

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Mar 10 2023

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.

EMERGENCY MOTION TO STAY PROCEEDINGS ON REMAND

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Under Rule 240, SCACR, and this Court’s inherent authority, Appellants move to stay the circuit court proceedings following the Court’s remand order until the General Assembly adjourns on May 11, 2023, for the 2023 legislative session, *see* S.C. Code § 2-1-180, or until a party moves to lift the stay. A stay is necessary to give the General Assembly time to continue advancing S. 120 and any other similar legislation that would adopt a shield statute, without preemptively undermining the General Assembly’s intent or otherwise thwarting SCDC’s ability to obtain lethal injection drugs if that legislation is enacted.

FACTUAL BACKGROUND

A. Proceedings in circuit court after remand

As the Court has heard repeatedly during this litigation, SCDC has, despite its good faith efforts, been unable to obtain the drugs necessary to carry out an execution by lethal injection for the past decade. In their cross-appeal, Death Row Inmates raised only the issue that they “requested information (which is solely in the custody and control of SCDC) about what steps, if any, SCDC has taken to obtain lethal injection drugs.” Resps.’ Red Br. 55. The Court remanded this case for the narrow purpose of conducting discovery “regarding the State’s efforts to procure the drugs for lethal injection and the process it undertook to determine the drugs were not ‘available’ in South Carolina,” while holding the “remainder of the appeal . . . in abeyance pending the circuit court’s resolution of the discovery issue.” *Owens v. Stirling*, 438 S.C. 352, 882 S.E.2d 858, 863 (2023).

Less than 24 hours after this Court’s decision, Death Row Inmates served new discovery requests on all Appellants (including on the Governor, who was never mentioned in Death Row Inmates’ cross-appeal). In addition to attempting to restart written discovery, Death Row Inmates also served a Rule 30(b)(6) notice demanding that SCDC produce a person with the most knowledge (i.e., a member of the execution team) to testify about essentially everything SCDC

has ever done involving lethal injection, going all the way back to lethal injection’s adoption in 1995. Death Row Inmates initially took the position that Appellants’ responses were due 30 days after these new discovery requests were served, ignoring both the mailing days of Rule 6(e), SCRCF, *see also* Order § (E)(5), No. 2022-000029 (S.C. May 6, 2022) (mailing days still apply to service by email), and this Court’s order “grant[ing]” Appellants’ motion for “an adjustment of the deadlines” in circuit court. Order, *Owens v. Stirling*, No. 2022-0001280 (S.C. Feb. 9, 2023).

Given the 60-day timeframe for discovery on remand, Appellants did not wait for Death Row Inmates to move to compel discovery responses. Instead, Appellants wrote the circuit court on February 24 and asked for a status conference regarding the scope of discovery. This looming discovery dispute aside, a discovery conference was still necessary: This Court directed that “the circuit court *shall* consult with the parties” about “the specific discovery responses that remain outstanding” about the availability of lethal injection drugs. *Owens*, 438 S.C. 352, 882 S.E.2d at 863 (emphasis added).

The circuit court held a telephonic status conference on March 1. Death Row Inmates quickly conceded that “availability” is what this Court “want[s] to hear about” and admitted that at least the 30(b)(6) topics were “very poorly drafted.” Status Conference Tr. 12:1–5, 12:12–13, *Owens v. Stirling*, No. 2021-CP-40-2306 (S.C. Comm. Pls. Mar. 1, 2023). They agreed to prepare revised discovery requests by March 8. *Id.* at 20:15–21.

But these new discovery requests did not narrow the scope of what Death Row Inmates seek to the specific issues set forth in this Court’s remand order. Instead, Death Row Inmates now claim that the “normally broad scope of discovery is even broader in this case,” simply because this Court did not “prospectively limit the scope of discovery to only the initial discovery requests” that Death Row Inmates had served. Letter from J. Kendrick to Circuit Court 1, No. 2021-CP-40-

2603 (S.C. Comm. Pls. Mar. 7, 2023). Death Row Inmates still seek information about lethal injection going back to 1995, and they assert that some of their requests (such as for autopsies from executions by lethal injection) are “relevant to multiple claims pending at the Supreme Court,” such as their ex post facto and article I, section 15 claims, *id.* at 2, even though those claims were not remanded to the circuit court, *see Owens*, 438 S.C. 352, 882 S.E.2d at 863.

