

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Dec 27 2023

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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*,

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'-APPELLANTS' MOTION TO SUPPLEMENT THE RECORD

Pursuant to Rule 212(b), SCACR, Respondents move this Court for leave to supplement the record to include the Affidavit of Dr. Michaela Almgren, attached as Attachment A. *See* Rule 212(b), SCACR (“after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so.”). In support of this motion, Respondents state as follows:

1. Respondents initiated this action by filing suit in the lower court on May 17, 2021. The initial complaint asserted that Act 43 constitutes *ex post facto* legislation, that it is unconstitutionally vague, and that it violates the non-delegation doctrine. Respondents moved for a preliminary injunction and requested expedited discovery and a hearing. Two days later, counsel

for the South Carolina Department of Corrections notified this Court that due to the passage of Act 43, the State could carry out executions by electrocution and urged this Court to issue execution notices. This Court did so but later vacated them given that “electrocution [was] the only method of execution available.” Order, *State v. Owens*, No. 2006-038802 (June 16, 2021); *see also*, Orders, *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (same).

2. On September 27, 2021, Respondents filed a second complaint challenging the constitutionality of the firing squad and the electric chair and again requested injunctive relief, expedited discovery and a hearing. This second action was consolidated with the first. Appellants sought to remove the case to federal court, but the federal district court denied their request as to the state law claims because “the questions being raised here are novel and/or complex issues of State law that have not been addressed by the South Carolina courts.” Order, *Owens v. Stirling*, No. 3:21-cv-03564-JD (D.S.C. Jan. 13, 2022).

3. Upon return to state court, Respondents proposed (and Appellants agreed to) an expedited scheduling order for the specific purpose of obtaining a timely resolution of the case. *See* Consent Motion to Designate Consolidated Cases Complex and Assign Exclusive Jurisdiction, *Owens v. Stirling*, Case No. 2021-CP-4002306 (February 7, 2022). However, after the parties complied with the initial briefing deadlines (but before the proposed hearing date), Appellants announced on March 18, 2022, that the State was prepared to carry out executions by firing squad. The State requested that this Court issue new execution orders for Respondents – an action that would moot the pending litigation before it could be resolved. Instead, this Court assigned the case to Judge Jocelyn Newman and ordered her to complete a trial within ninety days. Admin. Order (May 5, 2022).

4. Respondents prevailed at trial and Appellants appealed. Respondents filed a cross-appeal related to the circuit court's denial of discovery on the topic of lethal injection. Following oral argument, this Court issued a partial remand, finding that the trial court abused its discretion by denying Respondents' discovery requests. *Owens v. Stirling*, 438 S.C. 352, 360, 882 S.E.2d 858, 862 (2023). Rather than engaging in discovery on remand, Appellants obtained an emergency stay while the Legislature considered and passed amendments to S.C. Code Ann. § 24-3-580 (2023) (the "Shield Statute").

5. On September 19, 2023, nearly four months after the Shield Statute became law, Appellants announced that, after a very large number of unsuccessful attempts, they obtained an unspecified amount of pentobarbital from an unidentified source. They further stated that SCDC has adopted a new, undisclosed lethal injection protocol. Appellants moved to dismiss this case as moot, allowing executions to go forward. This Court denied the motion, scheduled the case for re-argument and instructed the parties, if they wished, to "amend their briefs to include arguments related to the Shield Statute." Order, *Owens v. Stirling*, No. 2022-001280 (Oct. 31, 2023).

6. As discussed in Respondents' Amended Brief, the Shield Statute raises several concerns about Respondent's ability to obtain information regarding the quality, reliability and efficacy of the lethal injection drugs that Appellants now possess. Because the facts in support of Respondents' amended arguments are outside the expertise of the average layperson, Respondents consulted with Dr. Almgren, a pharmacist with extensive experience and training related to both mass manufactured and compounded drugs. Given the timeline and circumstances of this case, these issues were not explored previously because Appellants denied any ability to obtain lethal injection drugs and refused to answer any of Respondents' discovery requests on this topic (both before and after this Court's remand order).

7. Accordingly, Respondents move this Court for leave to supplement the record. To the extent there is any factual dispute about the statements contained in Dr. Almgren's affidavit, this Court should remand the case to the circuit court for additional fact development.

Respectfully submitted,

s/ Lindsey S. Vann

Lindsey S. Vann (No. 101408)
Emily Paavola (No. 77855)
Allison Franz (No. 105189)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

John H. Blume (No. 743)
CORNELL LAW SCHOOL
112 Myron Taylor Hall
Ithaca, NY 14853

Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
506 Pettigru (29601)
P.O. Box 6938
Greenville, SC 29606

John Christopher Mills (No. 9067)
J. CHRISTOPHER MILLS, LLC
2118 Lincoln Street
Columbia, SC 29202

Counsel for Respondents-Appellants

December 27, 2023.