hour
10 long conversation with Dr. Jane Easdown, a
11 neuro-anesthesiologist at the Vanderbilt University
12 Medical Center."

13 A. Yes.

14 Q. Okay. And that conversation that you
15 had with Dr. Easdown was about the idea of
16 consciousness, wasn't it?

17 A. That's correct.

18 Q. And you were referring to her on the
19 idea of consciousness because you recognize that
20 she was more qualified than you in that field,
21 correct?

22 A. She had more experience than I did.

23 Q. Do you think you are more qualified than
24 Dr. Easdown to opine on the issues of
25 consciousness?

Dr. John Wiksw, Jr. 7/6/2022

1 A. On her areas expertise she is much more
2 experienced than I am.

3 Q. So is that a yes or no?

4 A. A yes or no to what question?

5 Q. To whether or not you feel more
6 qualified to testify regarding the idea of
7 consciousness?

8 A. No, I do not feel more qualified than
9 Dr. Easdown to discuss the subtleties of
10 consciousness.

11 Q. All right. Paragraph 4 you -- I'm
12 simplifying it --

13 A. What document?

14 Q. Going back to your report, Exhibit 5.

15 A. Got it. That's a statement not a
16 report.

17 Q. Understood. Your affidavit how about
18 that?

19 A. When you say report, I'm thinking I've
20 used 1998 Florida report as the report. That's
21 part of my --

22 Q. Fair enough. Generally speaking,
23 experts provide reports but it's your affidavit,
24 it's your sworn testimony. I'm fine with that.
25 So paragraph 4 --

Dr. John Wiksw, Jr. 7/6/2022

1 A. I view it as an abbreviated version of
2 my findings.

3 Q. Do you have a more complete report that
4 you've prepared for this case?

5 A. No.

6 Q. Okay.

7 A. I have the 1998 one as a much more
8 pedagogical introduction.

9 Q. But you didn't prepare it for the
10 litigation in South Carolina?

11 A. No, but I provided South Carolina with
12 it.

13 Q. Okay. Do you even know if the
14 electrical system used in Florida that you were
15 reviewing in the late '90s is comparable to the
16 system used in South Carolina?

17 A. That's not relevant to the findings of
18 the report.

19 Q. Fair enough. So paragraph 4 of
20 Exhibit 5 and its subparts is you describing terms
21 associated with the study of electricity and
22 different mathematical equations associated with
23 how we describe electricity, correct?

24 A. Correct.

25 Q. Okay. And then in 5, it's your opinion

Dr. John Wiksw, Jr. 7/6/2022

1 that there is a "substantial risk that in a
2 significant number of cases death by electrocution
3 is neither painless nor instantaneous for the
4 reasons described in detail below." Is that
5 correct?

6 A. You have just read me statement 5, which
7 I agree with.

8 Q. I mean, it's your sworn testimony, I
9 would hope you agree with it.

10 A. Yes. What you're asking me, I agree
11 with my sworn testimony, yes.

12 Q. Okay.

13 A. In paragraph 5.

14 Q. How do you quantify substantial risk?

15 A. Basically the probability of a botched
16 execution using the term of the trade.

17 Q. Okay. Do you have a probability value
18 that you've come up with? Have you run any
19 statistical analysis on these things?

20 A. I do not have that number on the tip of
21 my tongue right now.

22 Q. I mean, you use mathematics primarily
23 when you're dealing with physics -- yeah, with
24 physics, correct? And in your studies, your
25 published studies, you would run statistical

Dr. John Wikswo, Jr. 7/6/2022

1 analyses, would you not?

2 A. Yes.

3 Q. Because you can't publish unless you
4 meet certain criteria with regards to statistical
5 relevance, probability values, all those things,
6 correct?

7 A. Depending -- depends on what you were
8 publishing.

9 Q. Okay. Not talking about a case study.
10 I'm talking about the type of publications you
11 generally do, which is a data compilation and
12 studying certain models that you create and
13 producing data from those models, and in those
14 publications, do you not ordinarily have to have a
15 statistical analysis?

16 A. There are a number of my publications
17 that have zero statistical component for a variety
18 of reasons.

19 Q. Do you not normally have to have a
20 statistical analysis?

21 A. Depends on the context.

22 Q. In your publications?

23 A. Depends on the context. I have 200 and
24 something publications, some have statistics and
25 some do not. There's no hard and fast rule that

Dr. John Wiksw, Jr. 7/6/2022

1 says every paper has to have statistics.

2 Q. So what's the substantial risk?

3 A. Not having the -- the actual numbers of
4 the compiled lists. Not having the compiled list,
5 I would today estimate between 10 and 25 percent
6 chance of an execution being botched.

7 Q. And that's where you come up with the
8 term substantial risk?

9 A. Yes.

10 Q. All right.

11 A. But, I mean, those statistics exist, but
12 there's a problem with those statistics as well is
13 that in light of a controlled scientific
14 experiment, which is unconscionable in this
15 environment, it is not clear that the
16 measurements -- it's clear the measurements
17 required to quantify the success of a judicial
18 execution are not made.

19 Q. So you don't know what they would be
20 because the study hasn't been done?

21 A. Well, I mean, for example, are you
22 recording electroencephalogram and the
23 electrocardiogram immediately after cessation of
24 shock? No. And so without that, you don't know
25 whether, in fact, what is happening. So the data

Dr. John Wikswo, Jr. 7/6/2022

1 do not exist and one has to rely on third party
2 observations and anecdotal accounts or prisoners
3 or industrial accident victims reporting their
4 results. And so it's not possible to come up with
5 a -- if you were doing cardiac defibrillation
6 studies, which I have done and published, where
7 the statistical analysis would -- you know the
8 probability of success of a particular
9 defibrillation shock. I have published papers on
10 that using a model that was not that different
11 from the one we did with the unpublished paper.
12 The point is we had data, we had quantitative data
13 to analyze, to apply statistics on probability of
14 success of defibrillation.

15 Q. You mentioned a couple of times now
16 industrial electric shocks or accidental electric
17 shocks in addition to judicial execution?

18 A. Correct.

19 Q. Okay. And you talk about reports of
20 survivors of an industrial electric shock or an
21 accidental electric shock?

22 A. Correct.

23 Q. Are you aware sitting here today of any
24 situation where the person became energized at the
25 head in an industrial electric shock and survived?

Dr. John Wikswo, Jr. 7/6/2022

1 A. Yes. There is a -- it's in my files, I
2 think I reference it in the 1998 report, though I
3 may not have had the specifics of it, of a
4 gentleman who was working on a power pole I
5 believe contacted an energized line with his head
6 and survived noting that he could count the spokes
7 of the bicycle of the bicyclist going past him
8 and --

9 Q. We'll get to that because -- it's in
10 here, I think, actually --

11 A. Good.

12 Q. -- nd I don't know what the basis for
13 that was?

14 A. I have the article in my files. I have
15 not gone back to the original source.

16 Q. When you say an article, was this just a
17 newspaper article?

18 A. It was a -- no, it was probably a
19 scientific report on accidental electric shocks
20 discussing the fact.

21 Q. So it was a case study?

22 A. It was probably a comp -- I don't
23 remember the exact article. It was probably a
24 compilation of case studies.

25 Q. Okay.

Dr. John Wikswa, Jr. 7/6/2022

1 A. But it also was, yes. It was -- it
2 was -- it was prob -- it was probably a
3 compilation of case studies, but I can't -- until
4 I find the article I can't be sure.

5 Q. And you're confident you have possession
6 of that article somewhere?

7 A. Yes.

8 Q. And it forms part of the bases of your
9 opinions in this case?

10 A. Yes.

11 Q. All right. So as soon as you put your
12 hands on it you'll get it to us, correct?

13 A. Well, I haven't looked at it probably
14 since 1998, but I can find it I expect.

15 Q. All right. I just -- if it's
16 something --

17 A. Are you requesting it?

18 Q. Yes, I requested it in my subpoena. Any
19 articles that form the bases of your opinions in
20 this case?

21 A. I mean, I have a -- probably a two-inch
22 thick file of industrial electrocution reports.

23 Q. Okay. I'm asking for the ones you're
24 aware of where the person became energized through
25 contact with the electrical current at the head

Dr. John Wiksw, Jr. 7/6/2022

1 and that the current passed through the body to a
2 grounding source, either a lower extremity or a
3 lower part of their abdomen, not necessarily hand
4 to hands or one of those situations. So that's
5 the criteria of what I'm looking for. And in
6 response to that question you provided this answer
7 about the man who said he could see the spokes of
8 the bicycle wheel as they rotated. That's -- if
9 you're aware of any others I want those too.

10 A. Fine. I'll review the original
11 literature.

12 Q. Okay. On page 3 of Exhibit 5, this
13 would be under 9C, you mentioned you reviewed
14 non-scientific material relating to among other
15 things anecdotal accounts from persons who have
16 come into contact with a high voltage electrical
17 current. What do you mean by anecdotal accounts?

18 A. Typically newspaper articles, witness
19 testimonies. In the list of the autopsy, in the
20 autopsy lists some of those statements are not
21 autopsy reports but were written statements that
22 were treated as part of the record. I don't think
23 they were just newspaper accounts.

24 Q. Okay.

25 A. But I view, you know, the -- the large

Dr. John Wiksw, Jr. 7/6/2022

1 number of anecdotal accounts are coming from lay
2 people who witnessed executions.

3 Q. And that was going to go to E, which you
4 kind of just answered before I could ask the
5 culminating question, but subpart E of paragraph 9
6 is read statements from persons who witnessed
7 judicial executions of prisoners?

8 A. Correct.

9 Q. With regards to the anecdotal accounts
10 referenced in 9C or the statements referenced in
11 9E, did you do anything to try to determine what
12 the qualifications were of the individuals giving
13 those statements?

14 A. No.

15 Q. Did you do anything to try to figure out
16 if they had any bias?

17 A. I did not specifically identify -- I did
18 not look for bias by the observers.

19 Q. Have you ever done any studies, I know
20 in the clinical setting in the medical field they
21 do studies where they have to account for the bias
22 of the subject. Have you done any studies where
23 you had to account for the potential bias of
24 your -- the individuals in your study?

25 A. In my career I have only done a very

Dr. John Wikswo, Jr. 7/6/2022

1 small number of studies involving human subjects,
2 and to the best of my knowledge, none of them
3 involved qualitative observations by an observer
4 and hence bias was not a factor in any of the
5 studies that I personally have been involved in.

6 Q. So how, if you were designing a study,
7 do you create a study to account for the potential
8 bias of your subject in a qualitative analysis?

9 A. It is beyond my expertise to hypothesize
10 on the design of the study designed to avoid
11 reporter bias.

12 Q. With 9C and 9E of Exhibit 5, do you have
13 a way to quantify how many of these anecdotal
14 accounts or witness statements you've reviewed?

15 A. I can go down and count the statements.

16 Q. Did you review the actual source
17 materials or were these compilations that were
18 prepared for you?

19 A. These were -- I reviewed source
20 material.

21 Q. So you're not including in this, I'm
22 assuming then the spreadsheet that was prepared
23 for you by Justice 360?

24 A. Correct.

25 Q. You would agree with me there's a column

Dr. John Wiksw, Jr. 7/6/2022

1 in there where they put in what they believe were
2 the statements and observations from the source
3 materials that they reviewed?

4 A. I did not utilize that analysis in my
5 reports and affidavit.

6 Q. Okay. Go to page 4 of Exhibit 5. This
7 would be paragraph 10I. A Microsoft Excel
8 spreadsheet prepared by Justice 360 attorneys that
9 lists 248 electrocutions carried out in
10 South Carolina. Is that the same spreadsheet we
11 were just discussing?

12 A. Yes.

13 Q. So that did not form the bases of any of
14 the opinions that you have in this case?

15 A. That is correct. The 360, Justice 360
16 spreadsheet did not influence my decisions.

17 Q. That's different than my question. Did
18 it form the bases for --

19 A. No.

20 Q. -- any of your opinions?

21 A. No.

22 Q. And you did not review the source
23 materials for that spreadsheet did you?

24 A. No, I did not.

25 Q. Okay. All right. And we go to

Dr. John Wiksw, Jr. 7/6/2022

1 paragraph 11, I already asked you about the term
2 substantial risk and you used that term again in
3 paragraph 11. Is it the same term? Do you
4 quantify it the same way? Is your testimony the
5 same with regards to substantial risk in paragraph
6 11 as to what you already testified to?

7 A. Yes.

8 Q. All right. You then start using the
9 term for some period of time, and I counted it up
10 at one point, I think you used that phrase six to
11 eight times in this affidavit. What do you mean
12 in paragraph 11 when you say South Carolina's
13 electrocution protocol and electrocution event
14 will remain alive, conscious, and sensate for some
15 period of time during the electrocution process
16 and, as a result, will experience for some period
17 of time the excruciating pain and suffering
18 associated with phenomena that occur when a high
19 voltage electrical current contacts a human being?

20 A. What's the question?

21 Q. What do you mean by the phrase for some
22 period of time?

23 A. Just that. A not yet specified period
24 of time.

25 Q. Have you -- scratch that. Are you aware

Dr. John Wiksw, Jr. 7/6/2022

1 of any scientific evidence that would allow you to
2 quantify the phrase you use here for some period
3 of time into a measurable increment?

4 A. I know of no existing scientific data
5 that could provide that number because the
6 requisite measurements are not made at the time of
7 judicial electrocution and controlled experiments
8 are not possible.

9 Q. I mean, are we talking in the order or
10 microseconds?

11 A. I think some period of time could be
12 many seconds, could be many.

13 Q. Less than 10?

14 A. I don't know.

15 Q. Less than five?

16 A. I don't know.

17 Q. Less than two?

18 A. I don't know. The difficulty is that
19 until you put electrocardiogram electrodes, blood
20 pressure monitors, and electroencephalogram
21 monitors that can survive shock you will never be
22 able to answer those questions, if then.

23 Q. So even if you could develop electrodes
24 for an EEG that would not be essentially destroyed
25 by the high voltage current --

Dr. John Wiksw, Jr. 7/6/2022

1 A. And that's basically when you have a
2 defibrillator. The defibrillators, the on demand
3 defibrillators that hang on the walls in the halls
4 have that ability. They have the ability to
5 measure the electrocardiogram and survive a
6 defibrillation shock.

7 Q. Would you classify that as a high
8 voltage shock?

9 A. Can be, depends on the defibrillator
10 but, yes, it's --

11 Q. Is there a -- is there a defined term, a
12 defined parameter when something goes from a low
13 voltage shock to a high voltage shock?

14 A. I think the trade typically says low
15 voltage is below 1,000 volts and high voltage is
16 above and it's tied into the risk of fibrillation.
17 I believe I've seen the literature where 5,000
18 volts is considered high. I believe 1,000 volts
19 is probably more accepted, but I don't -- I don't
20 have that classification literature at the tip of
21 my fingers right now.

22 Q. Well, if the electrode exists and you
23 use it all the time in these defibrillators why
24 hasn't anyone conducted this study?

25 A. You have to ask the people who are doing

Dr. John Wiksw, Jr. 7/6/2022

1 the electrocutions?

2 Q. Without that information you're
3 speculating as to what that period of time is?

4 A. I'm saying that there is a period of
5 time whose duration I do not know.

6 Q. Aren't you speculating there is even a
7 period of time?

8 A. No. Because if the shocks are too short
9 or not weak enough the prisoner continues -- can
10 awaken, continue to breath, and continues to have
11 a heartbeat. So it says that there is an interval
12 of time such that and there are prisoners who have
13 recalled a botched execution -- electrocution.
14 And the net result is that that's an existence
15 proof that there exists a period of time where
16 they can report these feelings because they
17 survived long enough and to the extent that they
18 could report it. The people that didn't survive
19 long enough to report it in all probability felt
20 those things but the duration of that feeling is
21 currently unknown.