B. Legislative action on a shield statute

At the same time the litigation has been proceeding in circuit court, the General Assembly has been considering legislation to enact a shield statute. In its current form, S. 120 expands existing statutory protections by “broadly” defining the “execution team” to include, among others, anyone who “compounds,” “supplies,” or “prepares” lethal injection drugs, and it prohibits disclosing any identifying information of an execution-team member in any way. S. 120, §§ (A)(1), (2), (B), (C), (G), (H), 125th Gen. Assemb., 1st Reg. Sess. (S.C. 2023).¹ S. 120 also exempts the purchase of lethal injection drugs from the procurement code and exempts suppliers from state regulations promulgated by DHEC, the Board of Pharmacy, or other agencies. *Id.* §§ (D), (E), (F). The legislation also expresses “the General Assembly’s intent to ensure the absolute confidentiality of the identifying information” of an execution-team member. *Id.* § (I).

The Senate has already given third reading to S. 120. *See* Sen. J. No. 27, 125th Gen. Assemb., 1st Reg. Sess. (S.C. Feb. 23, 2023). The bill was then sent to the House of Representatives, and the House Judiciary Committee has given S. 120 a favorable report with amendments. *See* House J. No. 37, 125th Gen. Assemb., 1st Reg. Sess. (S.C. Mar. 9, 2023).

¹ The House Judiciary Committee’s favorable report showing the Committee’s proposed amendments to S. 120 is attached to this Motion.

The legislation now heads to the full House, but the House won't be in a position to take up S. 120 for several weeks. The House will take up the budget the week of March 13, *see* House J. No. 37, 125th Gen. Assemb., 1st Reg. Sess. (S.C. Mar. 9, 2023) (motion by Rep. Bannister to set H. 4300 for special order), and, based on a recent announcement from the Speaker, the House will be on furlough the following week of March 20, set to return the week of March 27.

Although S. 120 has advanced through the legislative process in an expedited fashion, by the time it is anticipated to pass the House, head back to the Senate for the Senate to concur in the House amendments to the bill or to insist upon the prior version, and then be presented to the Governor, weeks will have passed. This relatively brief passage of time means that a shield statute may well not become part of state law until after this Court's deadline for proceedings on remand and after Appellants' deadline to respond to Death Row Inmates' discovery requests.

C. SCDC's efforts to obtain lethal injection drugs

SCDC has been consistently and diligently searching for lethal injection drugs for the past decade, including from other States, manufacturers, and compounding pharmacies. Until the last month or so, most of these efforts never proceeded beyond an initial conversation and rejection, and the few efforts that did quickly fizzled.

SCDC's prospects of obtaining lethal injection drugs changed in the past month. Once S. 120 began progressing through the General Assembly, SCDC has been able to point to that legislation and ask potential suppliers whether, if the shield statute became law, they would supply lethal injection drugs. SCDC has good reason to believe that divulging its efforts over the past month would have a chilling effect on potential suppliers.²

² To be clear, a shield statute does not guarantee that SCDC will immediately be able to obtain lethal injection drugs. Rather, it simply means that SCDC will have a better chance of obtaining those drugs.

ARGUMENT

The need for a stay is straightforward: A stay avoids thwarting SCDC's most recent efforts to obtain lethal injection drugs and preemptively making any shield statute a functional nullity by requiring Appellants to disclose potential suppliers in discovery while the General Assembly is advancing a bill that would enact a shield statute and prohibit SCDC from identifying those very suppliers. Put differently, if the Court wants to maximize the chances that SCDC is able to obtain lethal injection drugs (which, based on oral argument, seems to be the case), a stay is necessary so that suppliers who might be willing to provide lethal injection drugs if a shield statute is signed into law are not identified just before that shield statute is potentially adopted.

If the circuit court determines that the timing of discovery extends beyond the date the complaint was filed or the date of the remand, the circuit court could find that SCDC's latest efforts to obtain lethal injection drugs over the past month are responsive to Death Row Inmates' latest discovery requests (or responsive to any narrowed discovery requests) and within the scope of this Court's remand instructions because these activities relate to "the State's efforts to procure the drugs for lethal injection." *Owens*, 438 S.C. 352, 882 S.E.2d at 863. Thus, without a stay, SCDC would have to produce to Death Row Inmates' counsel the identities of potential suppliers that SCDC has contacted since S. 120 was introduced. And given the challenges of finding lethal injection drugs without absolute confidentiality for the supplier, it's likely that any recent leads would evaporate if potential suppliers' names are disclosed in discovery—thereby effectively undercutting the intended impact of S. 120.

