RECEIVED

Aug 15 2024

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE 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' PETITION FOR REHEARING

Respondents, through undersigned counsel, respectfully petition this Court for rehearing of its July 31, 2024 opinion reversing the well-reasoned decision of the circuit court. Rule 221(a), SCACR. Rehearing is appropriate because this Court improperly deferred to legislative findings that do not exist, erroneously concluded that a death sentenced inmate's ability to choose among methods of execution lessened the scrutiny this Court should apply in determining whether electrocution and the firing squad were "cruel," and did not require the Department of Corrections to disclose information necessary to validate the potency, purity, and stability of lethal injection drugs. In support of rehearing, Respondents submit the following:

I. DEFERENCE TO LEGISLATIVE FACT-FINDING IS INAPPROPRIATE IN REVIEWING THE AMENDMENTS TO S.C. CODE SECTION 24-3-530.

In practice, when deferring to legislative findings, this Court generally considers and defers only to the *express* legislative findings that are made explicit in the statute under review. *See, e.g.*, *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 223, 246 S.E.2d 869, 871 (1978) (deferring to section 31-13-180's explicit "declaration of legislative findings and purpose"); *Richards v. City of Columbia*, 277 S.C. 538, 545, 88 S.E.2d 683, 686 (1955) (deferring to explicit factual findings that dwellings unfit for human habitation "are dangerous or injurious to the health, safety or morals of the occupants"); *McNulty v. Owens*, 188 S.C. 377, 199 S.E. 425, 428 (1938) (deferring to legislation's explicit "Declaration of Public Interest" "declared as a matter of legislative determination"). If there are no express findings, however, the Court is left to guess what the Legislature considered and found in adopting a law. *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) ("After all, a statute is a statute, and no matter how 'authoritative' the history may be—even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report—one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted *for sure* was the text of the enactment; the rest is *necessarily* speculation.") (emphasis in original) (internal quotation marks omitted).

In this case, a review of the legislative record makes clear that no evidence was presented and no findings were made on the critical issue of how electrocution or the firing squad bring about the death of a condemned individual. In fact, members of the General Assembly were assured there was no reason to do so because this Court would ultimately decide whether the statute, and the

chosen methods of execution, were constitutional.[1] Thus, this Court's determination that it was "inconceivable" that the General Assembly did not consider issues such as "whether electrocution causes the brain to quickly become insensate or the heart to stop," *Owens v. Stirling*, Op. No. 28222, at 22 (S.C. Sup. Ct. filed July 31, 2024) [hereinafter "Op."], is rebutted by the legislative history and debates.

The amendments to section 24-3-530 began as bills in both the Senate and House, which proposed to change the default method of execution to electrocution. The Senate held no committee hearings for public comment, polling the bill out of committee in February 2021. 2021 S.C. Acts No. 43 (2021). The House held one committee hearing for public comment, at which the Director of the South Carolina Department of Corrections ("SCDC") testified he was unable to obtain the drugs for lethal injection and the law did not permit SCDC to carry out an execution by electrocution unless the inmate selected that method. S.C. House Judiciary Comm. Constitutional Laws Subcomm., Video (Feb. 11, 2021), https://www.scstatehouse.gov/video/archives.php. The Director did not testify about how electrocution worked, and his trial testimony makes clear that both then and now he does not have any such expertise and only understands the electrocution process "[v]ery generally" at a "very high level." R. p. 1064, line 19.

Following the committee proceedings, the bills were debated on the Senate and House floors with no additional testimony. Only then was the firing squad proposed. S.C. Senate, Video

[1] Even had the Legislature done so (and they didn't), legislative findings would not be "binding upon the court," would be "subject to judicial review," and subject to be overridden by "extrinsic evidence." *Richards*, 227 S.C. at 560–61, 88 S.E.2d at 694. Thus, "[l]egislative findings and declarations have no magical quality to make valid that which is invalid." *Bauer*, 271 S.C. at 229, 246 S.E.2d at 875; *see also Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (recognizing while it "review[s] congressional factfinding under a deferential standard," the Court does not "place dispositive weight on Congress' findings," but rather "retains an independent constitutional duty to review factual findings where constitutional rights are at stake").

of Floor Proceedings (Mar. 3, 2021);[2] S.C. House, Video of Floor Proceedings (May 5, 2021); S.C. Senate, Video of Floor Proceedings (May 12, 2021). In the Senate and House debates, the bill sponsors did not present how the methods would work and repeatedly informed the legislative body that the amendment would require the Department of Corrections to establish protocols for carrying out any method of execution.[3] *See, e.g.*, S.C. House, Video of Floor Proceedings, 1:14:47 (May 5, 2021) (Rep. Newton: "You know, the bill does not specify what size bullet, what type gun, any of that, it requires that the Department of Corrections shall establish protocols and procedures."); S.C. Senate, Video of Floor Proceedings, 4:31:54 (May 12, 2021) (Sen. Hembree: "And those policies and protocols will be developed by the Department of Corrections."). Thus, the legislators ultimately voting on the bill were uninformed about the way each method actually works.