22 Q. And you can't quantify the percentages
23 either, can you?

24 A. You don't have the data.

25 Q. Okay. How fast does electricity move

Dr. John Wiksw, Jr. 7/6/2022

1 through a substrate?

2 A. Depends upon the substrate.

3 Q. What's that fastest recorded measurement
4 of how -- of the movement of the current?

5 A. Depends upon what you're measuring and
6 how you are defining it because there happens to
7 be a term electrotonic spread versus effectively
8 electrokinetic where you have a propagating action
9 potential that moves with a finite velocity.
10 Electrotonic signals propagate very fast because
11 you're related to the resistance and capacitance
12 of the neural membranes. The difficulty is that
13 it's not a clean velocity per se because it's not
14 moving away form of constant shape.

15 Turns out that my research on cardiac
16 defibrillation hinged on the distinction between
17 electrotonic and propagated conduction of
18 electrical impulses.

19 Q. Does the frequency of the AC current
20 change depending on what substrate it's going
21 through?

22 A. Frequency does not change.

23 Q. And the frequency is from one electrode
24 to the next?

25 A. No.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. So how do you define frequency?

2 A. Frequency is -- first of all, you --
3 frequency applies for a periodic signal and it's
4 basically the number of periods per second, cycles
5 per second.

6 Q. And then that -- you put in your report
7 in the United States and almost every building
8 it's 60 hertz?

9 A. Correct.

10 Q. Which is 60 cycles per second?

11 A. Correct.

12 Q. So wouldn't you agree that it's moving
13 at least that fast?

14 A. That is a frequency not a speed.

15 Q. Explain the frequency then.

16 A. Frequency says when you sit at a point
17 and you measure a voltage, the voltage is going up
18 and down with time. That's frequency. That does
19 not say how quickly you can transport information
20 from point A to point B.

21 Q. I didn't ask you about transportation of
22 information.

23 A. But that's what speed is. Speed is --
24 Speed is a measure of movement of something. You
25 can move charge. You can move information.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Isn't speed just distance over time?

2 A. Yes.

3 Q. Is frequency not measuring a distance
4 over time?

5 A. No.

6 Q. So what's the cycle then?

7 A. The cycle is the number of periods per
8 second. So frequency is a measurement at a point
9 of a time varying phenomena. It may or may not
10 have anything to do with propagation of signal
11 because you were asking about how quickly does a
12 signal move.

13 Q. I'm just trying to figure out does the
14 frequency change depending on the substrate?

15 A. No, the frequency does not -- the
16 frequency is determined by the source of the
17 electricity.

18 Q. Okay.

19 MS. VANN: Sorry to interrupt. The
20 battery is about to die on the Zoom.

21 (a brief recess was taken.)

22 Q. (By Mr. Plyler) Dr. Wiksw, I'm going to
23 delve into very briefly and then we'll move on.

24 Going to page 1 of Exhibit 5, paragraph
25 4D. It explains there's two types of electrical

Dr. John Wikswow, Jr. 7/6/2022

1 circuits, both of which remain use across the world.
2 In a direct current circuit, current flows in the
3 same direction at all times and with nearly
4 continuous strength.

5 In an alternating current circuit, the
6 direction of the current flow constantly reverses,
7 going from full strength to zero in one direction,
8 then from zero to full strength in the other
9 direction. Current alterations in an AC circuit
10 occur in a uniform manner with a fixed frequency
11 measured in hertz. Did I read that correctly?

12 A. You read that correctly.

13 Q. And when you say a circuit, when we
14 talked about fuses and overload protectors
15 earlier, they break the circuit, correct?

16 A. Correct.

17 Q. And then electricity can not flow?

18 A. Correct.

19 Q. Unless something -- unless something
20 completes the circuit?

21 A. Correct.

22 Q. And if something does complete the
23 circuit, it will go back to flowing at that same
24 measured 60 hertz?

25 A. Correct.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. In a judicial electrocution the
2 condemned person becomes part of that circuit, do
3 they not?

4 A. That's correct.

5 Q. So the current is going at that 60 hertz
6 through that circuit which would include going
7 through the condemned person as part of the
8 circuit?

9 A. Correct.

10 Q. And that's 60 times per second?

11 A. That is the frequency at which the
12 direction of the current changes.

13 Q. So it's going, for instance, from head
14 to toe and then from toe to head?

15 A. Correct.

16 Q. And then it reverses 60 times every
17 second?

18 A. Correct.

19 Q. So when we have the two electrodes
20 connected, one is at the skull and one is at the
21 right calf as you've seen in the protocol?

22 A. Correct.

23 Q. Sixty times a second; it's either going
24 from the skull to the calf or the reverse?

25 A. Correct.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. And you get into the resistance of
2 various tissues and parts of the body, would you
3 agree with me that nerve fibers are one of the
4 most conductive substances in the body, or tissues
5 in the body, excuse me?

6 A. I do not have the conductivity
7 numbers -- I do not remember the exact
8 conductivity numbers. And the issue is what is
9 the conductivity of neural tissue, neural
10 cytoplasm inside the neurons versus the
11 conductivity of blood or plasma.

12 So today without having referred to the
13 numbers I would say that nerves are highly
14 conductive, but I'm not going to state that they
15 are the most conductive until I can check the
16 numbers.

17 Q. And you're not disputing that the
18 electric current is likely to contact the nerves,
19 are you?

20 A. No.

21 Q. Would you agree with me that similar to
22 the old saying that all rivers eventually lead to
23 the ocean, that all nerves in the body eventually
24 lead to the brain?

25 A. That is not correct.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. What nerves in the body do not lead to
2 the brain?

3 A. There are neurons in the heart that are
4 both afferent and efferent with ganglion a surface
5 of the heart. So you have closed neural circuits
6 in the heart --

7 Q. Fair.

8 A. -- and you get into questions of the
9 denervated heart due to either a transplant or in
10 the case of an animal experiment, an auto
11 transplant, and you find that the heart can
12 respond to externally delivered neurotransmitters
13 suggesting that there are nerves and there's no
14 connection to the brain.

15 Q. Okay. Besides those nerves are you
16 aware of any other nerves in the body that don't
17 eventually make their way to the brain?

18 A. There are lots of nerves in the
19 autonomic nervous system.

20 Q. Which is in the brain stem is it not?

21 A. No. The autonomic nervous system is not
22 in the brain. The autonomic nervous system is a
23 giant collection of nerves that control the
24 enteric --

25 Q. Okay. My --

1 A. The enteric -- I would say the enteric
2 nervous system. The autonomic nervous system --
3 the brain is part of the -- I misspoke. The brain
4 is subject to the autonomic nervous system. The
5 autonomic nervous system includes enteric nerves
6 that go from visceral organ to visceral organ.

7 Q. If I stub my toe, signals are sent from
8 the nerves in and around my toe to my brain to let
9 my brain know that I've hurt myself?

10 A. Well, in fact, what happens is, you stub
11 your toe, you have a reflex arc. They go to a
12 ganglion in your spine, which triggers a response
13 before your brain knows you've stubbed your toe.

14 Q. Okay. I get it. There's a reflex
15 before the signal --

16 A. The reflex arc, and so those are neurons
17 that are connected in circuits that do not
18 directly -- you asked me for an example of --

19 Q. No, I've moved on to something else.
20 Are you saying that the pain signals from the
21 nerves in my toe when I stub it don't eventually
22 go to the brain?

23 A. Some of the pain signals from your toe
24 will go to the brain. Some of the pain signals
25 may get reflected at one of the spinal ganglia and

Dr. John Wiksw, Jr. 7/6/2022

1 used to control the reflex arc.

2 Q. So there is some way for these signals
3 to travel around -- to travel through neural
4 pathways and make their way to the brain, correct?

5 A. Yes. Some of the neural information
6 traffic will reach the brain.

7 Q. Can you quantify how much?

8 A. I don't have that number handy.

9 Q. Is there a number there that quantifies
10 it?

11 A. I think one could do that.

12 Q. That's not what I asked. I'm not asking
13 if you could do it. I'm asking are you aware of
14 any number published data out there that has done
15 it?

16 A. I have not explicitly looked for that
17 number in the literature.

18 Q. Okay. Go to 12a, which is on page 4 of
19 Exhibit 5. You use that term for some period of
20 time again. Is it the same conversation that you
21 don't know how much that period of time is?

22 A. That is correct.

23 Q. On paragraph 12a ix, Roman numeral 9.
24 It's on page 5 of Exhibit 5. You talk in this
25 paragraph near the bottom that a prisoner

Dr. John Wiksw, Jr. 7/6/2022

1 subjected to an electrocution execution described
2 above dies from asphyxiation and/or organ damage
3 due to thermal heating and then you put in the
4 term, i.e. cooking. These processes require a
5 period of time to produce death.

6 A. Which paragraph are you on right now?

7 Q. Page 5, it would be 12a, little roman
8 numeral 9.

9 A. Got it.

10 Q. Which is IX, right?

11 A. Got it.

12 Q. Okay.

13 A. What's your question?

14 Q. Well, first off I'm asking did I read
15 that correctly? If that what you have written in
16 your report?

17 A. What I wrote is what I believe.

18 Q. And I read --

19 A. In paragraph 9.

20 Q. And I read it correctly, right?

21 A. I think you did. You want to read it
22 again. We can practice.

23 Q. Sure, but I'm worried about what the
24 record is going to look like later. That's the
25 whole purpose of doing this.

Dr. John Wikswo, Jr. 7/6/2022

1 A. Okay.

2 Q. And I'm trying to make sure that you
3 don't think I changed something in there and that
4 we can ask this question and move on. So if you
5 would like to test my ability to read, even with a
6 South Carolina education --

7 A. What I didn't --

8 Q. -- I think I can pull it off?

9 A. What I didn't appreciate was the fact
10 that you were reading to get that paragraph into
11 the record.

12 Q. Absolutely.

13 A. Now that I understand that I will --

14 Q. Thank you.

15 A. -- be much more careful tracking your
16 reading of my paragraphs.

17 Q. A prisoner subjected to an electrocution
18 execution described above dies from asphyxiation
19 and/or organ damage due to thermal heating, i.e
20 cooking. These processes require a period of time
21 to produce death. Did I read that correctly?

22 A. Correct.

23 Q. Is the term cooking a term of art in any
24 of your fields of study?

25 A. I'd say yes.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Okay. Define cooking?

2 A. Changing the properties of anything, in
3 this case a living substance by application of
4 heat over an extended period of time. Well,
5 actually over some period of time.

6 Q. You can microwave something right?

7 A. That's right.

8 Q. It doesn't take very long?

9 A. That's right.

10 Q. What about ceviche? Are you familiar
11 with ceviche?

12 A. No.

13 Q. It's where they take fish and submerge
14 it in citric acid?

15 A. You're making lutefisk, in other words,
16 is that --

17 Q. Maybe in Scandinavia but --

18 A. I don't know Ceviche.

19 Q. -- from the Spanish and Mexican Cuisine
20 it's called Ceviche.

21 A. News to me.

22 Q. Were you aware that citric acid can
23 denature a protein and that that is in fact a form
24 of cooking?

25 A. I was not aware of that specifically.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. All right. So the idea that cooking is
2 a term of art to describe adding thermal energy to
3 denature proteins or to change the substance,
4 that's not actually accurate, is it?

5 A. I don't understand your question.

6 Q. I think you're being a sensationalist
7 and you're using the term cooking here just to get
8 some sort of reaction when it's not actually a
9 term you use in your field of study.

10 A. It actually is a term I use in my field
11 of study, which is that I have done experiments on
12 cardiac pacing where I turned up the electric
13 current and the technician basically said don't
14 turn that knob any higher or you'll cook the
15 tissue or something to that effect, and that lead
16 to my discovery of the mechanism of cardiac
17 defibrillation. So I think cooking is a perfectly
18 acceptable term when you are applying electric
19 current to nerves and muscles.

20 Q. You don't think thermal heating would be
21 an acceptable term?

22 A. It'd be a little bit stilted.

23 Q. A little stilted or would it be more
24 descriptive of the actual process that's
25 happening?

Dr. John Wiksw, Jr. 7/6/2022

1 A. Well, actually I beg to differ with you.
2 Is that -- I mean, I've put lots of electrodes on
3 nerves and skeletal muscle, typically from frogs,
4 and when the nerve turns white under the electrode
5 you'd say hmm, I cooked that nerve rather than I
6 have thermally disassociated the proteins in that
7 nerve.

8 Q. Are you saying I would say that or
9 you --

10 A. I'm saying I would say it. I'm
11 looking -- if I'm doing an experiment on an
12 isolated nerve, an isolated piece of skeletal
13 muscle or an isolated rabbit heart, if I see a
14 burn on it, I realize I have cooked it, so I don't
15 believe I'm trying to be sensational. I think I'm
16 being descriptive.

17 Q. Have you published papers in your fields
18 of study that --

19 A. I don't believe I have used that term --

20 Q. -- described the process of cooking?

21 A. I don't believe I have used the term
22 cooking in any of my published papers on
23 electrical stimulation, but I have also not been
24 publishing papers on the effects of excessive
25 electrical stimulation because the cardiac work we

Dr. John Wikswo, Jr. 7/6/2022

1 tried very hard to not damage the tissue, and I
2 probably ended up having discussions with the
3 reviewers to that effect on the cardiac
4 defibrillation work.

5 Q. Does -- if you run an electrical current
6 through a human being will it change -- will it
7 raise the temperature, the internal temperature of
8 that person?

9 A. Yes.

10 Q. Is there a known mathematical equation
11 or model that you're aware of to calculate how
12 quickly and how much an electrical current will
13 raise the internal temperature of a person?

14 A. Those models have been created in the
15 past, and I don't know the extent to which there
16 are current publicly available models that could
17 do that today.

18 Q. At what temperature does the brain, the
19 human brain, start to suffer damage?

20 A. The issue is the duration of the
21 temperature, so it's the time temperature product.
22 And it's effectively a hyperbole of a high
23 temperature for a very short period of time can be
24 as bad as a lower temperature for a long period of
25 time.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Okay. Can you calculate how much the
2 internal temperature of a person will be raised if
3 you apply a 2,000-volt current to that person?

4 A. It is possible to do that calculation.
5 I am not able to do that calculation myself.

6 Q. So you don't know?

7 A. One can estimate it, but there's a
8 question of the granularity of your inquiry.

9 Q. If you had to estimate it what would it
10 be?

11 A. I would -- if I wanted to estimate it I
12 could come up with an average number for a person
13 by looking at the power dissipation and the heat
14 capacity of that person and calculate an average
15 change in temperature. The problem is you say,
16 well, what was the change of temperature of the
17 brain versus the scalp versus the neck. It
18 requires a more complicated model and there is no
19 analytical solution to that complicated model. It
20 has to be done numerically.

21 Q. So back to my question, if you were
22 going to estimate it what would your estimate --
23 what would be the estimation of how much the
24 internal temperature of a person would be raised
25 when you apply a 2,000-volt current to that

Dr. John Wiksw, Jr. 7/6/2022

1 person?

2 A. I don't -- excuse me -- I don't have
3 that estimate handy right now. I would refer
4 primarily to the experimental literature because
5 that's easier to measure than calculate.