The fact that "any supplemental record that is developed on remand [must] be kept confidential and under seal" does not avoid or solve this problem. *Id.* Even if under seal, the potential supplier's identity will have been disclosed—and to committed opponents of capital

punishment, no less. No matter that these anti-death-penalty advocates are officers of the court and regardless of what steps are taken to protect this information in discovery, leaks happen, confidentiality decisions can be reconsidered, and confidential information is misplaced. *See, e.g.*, Jill Colvin, *Classified Documents Found at Pence’s Home, too, his Lawyer Says*, Associated Press (Jan. 24, 2023); Annie Linksey, et al., *More Classified Documents Found at President Biden’s Delaware Home*, Wall St. J. (Jan. 21, 2023). Between these possibilities and the experience of trying to obtain lethal injection drugs without a comprehensive shield statute, S. 120 understandably expresses “the General Assembly’s intent to ensure the *absolute confidentiality* of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence.” S. 120, § (I), 125th Gen. Assemb., 1st Reg. Sess. (S.C. 2023) (emphasis added).

Four additional considerations support a stay. *First*, a stay avoids penalizing SCDC on account of its ongoing search for lethal injection drugs. Instead of simply awaiting further judicial or legislative direction, SCDC remained diligent in looking for suppliers of lethal injection drugs. The fact that S. 120 may not become law before this court’s expedited deadline or discovery responses are due should not force SCDC to disclose—and thereby undermine—its latest efforts.

This concern is far broader than this case. Not granting a stay would discourage all state agencies from demonstrating initiative, for fear of litigation consequences. Courts should want to encourage agencies to show the diligence that SCDC has here. A stay does that.

Second, granting a stay also avoids the risk of making the enactment of S. 120 pointless. *Cf. Sierra Club v. S.C. Dep’t of Health & Env’t Control*, 426 S.C. 236, 256, 826 S.E.2d 595, 606 (2019) (“The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.”). Unless SCDC were able to find some new supplier, not contacted

by SCDC in the past decade such that its name is not disclosed in discovery, that is willing to provide lethal injection drugs if a shield statute were in place, requiring Appellants to disclose the existing leads SCDC has developed for lethal injection drugs would make the shield statute worthless before it is even “presented to the Governor” for his signature. S.C. Const. art. IV, § 21. The Court should not make the General Assembly work in vain as it debates S. 120 by effectively negating a shield statute before it can even take effect. Instead, this Court should, as it has in the past, give the General Assembly the chance to enact important legislation without causing unnecessary negative consequences by rushing the judicial process. *Cf. Powell v. Keel*, 433 S.C. 457, 472, 860 S.E.2d 344, 352 (2021) (“reserv[ing] the effective date of” the opinion “to allow the General Assembly” to enact necessary legislation); *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985) (staying a case until “[t]he legislature solves this dilemma,” unless other conditions are met first).

Third, a stay helps effectuate this Court’s judgments and is consistent with the Court’s inherent authority. *See State-Rec. Co. v. State*, 332 S.C. 346, 349, 504 S.E.2d 592, 593 (1998) (“a court, once having obtained jurisdiction of a cause of action, has inherent power to do all things reasonably necessary to the administration of justice in the case before it”). This Court has affirmed the death sentences of Owens, Sigmon, and Moore. *See State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008); *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005); *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). For more than a decade and a half, these men have sat on death row as their direct appeals and collateral challenges slowly progressed to their conclusions, and now they have remained there as this case has been litigated. *Cf. Baze v. Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring) (lamenting the “seemingly endless proceedings” of capital litigation). Maximizing

SCDC's chances of obtaining lethal injection drugs will allow these judgments to (finally) be carried out.

Fourth, a temporary stay of the expedited discovery proceedings in circuit court will not prejudice Death Row Inmates, who have repeatedly sought to stay their executions. If a shield statute is not passed, then the concerns of undermining SCDC's recent efforts will be obviated, the stay could be lifted, and litigation could then proceed without any prejudice to Death Row Inmates. If a shield statute is passed and SCDC still cannot obtain lethal injection drugs, then again, the stay could be lifted and discovery could proceed. But if a shield statute is passed and SCDC could obtain lethal injection drugs, then Death Row Inmates' executions could proceed by their preferred method (and they cannot claim prejudice from having their duly imposed sentences finally carried out via their preferred method of execution).

CONCLUSION

For the foregoing reasons, the Court should stay the expedited discovery proceedings in circuit court through the end of the General Assembly's 2023 regular session on May 11, 2023, or until a party moves to lift the stay.

Respectfully submitted,

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March 10, 2023

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