In fact, the bill's sponsor in the Senate encouraged the Legislature to pass the amendments without further debate or study because this Court would review the law to make sure the methods were constitutional. The Senate bill's sponsor specifically stated that there was no need for the Legislature to "guard against" a "chamber of horrors because we have an Eighth Amendment that's going to do that" and the Courts would review the methods. S.C. Senate, Video of Floor Proceedings, 4:29:06 (May 12, 2021) (Sen. Hembree); *see also id.* at 4:28:46 ("[I]f the Supreme Court finds that either electrocution, or lethal injection, or a firing squad is a violation of the Eighth

[2] All videos of legislative proceedings are available at https://www.scstatehouse.gov/video/archives.php.

[3] At trial in this matter, Director Stirling testified that, while the Legislature might believe that the citizens of South Carolina approve of electrocution and firing squad as methods of execution, the protocols and information about how each method is actually carried out are "inaccessible to the public" and the public would not be permitted to observe an execution or learn more about the Department's procedures. R. p. 1089, lines 2–25.

Amendment, that case and that conviction is going to be overturned. They're going to find our statute unconstitutional."). Thus, this Court in essence deferred to the Legislature, which was deferring to this Court, with neither body considering the facts underlying the question of whether electrocution or firing squad are unconstitutional.

By assuming the Legislature made whatever factual findings were necessary to enact legislation insulates the Legislature's actions from judicial scrutiny—even when it made no factual findings at all—the Court effectively forecloses constitutional challenges to statutes. This precedent would deprive citizens wishing to raise such a challenge of the due process required under the Fourteenth Amendment to the United States Constitution. Further, it will hamstring this Court's future ability to invalidate otherwise unconstitutional statutes if the Court is required to assume without evidence (or in the face of contrary evidence) that the Legislature made all necessary factual findings to conclude that the statute was constitutional.

As the Supreme Court of the United States has recognized, even while it "review[s] congressional factfinding under a deferential standard," it does not "place dispositive weight on Congress' findings," but rather "retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007); *see also Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."). The end result in this case is unjustified circular blind deference, and this Court should review the evidence presented at trial without deference to non-existent legislative findings.

II. THIS COURT ERRED IN REJECTING THE CIRCUIT COURT'S FINDINGS ON ELECTROCUTION.

In its opinion, this Court set forth a standard for demonstrating whether an execution method is "cruel" under Article I, section 15, holding an inmate "must prove there is a substantial risk that the State's use of the method to execute him will inflict unnecessary and excessive pain that goes well beyond what is reasonably necessary to carry out death." Op. at 16. Ultimately, this Court rejected the challenge to the electric chair as "cruel" because it did not believe Respondents had disproven beyond a reasonable doubt "the original theory of the humanity of electrocution—that despite the damage it causes to the body, the condemned inmate feels no pain because the brain is immediately rendered insensate and the heart is almost immediately stopped." Op. at 22 (citing *In re Kemmler*, 136 U.S. 436 (1890)). On this key point, this Court improperly rejected the circuit court's findings on the credibility of the experts and the weight of the evidence presented.

Having presided over the trial and witnessed all testimony firsthand, the circuit court is uniquely positioned to determine questions of credibility, and those determinations should not be disturbed if they are supported by "any evidence." *State v. Frasier*, 437 S.C. 625, 632, 879 S.E.2d 762, 766 (2022) (noting the need for particular deference to trial court findings of witness credibility). In this case, there was ample support for the trial court's decision to credit the opinion of Respondents' well-qualified experts—Dr. John Wikswo and Dr. Jonathan Arden—rather than those of Dr. Ronald Wright. Dr. Wright testified that electrocution "kills the brain" in "femtoseconds," and therefore the first application of electric current would render an inmate immediately unconscious and insensate. R. p. 1446, lines 12–14. He offered no affirmative proof in support of this proposition and he was unable to explain why, if he was correct, autopsy reports and contemporaneous newspaper accounts established that on numerous occasions electrocution

executions required multiple or prolonged shocks to bring about death.[4] He also testified that after brain "poration," an inmate will not be able to breathe, move, or make sounds. The basis for his opinion was that he had "never seen anybody who has survived a high voltage electrocution." R. p. 1468, lines 4–6.