6 Q. You think it would be on the order of 10
7 degrees Celsius?

8 A. Could be.

9 Q. And that converts to approximately 50
10 degrees Fahrenheit?

11 A. No. You're talking about temperature
12 change.

13 Q. Yes, how much it would raise --

14 A. You've got to be careful. You're asking
15 taking 10 degrees Fahrenheit converting it to --

16 Q. No. I said Celsius.

17 A. No, but if you're trying to convert
18 Celsius to Fahrenheit, that's 10 degrees of
19 temperature -- it's 2. -- the multiplication
20 factor is 2.2 because if you simply say convert 10
21 degrees Fahrenheit -- correction 10 degrees
22 Celsius to Fahrenheit, that is not a temperature
23 change of 10 degrees. What you have to do is you
24 have to say give me 10 degrees Celsius, give me
25 the temperature in Fahrenheit; give me 20 degrees

Dr. John Wikswo, Jr. 7/6/2022

1 Celsius, give me the temperature in Fahrenheit.
2 Subtract the two Fahrenheit temperatures and I
3 believe the conversion is 2.2.

4 Q. So you're saying it would be
5 approximately 22 degrees Fahrenheit, the change?

6 A. In round numbers, I can't remember the
7 exact conversion factor.

8 Q. Assuming you're correct with 2.2,
9 subject to being corrected by some other data out
10 there, you've already agreed it would be
11 approximately a 10 degree Celsius change, and
12 based on your understanding of the conversion that
13 would go to approximately 22 degrees Fahrenheit?

14 A. Something like that. Again, I just
15 don't have that exact number handy.

16 Q. So if the average person's internal
17 temperature is 98.6 and we add 22 degrees
18 Fahrenheit to it, we're talking about an internal
19 temperature of just slightly over 120 degrees
20 Fahrenheit?

21 A. That would be average temperature. You
22 talking -- you said average temperature?

23 Q. I said the internal temperature of a
24 person --

25 A. It depends upon where you measure that

Dr. John Wiksw, Jr. 7/6/2022

1 temperature. There's -- the temperature will be
2 highly heterogeneous.

3 Q. And we have an electrode in this -- we
4 have an electrode in this system that would be
5 attached directly to the person's head, correct?

6 A. Correct.

7 Q. Would the -- would the rise in
8 temperature be greatest at the -- the connections
9 where the electrodes are connected to the person?

10 A. That depends upon the interface -- that
11 depends upon the nature of the electrode, the
12 interface between the electrode, and the skin and
13 what underlies the skin.

14 Q. If an electric current encounters
15 resistance some of the current will be dissipated
16 in the form of heat will it not.

17 A. The current will not be dissipated. Its
18 power will -- its energy will be dissipated.

19 Q. Some of the energy of the electric --

20 A. Because current will be continuous.
21 Current is conserved. What current goes in the
22 head comes out the right calf and what goes in the
23 a right calf comes out the head. The question is
24 not the current but the electrical power.

25 Q. So some of the energy --

Dr. John Wiksw, Jr. 7/6/2022

1 A. Fine.

2 Q. -- of the electrical current -- created
3 by the electrical current --

4 A. Carried by the electrical current.

5 Q. -- carried by the electrical current
6 will be dissipated in the form of heat if it
7 encounters a resistant surface?

8 A. Correct.

9 Q. And you've opined that the skull is,
10 relative to the other parts of the human body,
11 highly resistant?

12 A. Higher -- it has a higher resistance.

13 Q. Was it highly resistant or just a higher
14 resistance?

15 A. It's -- highly is perfectly fine because
16 it's a matter -- I'm being careful about relative
17 measures.

18 Q. According to your Sepulveda --

19 A. Sepulveda.

20 Q. Thank you. To that article you wrote
21 with him, you had skin at like 2.2.

22 A. I'm not using any of the Sepulveda
23 results in supporting my current position.

24 Q. Why is that?

25 A. Because they have not been peer

Dr. John Wikswa, Jr. 7/6/2022

1 reviewed.

2 Q. And you're not aware of any that have
3 been peer reviewed that are out there?

4 A. Not to my knowledge, no.

5 Q. So, again, we're speculating on those
6 points because you don't have any scientific
7 evidence to support it?

8 A. You have all sorts of scientific
9 evidence, which are the burn rings on the scalps
10 of prisoners who have been either judicially
11 executed or have attempted to be judicially
12 executed. And also the burn damage reported
13 extensively in the accidental electric injury
14 literature.

15 So, for example, if you had an
16 electrical -- if you bumped into a wire with your
17 shin versus the back of your leg with your calf,
18 the damage would be quite different, extremely
19 different for whatever other reason. So it --
20 again, it's a systems problem and it's not a point
21 problem. It's the response of the entire system
22 to the current. And if you think of it as a
23 chain, I don't like thinking of it as the weak
24 link, but it's the spot where the energy is being
25 dissipated that matters. And there is no question

Dr. John Wiksw, Jr. 7/6/2022

1 that the scalp and the skull, the scalp and the
2 skull actually form a spatial low pass filter that
3 makes it hard to get electrical information into
4 the brain. It also makes it hard to get
5 electrical information out of the brain.

6 Q. Have you calculated how much of the
7 power carried by the electrical current would make
8 its way into the brain? Have you calculated that?

9 A. I have calculated that with
10 Dr. Sepulveda in a simplified model, but I am not
11 using that specific fraction in my analysis.

12 Q. Assuming that your numbers were correct,
13 or you wouldn't have asked that they be published
14 would you? You wouldn't submit data that you knew
15 to be incorrect for publication, would you?

16 A. At the time of that work that was our
17 best estimate of the numbers. It was not -- it
18 did not get accepted by peer review and I was
19 unable and unwilling to refine the manuscript in
20 accordance to the disparate views of these two
21 reviewers or three reviewers.

22 Q. If you applied whatever number,
23 fraction, ratio, whatever term you're using that
24 you came up with in your experiments in your data
25 compilation in that manuscript, would you be able

Dr. John Wikswow, Jr. 7/6/2022

1 to give an estimate for how much of the power
2 carried by a 2,000-volt current would dissipate
3 through the scalp, through the skull, into the
4 brain?

5 A. It is possible to take published data on
6 bone conductivity, and the papers that come to
7 mind are Sanchez who did experiments on intact
8 hogs, where you can get numbers and develop
9 mathematical models of that fraction of current.
10 The experimental evidence is that the thermal
11 damage to the scalp is vastly greater than the
12 thermal damage to the dura beneath the scalp.

13 So if you read the autopsy reports and
14 look for discoloration of the brain you will find
15 that the thermal damage -- the scalp can be burned
16 to the bone and the brain beneath it can be
17 discolored. That suggests that the current is not
18 getting through the skull but going elsewhere.

19 Q. Are you sure that's what it suggests
20 versus the heating of the skull causing a
21 different type of thermal injury to the surface of
22 the brain?

23 A. There are many --

24 Q. For instance, sir, have you reviewed any
25 house fire autopsies?

Dr. John Wiksw, Jr. 7/6/2022

1 A. I have not reviewed any house fire
2 autopsies.

3 Q. You're aware that thermal energy can be
4 transmitted through the skull into the brain,
5 correct?

6 A. Yes, it's also a matter of time.

7 Q. But there's different types of power
8 transmitted -- the energy that's being carried by
9 an electric current does not always dissipate in
10 the form heat, does it?

11 A. The electrical energy in an electric
12 circuit can -- by the laws of thermodynamics, can
13 either do mechanical work or generate heat. And
14 the efficiency of an electric motor is how much
15 mechanical work you get out without generating
16 heat.

17 Q. All right. Let's talk about
18 polarization and depolarization of the neuron?

19 A. Okay.

20 Q. Won't electric current depolarize a
21 neuron?

22 A. Depending upon the direction of flow of
23 the electric current.

24 Q. Will it interfere with the resting
25 membrane potential?

Dr. John Wiksw, Jr. 7/6/2022

1 A. Depending upon the direction of the
2 current and the arrangement of the electrodes it
3 could.

4 Q. Would it matter which direction the
5 current is going to interfere --

6 A. Not the direction -- I'm talking about
7 the direction -- it doesn't matter whether it's AC
8 or DC. I'm talking about the direction of the
9 current whether it longitudinal or transverse to
10 the neurons. So if my neuron is a horizontal
11 cylinder, whether the current is parallel or
12 perpendicular to the axis of the cylinder affects
13 the ability of that current to depolarize the
14 neuron.

15 Q. Applying an electrical current to the
16 scalp could not cause an effect inside the brain?

17 A. What did you just say?

18 Q. An effect inside the brain?

19 A. Repeat -- start the beginning of the
20 sentence please.

21 Q. Applying an electrical current to
22 someone's scalp --

23 A. Okay. You're app -- okay, you -- you're
24 asking --

25 Q. I haven't finished the question.

Dr. John Wiksw, Jr. 7/6/2022

1 A. Fine. Finish your question then.

2 Q. You're aware of other procedures
3 where -- that are used in medicine where they
4 apply an electric current to someone's scalp and
5 it produces an effect inside the brain, correct?

6 A. Yes, I am aware that there are medical
7 procedures that apply an electric current to the
8 scalp to affect the brain.

9 Q. You talk about it in no where else than
10 the e-mail we've already marked as an exhibit to
11 your deposition?

12 A. Fine.

13 Q. You talk about it in your report, do you
14 not?

15 A. I do.

16 Q. Electroconvulsive therapy, right?

17 A. Correct.

18 Q. The old term is electric shock therapy,
19 but that went out of fad or something, right?

20 A. Correct.

21 Q. Are you suggesting that that work is
22 based on just the thermal dynamics of the electric
23 current?

24 A. No, that's the electric current getting
25 through the skull.

Dr. John Wikswa, Jr. 7/6/2022

1 Q. So we know that electric current can
2 pass through the scalp through the skull into the
3 brain, correct?

4 A. Yes.

5 Q. Go to page 5 now. We're at 12b. It
6 says, prisoners can remain conscious and sensate
7 for some period of time during the electrocution
8 event. Is that the same some period of time?

9 A. Yes, it is the same some period of time.

10 Q. Okay. You said there is evidence that
11 this has happened in electrocutions in
12 South Carolina. Do you see that?

13 A. Yes.

14 Q. And you say you base this conclusion on
15 the following?

16 A. Which paragraph are you in now?

17 Q. 12b, page 5.

18 A. That's got seven parts. Oh, you're
19 still in the first part, got it. I see where you
20 are.

21 Q. I've gotten out of 12a finally. I'm
22 going on to 12b.

23 A. Moving along.

24 Q. I've looked through 12b and I don't see
25 where you provide any bases to make the statement

Dr. John Wiksw, Jr. 7/6/2022

1 that there is evidence that this has happened in
2 electrocutions in South Carolina. So what's the
3 bases for you to say not that you believe in your
4 opinion this process will do it but that there is
5 evidence it's happened in electrocutions in
6 South Carolina?

7 A. I will have to go back and re-read the
8 entire set of news articles describing from South
9 Carolina Press on page 2 of my -- actually under
10 6.

11 Q. So the answer is media reports on
12 various electrocutions that have occurred in South
13 Carolina?

14 A. That's the -- the most immediate answer.

15 Q. It wasn't the spreadsheet that Justice
16 360 prepared for you?

17 A. No.

18 Q. In 12b, little double I, roman numeral
19 2, fairly long paragraph, but I want to focus on
20 the prisoner's skull presents significantly
21 greater resistance for the current than does the
22 prisoners skin. Do you see that?

23 A. Yes.

24 Q. Say, as a result, the vast majority of
25 the electrical current travels around the

Dr. John Wikswa, Jr. 7/6/2022

1 perimeter of the prisoner's head and down the
2 prisoner's torso and legs until it leaves his or
3 her body through an electrode applied to the calf
4 of one leg or an electrode on each leg?

5 A. Correct.

6 Q. Those are your words?

7 A. They are my words.

8 (Exhibit 7 marked for identification.)

9 Q. (By Mr. Plyler) All right, sir, I'm
10 handing you an e-mail that's been marked as
11 Exhibit 7. I'll represent to you it was produced to
12 us in response to our subpoena. I got it yesterday
13 dated February 22 of 2021; do you see that?

14 A. Right.

15 Q. Now, this is approximately 10 days or a
16 week after you signed the engagement contract with
17 Mr. Bloom's clinic in Cornell?

18 A. Correct.

19 Q. Okay. And you're sending this to
20 Mr. Bloom. You copied yourself, you sent it to
21 Ms. Freedman, Mr. Vanwinkle who's with Justice
22 360, and a Ms. Franz and I don't know her. Sorry,
23 I'm not trying to leave her out, I just don't know
24 who she is.

25 And you have an attachment that says the

Dr. John Wiksw, Jr. 7/6/2022

1 SC electrocution process and then in parenthesis
2 for John W., and then an underscore JPW DOCX; do
3 you see that?

4 A. Yes.

5 Q. Okay. All right. And you say, John --
6 because I know it's from you to Mr. Bloom, but you
7 both are named John. So you say, John -- talking
8 about him -- I have some problems with the
9 statement. I made some minor edits. I think we
10 need to discuss it. Do you see that?

11 A. Yes.

12 Q. And those edits were made in the
13 attachment, correct, with changes tracked so we
14 could see what they were?

15 A. Correct.

16 Q. All right.

17 (Exhibit 8 marked for identification.)

18 Q. All right. Sir, I'm handing you what's
19 been marked as Exhibit 8 to your deposition and
20 I'll represent to you that this was also produced
21 in the subpoena response and was the attachment to
22 the e-mail we just marked as Exhibit 7; do you see
23 that?

24 A. Yes.

25 Q. All right. And you are JPW, correct?

Dr. John Wikswa, Jr. 7/6/2022

1 A. That is correct.

2 Q. All right. And these comments that we
3 see along the right side, those are your comments,
4 correct?

5 A. That is correct.

6 Q. And they reference -- they were
7 referenced as problems you had with the statement,
8 right?

9 A. Correct.

10 Q. Go to the second page of Exhibit 8. The
11 paragraph reads, and I'm looking at the first
12 comment with its attachment, it says the vast
13 majority of the electrical current travels around
14 the perimeter of the prisoner's head and down the
15 prisoner's torso and legs until it leaves the leg
16 electrode. Do you see that?

17 A. Yes.

18 Q. Let's go back and look at Exhibit 5 real
19 quick. Exhibit 5 says the a vast majority -- this
20 is 12Bii. The vast majority of the electrical
21 current travels around the perimeter of the
22 prisoner's head and down the prisoner's torso and
23 legs until it leaves his or her body through an
24 electrode applied to the calf of one leg or an
25 electrode on each leg. Is that not substantially

Dr. John Wiksw, Jr. 7/6/2022

1 similar language?

2 A. Yes.

3 Q. You even had a comment here that you
4 attached to the term vast majority?

5 A. Yes.

6 Q. In Exhibit 8, correct? And your comment
7 was what do we have to prove and in quotations
8 vast. It's on page two?

9 A. I see it.

10 Q. That's your comment, correct?

11 A. Correct.

12 Q. And you're asking that question to
13 Mr. Bloom, correct?

14 A. Correct.

15 Q. Because he's the one that wrote the
16 phrase the vast majority of the electrical current
17 travels around the perimeter of the prisoner's
18 head and down the prisoner's torso and legs?

19 A. I am not -- you are seeing a draft of a
20 document that was written after I had provided him
21 my reports.

22 Q. Are you sure?

23 A. I do not know the exact date by which,
24 but I believe that I would have given -- I would
25 have provided information to --

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Let's go to Exhibit 7 and see if we can
2 help you with that. Go down the e-mail chain on
3 the first page on February 19 of 2021 John Bloom
4 wrote, John -- talking about you, go to the second
5 paragraph -- I am also attaching a description we
6 drafted laying out how we think it works and the
7 problems, but I am not a scientist and we would
8 appreciate your review to make sure we get it
9 right for our filings.

