

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

MIKAL D. MAHDI,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

Case No. 2014-002131

**REPLY IN SUPPORT OF
MOTION TO STAY THE SETTING OF AN EXECUTION DATE**

Having completed federal habeas corpus review following the denial of his certiorari petition by the U.S. Supreme Court, Mikal Mahdi has come to this Court with a request to stay the issuance of an execution notice—and its corollary, the setting of an execution date. Mr. Mahdi makes this request because this Court is currently reviewing a Circuit Court decision holding that both of the State’s currently-available methods of execution (electrocution and firing squad) are unconstitutional, and that the statute authorizing the Department of Corrections to carry out executions is both impermissibly vague and violates the non-delegation doctrine of the South Carolina Constitution. To date, this Court has not permitted the execution of any South Carolina prisoner during the pendency of this litigation and consideration of these weighty issues.

In view of the State’s response brief, Mr. Mahdi and the State are in agreement that the applicable standard is whether, under *In re Stays*, there are exceptional circumstances that justify the issuance of a stay. In his motion seeking an order preventing the Clerk from issuing an execution notice, Mr. Mahdi argued that the exceptional circumstances that presently exist are the pendency of *Owens v. Stirling*, the fact that the most recent court decision concerning South

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Carolina's execution procedures found them unconstitutional, and the fact that this Court has already heard oral argument on these matters and is preparing to issue a decision. Critically, the State's response brief disputes none of this. The State quite easily could have taken the position that the pendency and status of *Owens v. Stirling* is not an exceptional circumstance that warrants a stay. It did not, implicitly conceding it is in fact exceptional. Indeed, it would seem difficult for the State to argue that a lower court order invalidating both available methods of execution and the enabling statute itself, and a case in which this Court received expedited briefing and heard almost three hours of oral argument, was somehow not exceptional.

And so, rather than taking the difficult-to-defend position that Mr. Mahdi should be executed while this Court considers whether the State's methods of execution are even constitutional, the State has argued that there are additional processes that need to happen before an execution date could be enjoined. The State suggests the Clerk should issue an execution notice, that Mr. Mahdi should either intervene in *Owens v. Stirling* or file his own identical civil suit and seek a stay through that separate action, that the Director of the Department of Corrections should certify by affidavit which execution methods are available at the present time, and that Mr. Mahdi should then elect his method of execution.

However, in light of the State's failure to dispute that the pendency and nature of *Owens v. Stirling* constitutes an exceptional circumstance, this Court should decline the invitation to over-complicate and over-proceduralize matters prior to staying Mr. Mahdi's execution. If a stay will be warranted after all of the procedural steps that the State recommends, that stay should issue now. There is simply no benefit to the procedural hoops through which the State thinks Mr. Mahdi needs to jump.

Moreover, the State's suggestion that Mr. Mahdi might somehow obviate the relevance of *Owens v. Stirling* by electing, and thereby waiving any objection to, either electrocution or firing squad, ignores the fact that this Court is currently reviewing the lower court's ruling that the enabling statute itself is both unconstitutionally vague and violates non-delegation doctrine. Neither of those issues have any bearing on Mr. Mahdi's theoretical election.

Nor does the State's implication that there would be some value in prompting the Director to provide a new certification regarding the availability of execution methods make any sense. Only two weeks ago, this Court heard oral argument in *Owens v. Stirling*, discussed at length the unique circumstance of South Carolina being the only state in the country that is apparently unable to obtain lethal injection drugs, and heard argument from counsel for the Department of Corrections. At that time, no new information about the availability of lethal injection drugs was provided. It is unclear what counsel for the State in this action believes has changed in the past two weeks. The overwhelming likelihood is that nothing has changed.

The strained nature of the State's position is perhaps best illustrated by its comment that "Mahdi shares a *generally* similar situation [as the *Owens* plaintiffs] rather than being *similarly* situated." Response Brief, p. 3 (emphasis in original). This is a linguistic distinction without any substantive difference.

Finally, there is no question that there is both authority and precedent for this Court to issue an order preventing the Clerk from issuing an execution notice in proper circumstances. As noted in Mr. Mahdi's motion, the Court has already done so in the cases of Mr. Owens and Mr. Wood. While the State quibbles about the details and procedural circumstances of *Wood*, it never claims that the Court lacks the authority to grant the relief Mr. Mahdi requests.

At bottom, Mr. Mahdi's motion is straightforward and reasonable. South Carolina is currently the only state in the country where prison officials say they are wholly unable to obtain lethal injection drugs. It is one of two states that authorize the firing squad. A lower court has declared all presently-available methods of execution unconstitutional, and this Court is in the process of sorting through these important legal questions. Meanwhile, the Court has stayed the executions of all prisoners who would otherwise be eligible to have their sentences carried out while these matters are addressed in an orderly fashion. All Mr. Mahdi asks is that the Court take the same action in his case without the needless procedural complications that the State seeks.

Respectfully submitted,

/s/ E. Charles Grose Jr.

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