10 A. Yes, but we had already discussed these
11 issues I believe before I received that statement,
12 so I do not know the extent to which his writing
13 reflects my verbally expressed positions.

14 Q. Where are those e-mail chains?

15 A. There isn't one. I don't know when I
16 sent South Carolina the Florida reports.

17 Q. And you're saying in the Florida reports
18 you used the term --

19 A. I don't remember.

20 Q. -- vast majority?

21 A. I don't know whether I used vast
22 majority in the Florida report or not.

23 Q. Because what I'm trying to understand is
24 why your comment would be, what do we have to
25 prove "vast" if the source materials for it was

Dr. John Wiksw, Jr. 7/6/2022

1 one of your reports you had already provided to
2 Mr. Bloom?

3 A. The choice of the word vast may be
4 Mr. Bloom's but it is not inconsistent with my
5 understanding of the problem and it's a fair
6 question when we use the word how do you justify
7 it.

8 Q. So what did he provide you to prove it?
9 I mean, your comment says, what do we have to
10 prove "vast". And then you end using that
11 language in your affidavit --

12 A. Yes.

13 Q. -- so what did he do to prove it? I
14 mean, should I be deposing Mr. Bloom instead of
15 you?

16 A. I don't have any problem with using that
17 word in my own voice.

18 Q. But you did when you sent this
19 attachment --

20 A. No, it was an academic question.

21 Q. Hold on, sir. Let me finish. Let me
22 finish.

23 A. I'm sorry.

24 Q. You did have a problem denoted by your
25 comments when you sent this attachment to him on

Dr. John Wikswo, Jr. 7/6/2022

1 February 22 of 2021 as we talked about when I
2 showed you Exhibit 7 where you said I have some
3 problems with the statement. And I said your
4 comments in Exhibit 8 reflect those problems and
5 you said yes.

6 So you had a problem with it in February
7 of 2021, February 22 of 2021, but by April 27
8 apparently that problem has been abated because
9 you signed the affidavit with the term in it. So
10 what I'm asking is what did they provide to you to
11 prove this that alleviated the problem you had
12 with the term vast, or are you still sitting here
13 with no proof that the vast majority of electrical
14 current travels around the perimeter of the
15 prisoner's head and down the prisoner's torso and
16 legs?

17 A. The evidence that I have examined over
18 the past 30 years of considering --

19 Q. That's okay. You can keep going.

20 A. I just didn't want to interrupt your
21 sidebar.

22 Q. Well, that's why we have a record being
23 made, so I can read your answer in my ledger.

24 A. Okay. All evidence that I have acquired
25 over the past 30 years is consistent with the word

Dr. John Wiksw, Jr. 7/6/2022

1 vast. I would like, but do not have, a
2 quantification for vast.

3 Q. So what do you have to prove that it's
4 the vast majority?

5 A. That's a qualitative measure.

6 Q. Then why use the term vast if you can't
7 support it with any scientific evidence?

8 A. I can support it with evidence. It's
9 not scientific evidence.

10 Q. Then what's the quantity that you're --
11 what is the quantification that you are supporting
12 by using the word vast?

13 A. The fact that the damage to the scalp
14 and the skin and musculature of the neck are
15 vastly greater than the damage to the brain and
16 the spinal cord and that's where the pathways are
17 involved.

18 Q. Well, the brain and spinal cord are less
19 resistant by your own statements and opinions than
20 the skull and the skin actually, correct?

21 A. Correct.

22 Q. And if they're less resistant, then less
23 of the electrical power carried by the current
24 will dissipate as thermal energy in that
25 substrate, correct?

Dr. John Wikswo, Jr. 7/6/2022

1 A. You have it backwards.

2 Q. I have it backwards?

3 A. The point is that while the brain and
4 the nerves are capable of carrying current, the
5 skull and the spinal column shield those tissues
6 from the voltage that would deliver that current.

7 Q. And you have a scientific paper to prove
8 that?

9 A. Yes, there's all sorts of literature on
10 that.

11 Q. So why do people die from high voltage
12 electrical shocks, not the low current -- not the
13 low voltage ones that cause the heart to go into
14 fibrillation and require more extended period of
15 time of the current being applied. I'm talking
16 about the high voltage electrical shocks, what's
17 the mechanism of death because we know people die
18 from these, correct? So what's the mechanism of
19 death?

20 A. I don't have the specific numbers for
21 the fraction of mechanism. Asphyxiation because
22 of lack of -- inability to breathe is a major
23 factor. The -- depending on the duration of the
24 exposure, the heart is not pumping blood during
25 the delivery of the high voltage shock. When the

Dr. John Wiksw, Jr. 7/6/2022

1 high voltage shock is terminated the heart may
2 restart spontaneously.

3 Q. How often?

4 A. I expect the majority of the times.

5 Q. How long will it take to restart?

6 A. It would be instantaneous.

7 Q. As soon as you turn it off it's going to
8 start back up?

9 A. It'll start, but it'll start back with
10 an altered rhythm because of the accumulation of
11 metabolic products in the heart when it is not
12 beating and properly being profused.

13 Q. So in a one second encounter with a high
14 voltage current the person would die from
15 asphyxiation?

16 A. I don't know whether a person will die
17 of asphyxiation from a one second exposure.
18 Industrial exposures are typically longer than
19 that. South Carolina is five seconds.

20 MS. VANN: Sorry. We've been going for
21 a couple of hours. Is there any way we can
22 take a comfort break?

23 MR. PLYLER: Let me just finish this
24 line of thought and then we'll absolutely do
25 that.

Dr. John Wiksw, Jr. 7/6/2022

1 MS. VANN: Thank you.

2 Q. (By Mr. Plyler) What did you calculate
3 the time of exposure for the -- for the electrical
4 encounter that Mr. Petricca, P-E-T-R-I-C-C-A, had in
5 the case where you were an expert against Allegheny
6 Power?

7 A. I don't remember that number.

8 Q. All right.

9 A. Also -- that's fine.

10 Q. Take a break.

11 (A brief recess was taken.)

12 Q. (By Mr. Plyler) Dr. Wiksw, we're back
13 from a short break. I believe everybody has gotten
14 their comfort break and ready to continue. Good.
15 Great.

16 I've been asking you about paragraph 12
17 ii -- let me make sure I've got my numbers right.
18 Yeah, 12b ii, which is on page 6 of Exhibit 5. I'm
19 going to move on to --

20 A. What number are we at?

21 Q. We're going to go to the one that's
22 three little Is?

23 A. What page?

24 Q. Page 6?

25 A. Got it.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. And this is where you describe the
2 insulating properties of the skull and then start
3 to discuss how the ability of the prisoner's brain
4 to function becomes compromised over time by a
5 combination of factors. Do you see that?

6 A. Yes.

7 Q. All right. You say a period of time, do
8 you know how long of a period of time? Are you
9 aware of any scientific research that would
10 support a quantification of that period of time
11 before the prisoner's brain is unable to function?
12 And I'm using unable, and that's probably not
13 specific enough.

14 Would you agree with me that a person
15 can lose consciousness and still have neural
16 activity?

17 A. Yes. A person can lose consciousness
18 and have neural activity.

19 Q. Okay. Are you aware of how long or any
20 scientific papers or research that would support a
21 way to calculate how long it would take for the
22 person to lose consciousness due to any sort of
23 effect on the brain during electrocution?

24 A. Repeat the question please.

25 Q. I'll try.

Dr. John Wikswo, Jr. 7/6/2022

1 A. That says something about the question.

2 Q. It's one of those that's got enough
3 factors in it that you have to put in the front of
4 it, so let me stair step it which is the technique
5 they teach us right. So -- in paragraph 12b iii
6 you're describing a combination of factors that --
7 that would start to affect the ability of the
8 prisoner's brain to function because of the
9 electrocution process; is that fair?

10 A. Correct.

11 Q. And I was asking because the ability to
12 function could have a lot of different meanings,
13 but obviously one that we're really interested in
14 in the analysis of constitutionality of these
15 different methods of execution is the idea of
16 consciousness, the conscious pain and suffering?

17 A. Correct.

18 Q. And I think you agreed with me that
19 someone could lose consciousness from the effects
20 of the electrocution, correct?

21 A. Yes.

22 Q. All right. And what I'm trying to
23 figure out is, are you aware of any studies that
24 would -- that either calculated or allow you or
25 someone with your sort of expertise to calculate

Dr. John Wiksw, Jr. 7/6/2022

1 how long that period of time would be from the
2 electrical -- the electrocution beginning and the
3 person losing consciousness?

4 A. I know of no calculations of the time
5 between application of electric shock and loss of
6 consciousness, and -- I know of no such
7 calculations.

8 Q. So we don't know how long it would take
9 somebody to lose consciousness during this
10 electrocution?

11 A. That's not completely -- that's not
12 correct. I disagree with that statement.

13 Q. So then tell me how long will it take
14 for someone to lose consciousness during an
15 electrocution?

16 A. That's not the way you're question was
17 originally -- could you read back the first
18 question?

19 Q. Makes me want to play the game of, well,
20 depends on what you mean by the first question.
21 And my first was would you state your name for the
22 record.

23 (Record read.)

24 THE WITNESS: Okay. You know that there
25 are cases of "botched" electrocutions where

Dr. John Wikswo, Jr. 7/6/2022

1 people can -- people -- prisoners have
2 relayed their perceptions. And I don't at
3 this point remember which electrocution that
4 was in fact the case, but there's, I believe,
5 more than one. And there are also
6 observations of -- for example, there was one
7 I was reading a prisoner had a nervous tick
8 that led to head bobbing, and between the
9 shocks of the sequence the head bobbing
10 resumed. And the question was to what extent
11 was that a conscious head bobbing or an
12 unconscious head bobbing, but it's clear that
13 the activity was interrupted and resumed.

14 So you -- read the question again. I
15 mean, I'm getting closer to the answer of
16 that question.

17 (Record read.)

18 THE WITNESS: My answer would be is that
19 what we do know is that it may not be
20 instantaneous, okay. It was a carefully
21 worded question for which you got a carefully
22 worded answer.

23 Q. (By Mr. Plyler) Thank you. Are you aware
24 of any published works regarding the incidents of
25 "botched" executions by various methods?

Dr. John Wiksw, Jr. 7/6/2022

1 A. There is a paper that I referred to in
2 my list of discoverables that is a catalog of --

3 Q. Are you talking about Hillman's papers.

4 A. I'm not sure which paper. There's more
5 than one Hillman paper. There's a Hillman paper
6 on pain and there is -- I want --

7 Q. Remember this has your subpoena response
8 on here?

9 A. I'm looking for Exhibit 4.

10 Q. Okay. And while you're looking for
11 that, when you prepared Exhibit 4, did you type in
12 each one of the subpoena categories and then type
13 in your answer?

14 A. I actually used Adobe to convert it
15 to -- I grabbed it and --

16 Q. Cut and paste?

17 A. -- cut and paste, so there may be some
18 typos in that.

19 Q. No, that's okay. But, I mean, the
20 different categories of the subpoena are
21 represented --

22 A. I mean, I took the PDF document and one
23 way or the other converted it into a Word
24 document, corrected for the hyphenations and the
25 letters R that were replaced by some other

Dr. John Wiksw, Jr. 7/6/2022

1 character.

2 Q. Right, that happens all the time. The
3 reason, and it's a clean up, I didn't bring a copy
4 of the subpoena to make as an exhibit to your
5 deposition?

6 A. So it's the paper that I have looked at
7 but I have not studied it at length, it's Radelet,
8 paper 1 Radelet Botched Executions Examples of
9 Post-Furman Botched Executions.

10 Q. And that's page 3?

11 A. That's on page 4, item 1 and that was a
12 fairly extensive inventory of botched executions,
13 and I have not yet studied it in depth.

14 Q. And it was published at the
15 Deathpenaltyinfo.org website?

16 A. Correct and I have -- I have -- I know
17 nothing about that organization or the validity of
18 the document, but I have found it.

19 Q. Okay. Have you reviewed the work of
20 Austin Sarat, a published book called Gruesome
21 Spectacles where he did a survey of thousands of
22 executions looking at incidents of botched and --
23 the rate of botched executions. Are you familiar
24 with that work?

25 A. What was the names again?

Dr. John Wiksw, Jr. 7/6/2022

1 Q. The author's name is Austin Sarat. I
2 believe it's S-A-R-A-T, and the publication -- the
3 name of his book is Gruesome Spectacles.

4 A. I don't believe I've read that book.
5 I'm not sure I'm aware -- even aware of it.

6 Q. Okay. All right. Going to 12b ix,
7 little Roman numeral 4. Says the reduced portion
8 of electrical current that reaches the prisoner's
9 brain may on occasion depolarize the prisoner's
10 brain disrupting the brain's ability to transmit
11 electrical current and inactivating (depolarizing
12 or hyperpolarizing) the neurons. Did I read that
13 correctly?

14 A. Correct.

15 Q. So you do recognize that some portion of
16 the electrical current is going to reach the
17 brain?

18 A. Yes.

19 Q. Okay. When you say may and on occasion
20 have you done anything to try to quantify that?

21 A. No, I have not.

22 Q. Are you aware of any scientific --
23 published scientific data or papers out there that
24 would allow someone to quantify this may and on
25 occasion that you have here in 12b ix?

Dr. John Wikswo, Jr. 7/6/2022

1 A. I know of no studies of neural
2 polarization or depolarization during a judicial
3 execution.

4 Q. So you have no way to quantify the may
5 or the on occasion in that sentence, correct?

6 A. The anecdotal evidence coming from
7 survivors or transient survivors and witnesses
8 suggest that the return to function of the neurons
9 is possible. It says will therefore, the last
10 sentence will be -- will thereafter be incapable
11 of repolarizing during alternating current
12 stimulation.

13 Q. Right. Read the whole sentence.
14 However, there is no scientific evidence that the
15 prisoner's depolarized or hyperpolarized brain
16 neurons --

17 A. Correct.

18 Q. -- will thereafter be incapable of
19 repolarizing?

20 A. Right. So this is basically says that
21 there is no statement that proves them incapable
22 of repolarizing.

23 Q. Right. My question before was
24 different.

25 A. What was your question before?

Dr. John Wikswo, Jr. 7/6/2022

1 Q. It was your use of the word may on
2 occasion and then in context of that sentence,
3 so -- because they're two different concepts in my
4 opinion when you look at that paragraph. The
5 first one is the reduced portion of electrical
6 current that reaches the prisoner's brain may on
7 occasion depolarize a prisoner's brain disrupting
8 the brain's ability to transmit electrical current
9 and inactivating depolarizing or hyperpolarizing
10 the neurons. That was the first statement you
11 made.

12 A. No problem with that.

13 Q. And I said, did you do anything to try
14 to quantify the may or the on occasion to try to
15 figure out how often the --

16 A. My response to that was there are
17 anecdotal accounts suggesting that this happens.

18 Q. Okay.

19 A. The fundamental difficulty is that the
20 measurements have never been made, and were the
21 measurements made one may or may not find those
22 times but until those measurements are made
23 there's no idea.

24 Q. We're just speculating what the times
25 are?

Dr. John Wikswow, Jr. 7/6/2022

1 A. I wouldn't speculate. I'm not
2 speculating because there is evidence. There is
3 anecdotal evidence supporting the fact that the
4 brain is affected by the electrical shock and can
5 survive.

6 Q. But you just can't quantify how often
7 someone might survive?

8 A. How often and it's also a matter of how
9 long, and the protocols are designed such that you
10 have a pause and then you have a second shock.
11 And so then the question is what is happening?
12 One of the fundamental question is what is
13 happening between the first and the second or the
14 second and the third or the third and the fourth
15 shock when you have a --

16 Q. There's only three in South Carolina?

17 A. That's good. But the point is in --
18 there, I think, have been more shocks in other
19 states historically, but the point is that there
20 is no way to quantify -- one, there have been no
21 attempts and one can ask whether there's even a
22 means to quantify the neural responses to those
23 shocks in humans. Sanchez has done experiments on
24 pigs.

25 Q. The anecdotal evidence that you've

Dr. John Wiksw, Jr. 7/6/2022

1 referenced as we've discussed 12b ix here, is that
2 anecdotal evidence that would support a conclusion
3 of return to consciousness; or are you talking
4 about anecdotal evidence that could be explained,
5 for instance, when you attach electrodes to a
6 cadaver and the hand starts twitching?

7 A. The issue is you have to agree upon
8 either a definition of consciousness or the levels
9 of consciousness, and the complexity is that --
10 well, it's fine. So the point is that it's not
11 like consciousness is an all or nothing.

12 Q. All I'm asking is the anecdotal evidence
13 that you've referred to -- that you're using to
14 explain yourself here as we've asked -- as I've
15 asked you questions about 12b ix?

16 A. Repeat your question.

17 Q. I'm trying to. During our discussion of
18 what you've written here in 12b ix of Exhibit 5,
19 you've referenced anecdotal evidence to support
20 your statement here about depolarization or
21 hyperpolarization of neurons in the brain and
22 their ability recover. And what I'm asking is,
23 since brain function, there are different levels
24 of brain functioning. I mean, someone could have
25 zero electrical activity, but they're still having

Dr. John Wiksw, Jr. 7/6/2022

1 brain stem activity and continue to exist, I
2 guess, on at least a basic level of their heart
3 beating and their lungs inflating and all that.

4 What I'm asking is, does any of that
5 anecdotal evidence that you're talking about
6 support a conclusion that not only might they be
7 capable neurons of repolarizing but that the
8 person would be capable of regaining
9 consciousness?

10 A. There is anecdotal evidence of "botched"
11 judicial executions where the prisoner rises to
12 some level of consciousness.

13 Q. Are you aware of any anecdotal evidence
14 where the execution is not botched where that same
15 anecdotal evidence exists?

16 A. I believe that is in the current jargon
17 the definition of botched and so if it wasn't
18 botched it wasn't seen.

19 Q. And how often are these executions
20 botched?

21 A. I don't have the statistics at my
22 fingertips right now.

23 Q. And you have done any sort of
24 independent statistical analysis to try to
25 determine how often they're botched?

Dr. John Wiksw, Jr. 7/6/2022

1 A. The question is, is how good is the data
2 and how representative is the data.

3 Q. I understand that. That would be part
4 of the statistical analysis that you could perform
5 if you did that, but that whole point is --

6 A. So you can't --

7 Q. -- you haven't done it?

8 A. One it can't be done and, two, I'm not
9 giving you a hard number that would require error
10 bars.

11 Q. You're saying it's not possible to do a
12 survey of the documentation and evidence of
13 executions carried out across the United States
14 and make a determination of how often --

15 A. It is possible to do that. I have not
16 done that myself.

17 Q. Thank you. That was the question.

18 A. Oh, okay. Fine.

19 Q. Twice in this report you make the
20 statement no scientific evidence contradicts the
21 above statements. You do it in paragraph 11 and
22 the last sub-paragraph, which would be
23 sub-paragraph 11 ironically enough, and then you
24 do it in 12b vii. You have a statement no
25 scientific evidence contradicts the above

Dr. John Wiksw, Jr. 7/6/2022

1 statements; do you see that?

2 A. 12b vii, we're on page?

3 Q. 6?

4 A. Yes.

5 Q. And then if you go back to page 5 it
6 would be under 11, I apologize, it's actually
7 12a xi and under 12b vii you have the statement,
8 no scientific evidence contradicts the above
9 statements.

10 A. Yes. I have that statement in multiple
11 places, at least two places in my affidavit.

12 Q. If you had scientific evidence that
13 prove your statements wouldn't you have cited to
14 it?

15 A. I have made statements that reflect my
16 detailed understanding of the mechanisms of
17 judicial death by judicial electrocution and a
18 review of the anecdotal literature that support
19 everything I said. In addition, there's
20 substantial scientific evidence supporting my
21 position coming from animal euthanasia
22 experiments.

23 Q. Why don't you cite to them here?

24 A. I chose not to.

25 Q. So you choose to make a comment that no

Dr. John Wiksw, Jr. 7/6/2022

1 scientific evidence contradicts you but you don't
2 put into the same report the scientific evidence
3 that would support you?

4 A. This particular report I did not put a
5 detailed analysis of the euthanasia literature.

6 Q. Okay. And 12c was page 6, you use some
7 of those non-quantified terms again and I'm going
8 to ask you if you can quantify them. We just have
9 to go through the exercise. So, 12c, because
10 prisoners can remain alive, conscious, and sensate
11 during at least a portion of the duration of a
12 judicial electrocution event --

13 A. What number page again?

14 Q. Page 6, paragraph 12c.

15 A. Okay, got it.

16 Q. Because prisoners can remain alive,
17 conscious, and sensate during at least a portion
18 of the duration of a judicial electrocution event
19 for the following reasons they can experience
20 excruciating pain and suffering during the event.
21 Did I read that correctly?

22 A. Yes, you did.

23 Q. You say can remain alive. Have you
24 tried to quantify how often that occurs?

25 A. No, I have not.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Have you tried to quantify the statement
2 during at least a portion, have you tried to
3 quantify what that portion would be in the
4 scenarios where they can remain alive?

5 A. This is basically the period of time
6 discussion we previously had.

7 Q. All right. It's good for me.

8 On page 7, now we're getting down to,
9 it's C -- 12c, subpart vii is where you have the
10 statement about the electrical lineman -- lineman,
11 excuse me, during an accidental high voltage
12 electrical shock watched the individual spokes of
13 a bicycle wheel turn slowly as the rider was
14 passing by during the shock. And we mentioned
15 this previously in the conversation, but I told
16 you we'd get to it, so I'm keeping my promise.
17 You're going to look for that publication but
18 sitting here at this moment you're not able to
19 tell me the source for that statement, correct?

20 A. That is correct.

21 Q. All right. If you go to page 8,
22 paragraph 13. Since 1912, South Carolina has
23 carried out judicial electrocution --

24 A. Just one moment. For a second, I want
25 to -- I want to check one thing.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Sure.

2 A. I don't have copy of my 1998 report
3 handy, but the 1998 report makes reference to --
4 at least one reference to the euthanasia question,
5 so it's not that I'm not presenting it, but I'm
6 building this analysis on what I learned
7 previously and the animal euthanasia has been
8 brought up in prior testimony and it was a report
9 that you received but there is a more extensive
10 literature that I am referring to.

11 Q. So if you go to page 8 of Exhibit 5,
12 paragraph 13 says, since 1912 -- I'm just making
13 sure you're on that page?

14 A. Yes.

15 Q. Since 1912, South Carolina has carried
16 out judicial electrocutions using protocols that
17 called for application of a wide range of maximum
18 voltage with a minimum of 1,350 volts in 1930 to a
19 maximum of 7,000 volts in 1962. Is this
20 information that was provided to you by Justice
21 360?

22 A. Yes, it was.

23 Q. The majority of electrocutions for which
24 there is "reliable evidence" -- and I'm quoting
25 because we're going to come back to it -- were

Dr. John Wikswow, Jr. 7/6/2022

1 carried out using a maximum of 2,000 to 3,000
2 volts. Do you see that?

3 A. Yes.

4 Q. What was your criteria for determining
5 which ones had reliable evidence and which ones
6 didn't?

7 A. Those criteria came from Justice 360.

8 Q. And you didn't review the source
9 materials, correct?

10 A. I, in fact, think I did review much of
11 that material, but I did not make a compilation of
12 the results.

13 Q. So this is not the spreadsheet that
14 we've been talking about? That wasn't the basis
15 for this information?

16 A. The one thing I remember about the
17 document from Justice 360 was the 7,000 volt spike
18 in 1962 period.

19 Q. Okay. And why does that stick out for
20 you?

21 A. It was very tall.

22 Q. All right. So whatever criteria was
23 used to decide what did or did not have reliable
24 evidence you can't tell me that because you didn't
25 set that criteria, correct?

Dr. John Wikswow, Jr. 7/6/2022

1 A. Right.

2 Q. All right. There is evidence consistent
3 with painful or torturous deaths and
4 electrocutions carried out according to protocols
5 across the range of voltage requirements. Is that
6 information provided to you by Justice 360 or is
7 that some determination you made from your own
8 review of source materials?

9 A. It's a combination of both. Most of the
10 press accounts that I read were old, but I
11 can't -- I don't -- let me go back and look at
12 that report for the press accounts.

13 No, there were press accounts through
14 1991, so that entire period was covered by the
15 news accounts cited under my response 6 following
16 news accounts.

17 Q. All right. And what --

18 A. Yes. And they go -- they go -- yeah,
19 they're spanning the time. There are some old
20 ones '84, '85, '62, '96, '85, '91, '90, '91, '90,
21 '96. Yeah, and so I have -- I have read all of
22 those accounts but not recently.

23 Q. All right. What was the criteria you
24 used to determine what constituted evidence of a
25 painful or torturous death from those reports?

Dr. John Wikswo, Jr. 7/6/2022

1 A. I would have to reread the reports that
2 I cited to list the breadth of depth of evidence.
3 It's largely going to be muscle motion, screaming
4 out, body contortions, screaming out. There's not
5 a whole lot of way to signal that you're having a
6 tortuous death other than twitching, burning, or a
7 jumping, or a botched execution where they -- the
8 prisoner has clear evidence of one having survived
9 and two having severe burn damage.

10 Q. Under 13a you say, there is evidence
11 consistent with tortuous execution in 30 percent
12 of all electrocutions in South Carolina's history
13 for which there is any reliable information. Do
14 you see that?

15 A. Yes.

16 Q. You've already told me from the earlier
17 paragraph that this determination of what did or
18 did not have reliable evidence, that you didn't
19 make that decision, correct?

20 A. That's correct.

21 Q. So did you do a quantitative analysis
22 and run a statistical evaluation to come up with
23 this idea that there were 30 percent of all
24 executions in South Carolina history?

25 A. No, I did not.

Dr. John Wikswow, Jr. 7/6/2022

1 Q. Was that just provided to you?

2 A. Yes.

3 Q. So there's no scientific method to
4 support that statement, correct?

5 A. The difficulty is there is no scientific
6 method that can support any of the anecdotal
7 accounts.

8 Q. Right but there is certain criteria that
9 you have to meet to be allowed to testify to
10 certain things in a court of law, and whether it's
11 difficult or not you still have to meet those
12 criteria?

13 A. Okay.

14 Q. Is there a scientific method you used to
15 come up with the statement in your report that
16 30 percent of all executions in South Carolina's
17 history for which there is any reliable
18 information resulted in tortuous death?

19 A. Other than counting anecdotal accounts,
20 no.

21 Q. Well, not just anecdotal accounts, but
22 apparently the anecdotal accounts that for
23 whatever reason were determined to be reliable
24 versus the ones that weren't?

25 A. Okay.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. Correct? That's the statement for which
2 there is reliable information. Do you see it?

3 A. Okay. I have no problem with the
4 statement.

5 Q. Well, I do, and I'm trying to get to the
6 bottom of it.

7 A. Okay.

8 Q. You didn't run a statistical analysis
9 yet you want to offer the opinion that 30 percent
10 of all executions in South Carolina's history
11 resulted in tortuous deaths. You didn't run an
12 analysis to determine the criteria for what would
13 be or would not be reliable information that you
14 then used to try to run this alleged statistical
15 analysis. So I'm trying to get to the bottom of
16 this. How can you support through any scientific
17 method the statement that we see at 13a?

18 A. By counting of anecdotal reports.

19 Q. And you counted all of them or just the
20 ones that Justice 360 said were reliable?

21 A. I erred in my earlier statement in that
22 the numbers that I am reporting under paragraph 13
23 were, in fact, the result of a combination of my
24 reading of the press reports and Justice 360's
25 analysis.

1 Q. So what was the criteria you used to
2 determine what was or was not reliable, because
3 earlier you told me they did it and now you're
4 changing your statement --

5 A. No, I'm indicating that I had earlier
6 commented that I had not utilized the Justice 360
7 analysis. I am pointing out that, in fact, I did
8 use the Justice 360 analysis in the writing of
9 paragraph 13.

10 Q. Okay. Thank you for the bases. Now
11 we're getting down to what was the criteria used
12 to determine what was or was not reliable that you
13 then counted and determined without any sort of
14 statistical analysis that 30 percent of them were
15 tortuous?

16 A. I would like to point out that your use
17 of the word statistical analysis is interesting
18 because counting and dividing by the total number
19 is a rudimentary form of statistical analysis, but
20 that's not --

21 Q. You wouldn't publish that way and you
22 know it.

23 A. What?

24 Q. You know what a statistical analysis is,
25 it's something you do in your field.

Dr. John Wikswo, Jr. 7/6/2022

1 A. Well, the difficulty is that most
2 statistical analysis involve control experiments,
3 and I do not know how to do a control experiments
4 on judicial executions.

5 Q. Right. You didn't account for witness
6 bias. You didn't account for reporter bias of
7 what the witnesses allegedly said. You didn't set
8 a criteria for what would or would not be reliable
9 information. You didn't set a criteria for what
10 would or would not be a tortuous death, but yet
11 you want to offer that 30 percent of all
12 electrocutions in South Carolina are, in fact,
13 tortuous. Could you publish that in any journal?
14 Would any peer review journal accept that
15 analysis, Dr. Wikswo?

16 A. It depends on how it is presented. So
17 to say, no, would a peer reviewed journal publish
18 it? That is a very specific statement. Depends
19 on how it's presented.

20 Q. Do you consider yourself an anti-death
21 penalty advocate?

22 A. My personal views are independent of my
23 professional position on the effects of electrical
24 energy on the human body.

25 Q. Are you against the death penalty?

Dr. John Wiksw, Jr. 7/6/2022

1 A. I do not support capital punishment.

2 Q. Taking that a step further, does your
3 personal views of not supporting capital
4 punishment rise to the level of considering
5 yourself an anti-death penalty advocate?

6 A. I'm trying to figure out how to define
7 advocate. I'm not advocating against the death
8 penalty.

9 Q. Do you know if Justice 360 advocates
10 against the death penalty?

11 A. I don't know for a fact. I think it's a
12 reasonable assumption that they do.

13 Q. The affidavit you provided for use in
14 their current pending litigation in the Fourth
15 Circuit regarding their First Amendment claim and
16 right of access to this information?

17 A. Okay.

18 Q. Have you reviewed that litigation at
19 all?

20 A. I have not reviewed that litigation. My
21 expertise is not on capital punishment. My
22 expertise is on electrical response -- the body's
23 response to electrical current. There are many
24 ways to perform a judicial execution and I am not
25 an expert on any of the other ways.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. So you don't have any opinions about
2 firing squad? I'm sorry, you don't have any
3 opinions in your fields of expertise that you
4 believe would qualify you to give expert opinions
5 regarding the firing squad as a method of
6 execution, correct?

7 A. Repeat the question.

8 Q. Yeah. You said just a moment ago that
9 your expertise is in the application or effect of
10 electricity to the body and that you're not
11 qualified to talk about other methods of
12 execution, something to that affect?

13 A. Okay.

14 Q. So I'm asking do you have any opinions
15 in your fields of expertise that you believe
16 you're qualified in to give opinions regarding the
17 firing squad as a method of execution?

18 A. I -- my -- the formation of a
19 professional opinion regarding the firing squad is
20 contingent upon understanding how long the brain
21 can maintain consciousness once the heart has been
22 destroyed?

23 Q. Is that in your fields of expertise?

24 A. Well, it's getting close because there's
25 a question of how long can you deprive the heart

Dr. John Wiksw, Jr. 7/6/2022

1 of oxygen before -- I mean, the brain with oxygen
2 before it stops being conscious and so there's
3 going to be a dissent through levels of
4 consciousness once the heart is destroyed.

5 Q. And what studies have you done on any of
6 that?

7 A. I have done no studies on that.

8 Q. And what field of expertise that you
9 hold that you believe qualifies you to give any
10 opinion about any of those subjects?

11 A. Neurology -- I have done extensive work
12 on both neurology and cardiology including cardiac
13 hemodynamics, and so the question I'm asking is
14 how -- I'm asking a question, how long is the
15 brain sensate and conscious after the heart is
16 destroyed? This is not that different from the
17 question that was asked when people were beheaded
18 in the guillotine, you know, how long is the brain
19 working after you've been beheaded.

20 Q. So are you saying you do believe you
21 have the qualifications to render opinions about
22 the firing squad?

23 A. I'm asking questions. I'm not prepared
24 to render an opinion.

25 Q. I'm the one taking the deposition.

Dr. John Wiksw, Jr. 7/6/2022

1 A. Fine. But the point is I'm pointing out
2 that I do not personally -- I have not yet
3 personally formed an opinion on the firing squad.

4 Q. And you're not going to do that at the
5 trial of this case either are you?

6 A. I'm not planning to.

7 Q. Nobody has asked you to have they?

8 A. No, they haven't. It hasn't even been
9 discussed. There may have been a casual mention
10 about firing squad but, no, I have been asked to
11 testify against the firing squad.

12 Q. Have you relied on the work of Deborah
13 Denno at all in supporting your opinions in this
14 case?

15 A. I don't know who she is. Deborah?

16 Q. Deborah Denno?

17 A. D-E-N-O? Don't recognize the name.
18 There's a chance that I've cited her but I don't.

19 Q. Let's look back at Exhibit 8, please?

20 A. Exhibit 8?

21 Q. Yes, sir. Page 2, footnote 2.

22 A. Okay. Well, it turns out when I read
23 that footnote I know of the work of Orrin Devinsky
24 and the fact that he was quoted in Deborah Denno's
25 book. I have not -- I think I have -- actually, I

Dr. John Wiksw, Jr. 7/6/2022

1 have a copy of that article. I have not studied
2 it in depth.

3 Q. Whose article, Debra Denno's article?

4 A. I have the getting -- the Getting To
5 Death -- Are Executions Constitutional. We can
6 look at my list of responses to see whether that
7 is actually in it. Yes, so I list that as one of
8 the documents that I had looked at, have not
9 studied recently on page 4 of my response to the
10 subpoena attachment.

11 Q. Right. And that's an article, yes it's
12 a law review article she wrote --

13 A. Right. And I have read it, but I
14 haven't -- I read it when I got it, but I have not
15 studied it recently so I do not recall its
16 findings.

17 Q. That she wrote and published in 1997?

18 A. Right.

19 Q. Okay. Are you aware of any of her more
20 recent work?

21 A. No.

22 Q. Are you aware that she has actually
23 opined in law review articles that firing squad
24 may be the most humane and constitutional method
25 of execution available?

Dr. John Wiksw, Jr. 7/6/2022

1 A. I was not aware of that.

2 Q. Well, if you find her work to be
3 supportive of your opinions do you have any reason
4 to disagree with her later work?

5 A. I have to see the later work before I
6 can opine on that. But as I said, I have not -- I
7 have not formed an opinion on the firing squad.

8 Q. You've referenced the work of Hillman?

9 A. Yes.

10 Q. You even mentioned his article on pain?

11 A. Right. And that was the article that
12 talks about the different --

13 Q. By different methods of execution?

14 A. -- pain of different methods of
15 execution.

16 Q. Yeah. Did you see in there where he
17 references that he could find no evidence of
18 conscious pain resulting from a firing squad
19 execution?

20 A. If I saw that, I don't remember it.
21 Again, I have not been focusing on the firing
22 squad.

23 Q. Would you agree with me that electrode
24 surface area is probably more important to the
25 analysis of an electrocution than the electrode

Dr. John Wiksw, Jr. 7/6/2022

1 placement is?

2 A. Electrode placement surface area and
3 edge circumference are all important.

4 Q. Do you know what the -- the electrode
5 surface area edge circumference and placement is
6 in an execution by electrocution in
7 South Carolina?

8 A. I believe it is a copper mesh. I can't
9 remember the exact diameter, and then there is a
10 conductive gel and a sponge.

11 Q. The other jurisdictions where you
12 reviewed electrocution, I know you mentioned
13 Tennessee, Florida, Nebraska, I believe in one of
14 your reports Alabama is also mentioned. Have you
15 ever reviewed Alabama's?

16 A. I have reviewed autopsy reports from
17 Alabama, but I don't know -- I can't remember
18 whether I reviewed the -- any of the specifics of
19 Alabama. That was many years ago.

20 Q. Do you know if any of them used a copper
21 mesh basket versus a ream electrode for the head
22 placement?

23 A. I do not recall whether other
24 jurisdictions used a copper mesh basket.

25 Q. Do you recall what they used? I mean,

Dr. John Wikswa, Jr. 7/6/2022

1 you reviewed them?

2 A. There were cases that used basically a
3 metal helmet, a copper helmet, so the helmet would
4 be held over the sponge, the sponge would be in
5 contact with the brain.

6 Q. All right. Do you have any opinions
7 that you're prepared to offer in this case
8 regarding lethal injection as a method of
9 execution?

10 A. I have no opinions regarding that. As
11 an expert, I have no opinions regarding that.

12 Q. Going back to the manuscript the Finite
13 Element of -- I can't even remember the name of
14 the article at this point.

15 A. Sepulveda.

16 Q. Thank you. I know you mentioned that it
17 was submitted for publication and rejected. Do
18 you remember which journal and/or journals
19 rejected it?

20 A. It probably was just one journal and it
21 was probably the IEEE Transactions of Biomedical
22 Engineering, which was the premier journal in the
23 field.

24 Q. Okay.

25 A. Which I have published in before and

Dr. John Wikswo, Jr. 7/6/2022

1 after that submission.

2 Q. Okay. I'm assuming, based on the
3 opinions you've given here today that you've never
4 offered testimony regarding electric -- excuse,
5 judicial electrocutions wherein you suggested that
6 they were potentially instantaneous and painless?

7 A. To the best of my recollection I have
8 never stated that.

9 Q. You've always been offered by the people
10 opposing the death penalty, not for the other side
11 of that litigation, correct?

12 A. That is correct.

13 Q. I would be remiss if I didn't approach
14 this topic, so I gotta go through it.

15 (Exhibit 9 marked for identification.)

16 Q. All right, sir. I'm handing you what's
17 been marked Exhibit 9 to your deposition. I'll
18 represent to you this is another one of the
19 e-mails that was produced to us in response to our
20 subpoena. This one is dated July 4 of 2022 so a
21 mere two days ago?

22 A. Yes, I know that e-mail. So, what --
23 yes?

24 Q. Okay. You were asked to review some of
25 the medical records of one of the plaintiffs. His

Dr. John Wikswow, Jr. 7/6/2022

1 name is Gary Terry?

2 A. Yep, yes.

3 Q. And to give any opinion you might have
4 regarding certain metal or, you know, medical
5 devices that were used to repair joints or whatnot
6 inside of him, and if it would have -- if that
7 would have any effect on the judicial
8 electrocution as applied to him?

9 A. Correct.

10 Q. And if I'm reading your paragraph here
11 on Exhibit 9 correctly, you're suggesting that,
12 no, you don't believe that the hardware he has is
13 going to have any detrimental effect if judicial
14 electrocution was applied to him different than
15 any of the other opinions you've already offered?

16 A. That was not what I stated.

17 Q. Okay. Well, let's go through it. So
18 this is -- you wrote it to Lindsey Vann and copied
19 Hannah here. I'm sorry, Hannah, I should give
20 your last name too. Freedman. Say, Lindsey, I've
21 reviewed the records. In the SCDC protocol, a
22 single leg electrode is applied to the right leg.
23 Hence any damage or repairs to the left ankle or
24 knee should not affect the current distribution
25 during judicial electrocution. Did I read that

Dr. John Wiksw, Jr. 7/6/2022

1 correctly?

2 A. Yes, you did.

3 Q. And that is, in fact, where this
4 hardware is on Mr. Terry, correct?

5 A. I had trouble finding the specific
6 hardware in the left knee. It was clear there was
7 an issue with the left ankle, and as long as the
8 feet don't touch with the right electrode, the
9 metal in the left leg should make no difference.

10 Q. Okay. In fact, metal replacing bone,
11 you're replacing a more resistant substrate with a
12 less resistant substrate, correct?

13 A. Correct.

14 Q. All right. So I'm trying to figure out
15 what did I say wrong the first time around that
16 you --

17 A. You basically said that there was no
18 effect and that is not what I said. I understood
19 you to say that I concluded from this analysis
20 that there would be no effect from the metal in
21 the right hip. What I concluded is that there
22 would be -- could be changes and, in fact, the
23 presence of the conducting metal could increase
24 the current through the scalp but the extent to
25 which it does that is impossible to quantify

Dr. John Wiksw, Jr. 7/6/2022

1 without a good computational model.

2 Q. Which you don't have?

3 A. Which I don't have.

4 Q. So you can't provide any quantitative sort
5 of analysis to render an opinion that any of the
6 hardware in Mr. Terry has in his person is going
7 to result in him having a particularly painful
8 judicial electrocution?

9 A. The problem is when you add the word
10 quantifiable.

11 Q. I don't know how it's -- I mean, we're
12 not allowed to speculate. That's kind of -- one
13 of the basic rules of litigating. I can't
14 speculate. That's a real clear objection. If you
15 can't quantify it then aren't you speculating?

16 A. I think it is possible to state with
17 certainty that the presence of metal in the right
18 leg of this person will increase the current
19 delivered by the fixed voltage of the power supply
20 driving the electric chair.

21 The difficulty that I cannot quantify is
22 the magnitude of that increase. Is it 1 percent?
23 Is it 5 percent? Is it 10 percent? I do not
24 know.

25 Q. I'm assuming if you don't know you also

Dr. John Wiksw, Jr. 7/6/2022

1 can't in any way quantify what the difference
2 would be versus someone who didn't have that metal
3 in their body and was going through the same
4 process?

5 A. Could you ask that as -- either repeat
6 the question -- could you repeat the question?

7 Q. Are you of the opinion based on your
8 review of Mr. Terry's medical records that were
9 provided to you that his -- that the hardware, the
10 medical hardware that he has in his person, metal
11 hardware, is likely to increase the pain or
12 sensations of pain that he might feel during the
13 judicial electrocution in a way that's different
14 than somebody who doesn't have this hardware?

15 A. Yes. I believe that metal in his right
16 hip could, in fact, affect his sensations of pain
17 during judicial electrocution.

18 Q. In what sense?

19 A. It would increase the current flow,
20 change the current flow distribution, and increase
21 and possibly localize heating. The hip and the
22 knee, primarily the knee, but to some extent the
23 hip, are regions of constriction of the current
24 and basically that limits the resistivity of a
25 constriction, reduces the current delivered, and

Dr. John Wiksw, Jr. 7/6/2022

1 also increases local heating.

2 Q. But the metal is less resistant,
3 correct?

4 A. That's right, but the point is that
5 there could be current going through that
6 prosthetic hip joint that would otherwise -- the
7 total current through the cross-section of the leg
8 could be increased by placing an electric
9 conductor at the entrance to the leg. The extent
10 to which that matters could be estimated based on
11 the ratios of cross-sectional areas and electrical
12 conductivities. I have not done that and the
13 difficulty is that to do it in a meaningful way
14 you would need a three dimensional finite element
15 calculation of electric distribution with and
16 without a metal implant. I have not done that
17 calculation.

18 It's within my expertise to state that
19 it will increase the electric current. It is not
20 within my capability to state by how much.

21 Q. It would also reduce the resistance in
22 that area?

23 A. Thereby increasing -- yes, increasing
24 the electric current.

25 Q. I understand, but you've already

Dr. John Wikswo, Jr. 7/6/2022

1 explained I thought in detail that the more
2 resistant the more dissipation of the energy is
3 thermal or, excuse me, of the power that's being
4 carried by electric current as thermal energy,
5 correct?

6 A. The complexity -- no, the complexity of
7 the problem is that when you have a distributed
8 heterogeneous conducting system, a protonation in
9 one region affects the current -- can affect the
10 current everywhere else in the system.

11 Q. Are you of the opinion that his right
12 hip would not have had any electrical current
13 going through it if he didn't have a metal hip?

14 A. No, I'm not of that opinion.

15 Q. Okay. If I grabbed his left hand while
16 he's being electrocuted am I not going to be
17 energized?

18 A. Depends on what you're connected to.
19 The real question is in these cases why do you
20 have an arc burn between the scrotum and the
21 thigh. It's because of voltage drops occurring in
22 the thigh. And there are multiple reports of
23 penile burns and testicular burns because of
24 electric current flowing in the leg that is not
25 flowing in the penis or the scrotum and the net

Dr. John Wiksw, Jr. 7/6/2022

1 result is they are at a different electrical
2 potential than the tissue immediately adjacent to
3 them.

4 That's also why that if you have a
5 single leg electrode and the ankles touch you can
6 draw sparks because the ankle of -- let's say the
7 energized leg is the right leg, so the right calf
8 is close to ground. The right hip is at or the
9 hips are at a higher potential. Because there is
10 no way for the current to leave the left leg, the
11 entire left leg is at the elevated potential of
12 the hip. If you place it in contact with the
13 right foot, you suddenly have current flowing from
14 effectively a short circuit between the hip and
15 the other foot. So the difficulty is there is
16 evidence to show that voltage gradients in the
17 limbs can cause arcing. You can have arcing
18 between skin folds. You can have arcing between
19 the limbs if the feet touch and only one is
20 energized, and you can have arcing between the
21 testicles, the penis, and the energized leg. That
22 suggests that the distribution of currents in the
23 hip and the leg is, in fact, important. And the
24 fact that you're inserting a conducting object
25 into the hip is going to change that voltage

Dr. John Wiksw, Jr. 7/6/2022

1 distribution and it will end up reducing the
2 electrical resistance of the entire circuit, and
3 because you're working with a transformer power
4 supply that is effectively fixed voltage, more or
5 less fixed voltage, that will increase the total
6 current delivered to the prisoner, and current
7 times voltage is power. So that means that it
8 would increase the power dissipation in the
9 prisoner distributed over the entire body.

10 Q. Isn't it the power that kills them?

11 A. Death by judicial electrocution comes
12 from a variety of mechanisms including paralysis
13 of thoracic -- the respiratory musculature, which
14 will be increased with increased current. It
15 comes from direct action on the neurons, the
16 spinal cord, and interruption of the profusion by
17 the heart. All of those things are worse if the
18 current is increased rather than decreased.

19 So the problem with the Leuchter chair
20 was, in fact, that it had a voltage limiter in it
21 in the form of magnetic amplifier saturable
22 transformer, saturable reactor, and as the current
23 -- as the resistance dropped so did the voltage.
24 And this is a case where the presence of the metal
25 could, in fact, increase the current at the fixed

Dr. John Wiksw, Jr. 7/6/2022

1 voltage.

2 Q. Which is the opposite of the problem
3 that we had in the electric chair issue?

4 A. Exactly. It's the opposite of that
5 problem.

6 Q. That's what I don't understand.
7 Wouldn't that make this more efficient and more
8 effective instead of less efficient and less
9 effective?

10 A. It depends on what your objective is.

11 Q. Well, I think the objection is death. I
12 mean, that's the whole purpose that we're doing
13 this, isn't it?

14 A. But it turns out that parallel with
15 death happens to be pain and suffering.

16 Q. Which we've already talked about at
17 length and that you have not been able to provide
18 any quantitative analysis of when or if they are
19 conscious and if so, for how long, correct?

20 A. What I have said was that there is ample
21 evidence that pain and consciousness are not
22 instantaneously abolished by the existing
23 procedures of a judicial electrocution regardless
24 of jurisdiction.

25 Q. The anecdotal evidence?

Dr. John Wiksw, Jr. 7/6/2022

1 A. The anecdotal evidence, and you can
2 decide whether it's anecdotal that multiple shocks
3 were required. So some of the anecdotal evidence
4 is in fact, in the fact, that it took one, two, or
5 three and in some jurisdictions four shocks to
6 kill the prisoner.

7 Q. Well, I'm glad -- I'm actually glad you
8 brought that up. I would have forgotten to talk
9 to you about this if you hadn't brought it up so
10 I'm glad you did.

11 Fibrillation of the heart is more likely
12 to occur with a low voltage shock than it is with
13 a high voltage shock, correct?

14 A. Correct.

15 Q. All right. Your, in some ways,
16 suggesting or representing that there were
17 multiple shocks in the South Carolina protocol
18 using the same currents, the same voltage?

19 A. I didn't say that.

20 Q. Right. But that's kind of what you
21 represented.

22 A. No.

23 Q. These are different voltages that are
24 used at stages of the process, aren't they?

25 A. Yes, they are.

Dr. John Wikswow, Jr. 7/6/2022

1 Q. Right. And the low voltage shock would
2 be more likely to stop the heart, correct?

3 A. Well, part of the difficulty --

4 Q. Correct?

5 A. No, that's -- the low voltage might stop
6 the heart. The difficulty is historically, I
7 believe, that one of the reasons why the voltages
8 are dropped is that because the electroporation of
9 the skin and the underlying subcutaneous fat and
10 the charring reduce the electrical resistance, and
11 if you don't reduce the voltage you're more likely
12 to set the prisoner on fire.

13 Q. I'm going to try my question again. The
14 low voltage shock in South Carolina's protocol is
15 more likely to cause fibrillation of the heart
16 than the high voltage shock is, correct? I mean,
17 I thought --

18 A. No. No.

19 Q. -- this was a pretty settled premise.

20 A. Well, no -- no. Well, no. It turns out
21 that there's a condition to this statement, is
22 that it's a low voltage shock after you have
23 charred and converted into carbon the interfaces,
24 so in tool --

25 Q. How do you know that that's occurred?

Dr. John Wikswo, Jr. 7/6/2022

1 How do you know that doesn't occur during the
2 application of the low voltage shock? What
3 evidence do you have to suggest that?

4 A. The high voltage shocks in industrial
5 accidents and in electrocutions with protocols
6 that do not do the low voltage shock demonstrate
7 severe deep burns, so --

8 Q. If you apply low voltage current to
9 somebody for a long period of time are you
10 suggesting it wouldn't cause thermal injuries and
11 burning?

12 A. Low voltage shocks will cause thermal
13 injuries and burning.

14 Q. Right. And you don't have any evidence
15 to suggest that the first high voltage shock for
16 five seconds causes charring to a point that it
17 would reduce the transmission of the current at
18 the low voltage shock in the protocol and cause
19 his heart not to fibrillate. Do you have any
20 evidence of that?

21 A. Well, it turns out that I have published
22 a paper on cardiac defibrillation where a
23 colleague of mine was using different
24 defibrillation protocols and positive that he was
25 seeing a particular effect, and I became an author

Dr. John Wiksw, Jr. 7/6/2022

1 of the paper when I pointed out that the effect he
2 saw was, in fact -- he designed and optimized
3 defibrillation protocol and it included a first
4 rapid spike and then it increased in voltage over
5 time, but it was a very short rapid spike. The
6 purpose of that very short but rapid spike was to
7 electroporate all the tissues of the skin, to
8 increase the electrical conductivity. So I have a
9 published paper describing the use of a first high
10 voltage shock to make it easier to defibrillate a
11 heart.

12 Q. Did it work?

13 A. Yes.

14 Q. What's the name of the paper?

15 A. Co-author is Malkin M-A-L-K-I-N. He's
16 now on the faculty in biomedical engineering at
17 Duke. He was at University of Memphis at the
18 time.

19 Q. M-A-L?

20 A. M-A-L-K-I-N.

21 Q. K-I-N.

22 A. It was a fascinating paper because he
23 drew the wrong conclusion from his data and he
24 thought he was seeing inductive effects and I
25 said, no, you're seeing a nonlinear resistance, a

Dr. John Wikswo, Jr. 7/6/2022

1 voltage dependent resistance. And he did more
2 experiments and said, yes, that explains it
3 perfectly. So you're getting physiologically
4 significant electroporation by the first shock.

5 Q. Is that a good thing if what you're
6 trying to do is conduct a current through the
7 body?

8 A. The difficulty is that trying to conduct
9 a current to the body can increase -- improving
10 the conduction of current to the body may hasten
11 death but it may also increase the pain. Therein
12 lies the problem.

13 Q. Might increase the pain but for a
14 shorter period time?

15 A. Depending upon the effectiveness we're
16 back to the period of time question.

17 Q. I know, you can't answer it.

18 A. I know. No one can answer that. Well,
19 actually no one is willing to try to answer that
20 one.

21 Q. All right. So --

22 A. Is South Carolina going to want to put
23 electroencephalograms on their prisoners when they
24 are trying to execute them?

25 Q. So quite frankly y'all are the one with

Dr. John Wikswo, Jr. 7/6/2022

1 the burden of proof here to establish that this is
2 what you say it is.

3 A. My primary position on this is --

4 Q. So I don't know what my client is or is
5 not willing to do has any bearing on your
6 opinions.

7 A. -- that as I have stated multiple times
8 in my various reports and affidavits, is there is
9 no scientific evidence to support the fact that
10 judicial electrocution is instantaneous death and
11 painlessness -- and painless. That's my primary
12 position.

13 Q. And there's no scientific reports, not
14 anecdotal evidence but scientific reports, that
15 non-botched executions don't produce instantaneous
16 and painless deaths?

17 A. I'm afraid there's some -- there may be
18 some double negatives in there. Would you repeat
19 that?

20 Q. No. I'm going to let it read the way it
21 reads.

22 A. I'm not going to parse out the double
23 negatives on that one or if not. I thought I
24 caught a double negative but you may not have had
25 one and I just misunderstood you.

Dr. John Wiksw, Jr. 7/6/2022

1 Q. Well, I mean it's the exercise we've had
2 to do in multiple places in your deposition, which
3 is you say there's no evidence to prove this but
4 you also offer no scientific evidence to dispute
5 it. You've offered anecdotal evidence. We've
6 explained how you didn't do anything to try to
7 analyze potential bias in those anecdotes or try
8 to figure out what the criteria should be for this
9 person's statements are reliable and that one's
10 isn't. We've gone through this exercise, haven't
11 we?

12 A. In some form or another, yes.

13 Q. All right. I'm going to take a break,
14 collect my thoughts and I'm probably going to be
15 wrapping up.

16 MR. PLYLER: On a personal note, it's a
17 pleasure speaking with you because I'm
18 learning right and left. You're obviously
19 much smarter than I am, but I hope you
20 understand just because we're adversaries on
21 the litigation doesn't mean that I don't
22 appreciate you.

23 THE WITNESS: Fine.

24 MR. PLYLER: But let's take a little
25 break so I can collect my thoughts.

Dr. John Wiksw, Jr. 7/6/2022

1 (A brief recess was taken.)

2 MR. PLYLER: Dr. Wiksw, I appreciate
3 you letting me take the time to look at my
4 notes and collect my thoughts. You know how
5 this process works. I don't have any further
6 questions for you right now. Your attorney
7 might have some questions that spawn
8 follow-ups with me, but otherwise I
9 appreciate your time. And I guess we'll look
10 forward to speaking with you again in August.

11 THE WITNESS: Sounds good.

12 EXAMINATION BY MS. VANN:

13 Q. I just have two follow-up questions.
14 One is just to clarify the record. I think early
15 on you said that you reviewed the schematics last
16 night or this morning --

17 A. This morning.

18 Q. For Florida?

19 A. Not Florida, from South Carolina.

20 Q. I just wanted to clarify, they were the
21 South Carolina schematics?

22 A. They were the South Carolina schematics.

23 Q. And then, would receiving or being able
24 to review autopsy reports from South Carolina more
25 inform your opinion?

Dr. John Wikswow, Jr. 7/6/2022

1 A. Tremendously.

2 Q. How so?

3 A. It would answer the questions about
4 the -- particularly how effective the copper mesh
5 electrode for the top of the head was because in
6 some of the other execution protocols and devices
7 there is a burn ring called a hat band ring of
8 burned or charred flesh and sagging flesh on the
9 sides of the head and burns and sagging flesh on
10 the neck, and also the depth of the burns in the
11 calf, presence of arcing between the folds of
12 skin, for example, in the belly or the scrotum and
13 penis of a male prisoner. And you'd look for
14 bruise marks from the straps.

15 So my opinion has been formed many years
16 ago by a careful reading of a large number of --
17 much of my opinion has been formed many years ago
18 by a careful reading of a large number of autopsy
19 reports, careful reading of a large number of
20 autopsy reports. And to be Frank, I'm trying to
21 figure out what South Carolina is trying to hide
22 by not providing those reports. It's curious, I'm
23 curious if they were like every other autopsy
24 report I'd ready, I'm simply saying they look like
25 every other autopsy report, the fact that they are

Dr. John Wiksw, Jr. 7/6/2022

1 not being provided despite my having asked for
2 them multiple times suggests that there might be a
3 reason why they're not being provided. I don't
4 know what that reason might be, could be legal,
5 could be moral, could be practical. But having
6 access to those reports would help me refine my
7 interpretation of the sequence of events in
8 South Carolina judicial executions, the judicial
9 electrocutions.

10 MR. PLYLER: You know that's not my
11 question, right, it's her question.

12 MS. VANN: That's all the questions I
13 have. Thank you.

14 MR. PLYLER: Well, that did -- we're
15 going to have some follow-up on that.

16 EXAMINATION BY MR. PLYLER:

17 Q. Dr. Wiksw, I think we covered this
18 earlier, but you're not a forensic pathologist,
19 correct?

20 A. No, I'm not a forensic pathologist.

21 Q. You're not a medical examiner, correct?

22 A. That is correct.

23 Q. You've never performed an autopsy,
24 correct?

25 A. That is correct.

Dr. John Wikswo, Jr. 7/6/2022

1 Q. If you did you would probably be in
2 trouble for it. Withdraw the question, it was a
3 joke?

4 A. Thank you.

5 Q. Is there something that you believe you
6 would see on an autopsy report in South Carolina
7 that would change your opinions to -- well, in
8 that case, yeah, it's instantaneous and painless
9 in South Carolina, you think there's anything that
10 could be produced in those autopsy reports that
11 would show that?

12 A. An autopsy report of a successful
13 electrocution without deep burns.

14 Q. And you already testified earlier you're
15 not qualified to say what was a pre-mortem versus
16 a post-mortem burn, correct?

17 A. I don't necessarily endorse that
18 distinction.

19 Q. But you're not qualified to say one way
20 or the other, are you?

21 A. No.

22 Q. Okay.

23 A. But then why would you continue the
24 current after the person is dead? Just to
25 mutilate the body, I don't know. I mean, does

Dr. John Wiksw, Jr. 7/6/2022

1 that --

2 Q. I'm just trying to confirm. You don't
3 have the expertise to be able to say from looking
4 at an autopsy report, this was a pre-mortem burn
5 or that was a post-mortem burn, correct?

6 A. I do not have that expertise nor am I
7 sure that anyone does. And the questions I would
8 be asking myself when reading those reports are
9 basically the physical manifestations of
10 dissipation of electric power. And I am -- I
11 probably have a reasonable understanding of the
12 factors that affect the dissipation of electrical
13 power having either read or been a peer reviewer
14 for articles, for example, on shaping of cardiac
15 defibrillation electrodes to minimize the ring
16 burn of a cardiac paddle, so that -- it's known
17 that when you defibrillate the heart with a paddle
18 electrode from an external defibrillator you can
19 leave a ring burn. And a gentleman I knew named
20 Clifford Alfernez was working on a paddle with a
21 graduated electrical conductivity profile to
22 provide more uniform delivery of current to the
23 chest than was providing by the classic electrode.
24 And that is the thing I'm highly qualified to look
25 for when I review, particularly, photographs of --

Dr. John Wikswow, Jr. 7/6/2022

1 post-mortem of photographs of the burns associated
2 with judicial electrocution.

3 Q. Because of the vast majority of
4 autopsies you've reviewed, is that what you said
5 earlier?

6 A. No, I said because of my understanding
7 of the nature of electric current flow in
8 distributed conductors.

9 Q. How many autopsies have you reviewed in
10 the 30 something years that you've been --

11 A. 40 or 50.

12 Q. 40 OR 50?

13 A. Yes. I mean, we have the autopsy list,
14 and there may be autopsies that are not on that
15 list.

16 Q. And you think that that's a significant
17 of a number that gives you some sort of expertise
18 in interpreting an autopsy report?

19 A. As I said, I'm not a medical examiner
20 but I am able to learn from reading an autopsy
21 report.

22 Q. And you already testified that you're
23 not aware of and you don't have any intention of
24 trying to develop an electrocution process that
25 would be instantaneous and painless, correct?

Dr. John Wiksw, Jr. 7/6/2022

1 A. One, I'm not convinced that that's
2 possible. And two, I have no interest in working
3 on that.

4 Q. Have you reviewed the Complaint or any
5 of the iterations of the Complaint, so the
6 Complaint, the Amended Complaint, or the Second
7 Amended Complaint, or the Third Amended Complaint
8 in this particular lawsuit? Have you ever
9 reviewed those?

10 A. No.

11 Q. So you don't know what the actual legal
12 claims that have been brought are?

13 A. No.

14 Q. Correct.

15 A. That's correct.

16 Q. And you understand discovery and
17 litigation is governed by what is or is not
18 relevant to the legal claims, correct?

19 A. I assume that what one is allowed to
20 discover is dependent upon the particulars of the
21 case.

22 Q. Right. Not their expert's curiosity,
23 right?

24 A. The reason you hire experts is they may
25 be able to ask questions that a lay person or a

Dr. John Wikswo, Jr. 7/6/2022

1 skilled lawyer or even a medical examiner or
2 pathologist might not think to ask. So in the
3 case of the --

4 Q. Answer my question and then finish --

5 A. Repeat the question then.

6 Q. How about just answer the question.

7 A. I don't even remember what the question
8 was.

9 Q. Then what are you answering?

10 A. What I thought was the question.

11 Q. So what do you think the question was?

12 A. I don't remember. I went off on a
13 tangent.

14 THE WITNESS: You want to repeat the
15 question?

16 MR. PLYLER: You don't have to. All
17 right. I think we're done. Thank you,
18 Dr. Wikswo.

19 THE WITNESS: You're welcome.

20 (Deposition concluded at 3:31 p.m.)

21

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23

24

25

Dr. John Wiksw, Jr. 7/6/2022

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1 CERTIFICATE OF DEPONENT
 2 DEPONENT: JOHN P. WIKSWO, JR., PH.D.
 DATE: July 6, 2022
 3 CASE STYLE: FREDDIE EUGENE OWENS, BRAD KEITH
 SIGMON, GARY DUBOSE TERRY, AND RICHARD BERNARD
 4 MOORE vs. BRYAN P. STIRLING, ET AL
 ORIGINAL TO: Daniel C. Plyler, ESQ.

5 I, the above-named deponent in the
 deposition taken in the herein styled and numbered
 6 cause, certify that I have examined the deposition
 taken on the date above as to the correctness
 7 thereof, and that after reading said pages, I find
 them to contain a full and true transcript of the
 8 testimony as given by me.

9 Subject to those corrections listed
 below, if any, I find the transcript to be the
 correct testimony I gave at the aforestated time
 10 and place.

Page	Line	Comments
11	_____	_____
12	_____	_____
13	_____	_____
14	_____	_____
15	_____	_____
16	_____	_____
17	_____	_____

18 This the _____ day of _____, 2022.
 19 _____
 20 JOHN P. WIKSWO, JR., PH.D.
 State of Mississippi
 County of _____

21
 22 Subscribed and sworn to before me, this the
 _____ day of _____, 2022.
 23 My Commission Expires:
 24 _____
 25 _____ Notary Public

Dr. John Wiksw, Jr. 7/6/2022


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1 CERTIFICATE OF COURT REPORTER
 2 I, Dawn Dillard, Court Reporter, in and
 3 for the State of Tennessee, hereby certify that
 4 the foregoing contains a true and correct
 5 transcript of the testimony of JOHN P. WIKSWO,
 6 JR., PH.D., as taken by me in the aforementioned
 7 matter at the time and place heretofore stated, as
 8 taken by stenotype and later reduced to
 9 typewritten form under my supervision by means of
 10 computer-aided transcription.

11 I further certify that under the
 12 authority vested in me by the State of Tennessee
 13 that the witness was placed under oath by me to
 14 truthfully answer all questions in the matter.

15 I further certify that, to the best of
 16 my knowledge, I am not in the employ of or related
 17 to any party in this matter and have no interest,
 18 monetary or otherwise, in the final outcome of
 19 this matter.

20 Witness my signature and seal this the
 21 17th day of July, 2022.


 DAWN DILLARD, #1763
 CCR

22
 23 My Commission Expires:
 24 March 7, 2025

25

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 and SOUTH
CAROLINA DEPARTMENT OF
CORRECTIONS,**

Defendants,

and

**HENRY McMASTER in his
official capacity as Governor of
the State of South Carolina,**

Intervenor-Defendant.

IN THE COURT OF COMMON
PLEAS FOR THE FIFTH JUDICIAL
CIRCUIT

Case No. 2021-CP-40-02306

**RESPONSE IN OPPOSITION
TO PROTECTIVE ORDER**

Defendants have moved to protect witnesses from having to answer questions directly related to the issues underlying this litigation. Plaintiffs respectfully request the motion be denied and assert their objections to limitations on discovery in this case for the following reasons.

BACKGROUND

This litigation, among other issues, poses a challenge to the constitutionality of death by electrocution and firing squad under the South Carolina Constitution. The Court previously held a hearing on the Defendants' motion to dismiss and denied that motion. The Supreme Court then stayed the executions of the Plaintiffs and ordered this case to trial.

Defendants moved to limit discovery. They objected to any discovery, including deposition discovery, on three primary areas: (1) information about execution protocols;

(2) information on lethal injection, and (3) any inquiries that may lead to the discovery of the identification of execution team members. In a footnote, Defendants incorporated by reference all objections to initial discovery requests but did not offer further argument on each specific objection to Plaintiffs' written discovery.

This Court issued a Form 4 order denying the protective motion as to the execution protocols and granted the motion as to the remaining topics, specifically referencing lethal injection information and members of the execution team.

Depositions of South Carolina Department of Corrections agents

Plaintiffs deposed both Bryan Stirling and Collie Rushton, employees of the South Carolina Department of Corrections. Plaintiffs' counsel attempted to question Stirling about existing documents that would describe prior South Carolina executions. Stirling was directed not to answer any of those questions. Counsel then attempted to ask questions about any employees at the Department of Corrections who may have witnessed an execution and whether Stirling had ever gleaned any information regarding an execution from someone at the Department who had witnessed an execution. Stirling was again directed not to answer.

Counsel did not intend to ask the identities of the people who witnessed an execution. The questions were intended to elicit some description of what has happened in the past at a South Carolina execution.

Counsel attempted to ask similar questions of Rushton. Counsel intended to ask Rushton if had observed an execution and could describe what happened at the execution. Rushton was directed not to answer.

ARGUMENT

The focus of Plaintiffs' desired discovery is not to identify members of the execution team. Rather, they seek to determine whether the protocol on paper translates to an execution that would satisfy the requirements of the South Carolina Constitution.

At argument over the Defendants' motion, Plaintiffs pointed out the practical problem with limiting discovery as requested in the motion. If the Court does not rule the

methods of execution unconstitutional, the Supreme Court faces the question of whether death by electrocution or firing squad is always constitutional. No court in the country has made such a blanket decision allowing a type of execution to proceed regardless of how it is carried out and what pain or damage to the body it may cause.

It is well-settled parties may conduct discovery on any matter not privileged and relevant to the pending action. SCRCP, Rule 26(b)(1); *Hollman v. Woolfson*, 384 S.C. 571, 577 (2009). Plaintiffs are required to show the limitations imposed on discovery will impair the presentation of the case to the extent that an unjust result is a real threat, as opposed to mere possibility. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 476 (2009). That burden is met here.

This case involves both the pain and cruelty of the execution methods as well as the damage to the body of the prisoner being killed. Plaintiffs intend to offer evidence from expert witnesses that will prove both points. However, there is some risk the Court will not have sufficient evidence of how a South Carolina execution causes both damage to the body and incredibly cruel pain in the course of executing prisoners.

The questions to Stirling sought what institutional knowledge the Department of Corrections may have about the specific results of an electrocution. They also sought to determine what documents are available to describe these executions.¹

The questions to Rushton are far more specific. It is not in dispute that he has been present at an execution and witnessed the results of an execution. This information has been disclosed in the public record in prior unrelated federal litigation. Rushton would be able to describe the execution and the results of electrocution. It is difficult to see how this information would not be directly related to the instant case and would support Plaintiffs' claims.

Plaintiffs intended to carefully craft questions to avoid any mention of the specific

¹ Plaintiffs believe the Defendants would concede such documents exist and would describe these executions. Those documents are direct evidence that would support Plaintiffs' claims. It logically follows that, if the documents supported Defendants' case, they would have been disclosed.

persons on the execution team. There is nothing in the South Carolina statutes that creates a blanket prohibition on this information. S.C. Code § 24-3-580 (“...this information may be disclosed upon a court order under seal for the proper adjudication of pending litigation.”). It is difficult to imagine how this Court, and any reviewing Court, can properly adjudicate this case without ever hearing any information about executions from a first-hand witness to those executions.

CONCLUSION AND REQUEST FOR RELIEF

Under the very short timeline the Supreme Court has imposed on this case discovery is disclosed and counsel believes it impractical to reopen these depositions. However, counsel should be allowed to ask the questions in open court.

Counsel respectfully requests the Court deny the Defendants’ request for a protective order and allow counsel to question Stirling and Rushton on these topics to the Court can properly adjudicate this matter.

Respectfully submitted,

s/ Joshua Snow Kendrick

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Greenville, South Carolina
July 29, 2022

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.

Defendants' Pretrial Brief

Defendants Bryan P. Stirling, in his official capacity as Director of the South Carolina Department of Corrections (“Director Stirling”); the South Carolina Department of Corrections (“SCDC”); and Henry McMaster, in his official capacity as Governor of the State of South Carolina (“Governor McMaster”) (collectively, “Defendants”), submit, but do not file, this Pretrial Brief under Rule 16(c), SCRPC.

(1) A concise, non-argumentative statement of the facts of the case.

Plaintiffs are condemned inmates, each of whom has exhausted all direct and collateral appeals. They do not challenge their convictions or sentences in this case. Instead, they challenge two of South Carolina’s statutorily provided-for methods of execution: electrocution and the firing squad. They also raise various challenges to 2021 S.C. Acts No. 43, which amended S.C. Code Ann. § 24-3-530.

(2) An objective statement of the facts in controversy.

The facts in controversy here all relate to Plaintiffs' claims, particularly about whether electrocution and the firing squad violate article I, section 15 of the South Carolina Constitution. The parties do not dispute the underlying facts (such as Plaintiffs' convictions and sentences or the enactment of Act 43).

(3) The legal issues involved. This includes the law applicable to the cause of action and the defense.

Plaintiffs asserted eight claims in their Third Amended Complaint:

First claim: Due Process Violation – Retroactive Legislation

Plaintiffs informed Defendants yesterday and stated in their Pretrial Brief that they intend to dismiss this claim. Therefore, there is nothing for the Court to address on this claim.

Second claim: Ex Post Facto Violation

Plaintiffs assert that Act 43 violates the federal and state *Ex Post Facto* Clauses by imposing a harsher punishment than the one they received originally.

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.). South Carolina courts have repeatedly looked to federal law when interpreting the State’s *Ex Post Facto* Clause. *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)). A change in the method of execution is not a change in

punishment. *See, e.g., Malloy v. South Carolina*, 237 U.S. 180, 185 (1915); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997).

Third claim: Due Process Violation – Void for Vagueness

Plaintiffs contend that Act 43 is unconstitutionally vague because “available” does not have a discernable meaning and because Act 43 does not specify when the Director’s certification of available methods must be submitted to the Supreme Court.

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.* 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). Additionally, when “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.” *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Two other relevant interpretative rules here are that a court “must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something,” *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002), and that a statute must be interpreted “in the light of the circumstances and

conditions existing at the time of its enactment,” *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956).

This claim is the subject of the parties’ cross-motions for partial summary judgment.

Fourth claim: Statutory Violation Based on Meaning of “Available”

Plaintiffs contend that the Director and SCDC have “failed to meet their obligations” to make all three methods of execution available, “[w]hatever their obligations.”

This claim is governed by the same law on statutory interpretation that governs Plaintiffs’ third claim.

Fifth claim: Nondelegation Violation under Article I, Section 8

Plaintiffs contend that Act 43 gives the Director “unbridled discretion to determine whether a method is ‘available.’”

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 an 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. To fill up those details, the General Assembly must provide an “intelligible principle” for what an agency must do. *Bauer*, 271 S.C. at 232, 246 S.E.2d at 876.

The Supreme Court has held that there are two “matters of legislative determination”: “capital punishment as such and the method of execution.” *State v. Woomer*, 278 S.C. 468, 473, 299 S.E.2d 317, 320 (1982); *cf.* S.C. Code Ann. § 16-3-20(A); 2021 S.C. Acts No. 43, § 1 (amending S.C. Code Ann. § 24-3-530).

Sixth claim: Cruel or Unusual Punishment under Article I, Section 15

Plaintiffs claim that both electrocution and the firing squad violate the South Carolina Constitution’s prohibition on cruel, unusual, or corporal punishment.

The South Carolina Constitution provides that “cruel, nor corporal, nor unusual punishment” shall be inflicted. S.C. Const. art. I, § 15. The South Carolina “Constitution is construed 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); *see also Miller v. Farr*, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963) (“when construing constitutional amendments, the Court applies rules similar to those relating to the construction of statutes, in its effort to determine the intent of its framers and of the people who adopted it”). Historically, “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>. In a legal context, “unusual” “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). “Corporal” punishment was understood to include punishments such as whipping, branding, and the like; the death penalty was a separate type of punishment. *See, e.g., State v. Hamblin*, 4 S.C. 1, 3 (1872) (citing being “publicly whipped” as an example of

“corporal punishment”). Prohibited methods of execution are those that involved the “superaddition of terror, pain, or disgrace.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (cleaned up). Both electrocution and the firing squad have long been accepted methods of execution in the United States. *See, e.g., State v. Allen*, 266 S.C. 175, 187, 222 S.E.2d 287, 292 (1976) (electrocution); *Wilkinson v. Utah*, 99 U.S. 130, 134–35 (1878) (firing squad).

Alternatively, the United States Supreme Court and other States have, in the past decade, adopted a test specific to methods-of-execution cases: The condemned inmate “must 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.

Seventh claim: Election Between One Constitutional Method of Execution and One Unconstitutional Method of Execution Violates a Prisoner’s Statutory Right to Elect the Manner of His Execution

Plaintiffs contend they have an absolute right, based on the Supreme Court’s stay orders from June 16, 2021, that they have an absolute right to elect between two constitutional methods of execution.

This claim is governed by the same law on statutory interpretation that governs Plaintiffs’ third claim and the same constitutional law that governs Plaintiffs’ seventh claim.

Eighth claim: Terry’s As-Applied Challenge

Terry asserted an as-applied claim, contending either method would be unconstitutionally painful because of certain medical conditions.

Terry currently has a second PCR application pending, and the parties have agreed to sever this claim and strike this claim from the docket under Rule 40(j), SCRPC. That motion is pending.

(4) A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

Exhibits: Defendants at this time have not identified any exhibits that they will introduce. Defendants may introduce exhibits to impeach Plaintiffs' witnesses, depending on what each witness's testimony is.

Witnesses: Defendants intend to call three witnesses, if necessary, to rebut expert testimony that Plaintiffs offer:

- A. **Dr. Jorge Alvarez:** Dr. Alvarez is a Board-Certified Cardiologist and an expert in medicine, human anatomy, human physiology, and in particular on the cardiovascular system and its role and effect within the human body. He is expected to testify about the process for judicial executions in South Carolina and the physiological effects on a person during an execution. He will testify remotely.
- B. **Dr. Ronald Wright:** Dr. Wright is an expert in forensic pathology who has specifically studied electricity, electrocutions (both judicially imposed and accidental), and the effect of electricity on the human body. He is expected to testify about the process for judicial executions in South Carolina and the physiological effects on a person during an execution. He will testify remotely.
- C. **Dr. D'Michelle DuPre:** Dr. DuPre is an expert in forensic pathology. She has also had a career as a law enforcement officer in South Carolina. She is expected to testify about the process for judicial executions in South Carolina and the physiological effects on a person during an execution.

(5) Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.

Security concerns are particularly acute in the prison context, and courts have therefore shown considerable deference to prison officials. *See, e.g., Turner v. Safley*, 482 U.S. 78, 84 (1987); Order, *Justice 360 v. SCDC*, C/A No. 2020-CP-40-05306 (Nov. 25, 2020) (holding that execution protocols were exempt from FOIA). Along these lines, the General Assembly has statutorily protected information regarding members of the execution team. *See* S.C. Code Ann. § 24-3-580. Although that statute permits certain disclosures “under seal,” any testimony in open court must be limited such that information that reveals or could reasonably reveal the identity of any current or former member of the execution team must be limited.

(6) Any unusual question or matter which should be brought to the attention of the court.

There are currently seven pending motions that need to be addressed before or during trial:

- A. Defendants’ Motion for Partial Summary Judgment
- B. Plaintiffs’ Cross-Motion for Partial Summary Judgment
- C. Defendants’ Motion to Strike Late Expert Disclosures
- D. Plaintiffs’ Motion for Ruling on Motion to Compel and for Clarification on the Scope of Discovery Order
- E. Defendants’ Motion for Protective Order related to deposition questions to Bryan Stirling and Colie Rushton
- F. Defendants’ Motion to Exclude, or Alternatively, Limit Expert Testimony of John P. Wikswo
- G. Motion to Strike and Sever under Rule 40(j)

(7) A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

This case involves constitutional challenges to state law. Therefore, no settlement negotiations have taken place, and the questions raised here must be decided by the courts.

Respectfully submitted,

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