Dr. Wikswo and Dr. Arden, by contrast, testified that scientific literature, autopsy reports, and contemporaneous accounts of electrocutions demonstrate that inmates regularly remain alive, sensate, and able to move after the first application of electric current. Both experts relied on evidence that inmates moved, breathed, or screamed after the first application of the current, and cited examples from scientific literature of individuals who remained sensate, conscious, and able to speak after receiving an electric shock that was ultimately fatal.[5] *See, e.g.*, R. pp. 1169–70, 1186–87 (Dr. Wikswo), 1322–67 (Dr. Arden). Dr. Wright was unable to reconcile his theory of immediate brain death with Dr. Wikswo's and Dr. Arden's evidence that inmates remained able to breathe or move after application of the current.[6] The circuit court's decision is further supported

[4] The SCDC electrocution protocol appears to account for this by requiring multiple applications of electricity—2,000 volts for 4.5 seconds, 1,000 volts for 8 seconds, and 120 volts for 2 minutes. R. p. 1100, lines 9–17.

[5] Dr. Arden cited an example from scientific literature in which a person was able to tell his coworkers that he had been electrocuted before "fall[ing] down dead." R. p. 1324, lines 19–23. In addition, Dr. Wikswo testified that studies of electrocution in animals show that the head-to-leg (or head-to-hoof) method that South Carolina intends to use is not used to electrocute animals because it does not render the animal immediately insensate and causes pain. R. p. 1171, line 17–p. 1172, line 5 ("[T]he animal husbandry community after intense work has concluded that they would not do to an animal in a slaughterhouse what is done in South Carolina's death chamber.").

[6] Dr. Wright was questioned on this point in cross-examination:

> Q: If a person's cranial cell membranes have completely porated, can that person move?
> A: No.
> Q: Can they breathe?
> A: No.
> Q: Can they scream?
> A: No.

by the fact that the Nebraska Supreme Court also considered the same witnesses, presenting substantially the same evidence, and likewise credited Dr. Wikswo's testimony over Dr. Wright's.[7]

Further, the majority erred in rejecting the circuit court's decision to credit Dr. Wikswo's and Dr. Arden's testimony that inmates who were not rendered insensate were likely to experience pain from severe electrical burns. Citing autopsy reports of judicial electrocutions, Drs. Wikswo and Arden explained that every available autopsy from an electric chair execution, including from South Carolina, showed "severe burns of the head and the leg." R. p. 1333, line 20–R. p. 1334, line 3. In judicial electrocutions, the current generates enough heat to cause "full depth penetration burns of the skin," charring of flesh, and thermal damage of internal organs.[8] R. p. 1201, line 9–R. p. 1202, line 3; R. p. 1203, lines 1–7; R. p. 1208, line 17–R. p. 1210 line 13; R. p. 1347, lines 6-16; R. p. 1348, lines 18-24; *see also* R. pp. 1702–42 (Pls. Exs. 1–5); R. pp. 1762–86 (Pls. Ex. 17-18). The injuries include burning "all the way through the skin, from the electrical current";

R. p. 1468, lines 12–18.

[7] In *State v. Mata*, Dr. Wright theorized that "irreversible loss of brain functioning would occur within 1 second, or 'the speed of light.'" 745 N.W.2d 229, 273 (Neb. 2008). In contrast, Dr. Wikswo testified that "instantaneous loss of brain function was highly unlikely" because the current would not follow a pathway directly into the brain. *Id.* at 274. This testimony was supported by physical evidence, including the fact that "most of the physical damage is on the outside of the body" (indicating that the current was not traveling straight down into the inmate's brain), and that electrocuted inmates frequently displayed signs of life after the first application of the current and required multiple shocks. *Id.* at 275–76 (noting that physicians or witnesses reported that the inmate was still breathing or alive after the initial application in 20% of Nebraska executions). The *Mata* court credited Dr. Wikswo's testimony and the accompanying evidence, finding that "[t]his evidence shows that death and loss of consciousness is not instantaneous for many condemned prisoners." *Id.* at 277.

[8] For example, in one South Carolina execution, the fleshy portion of the inmate's nose was burned off. R. p. 1201, line 9–R. p. 1202, line 3; R. p. 1725. Other autopsies show burns associated with arcing "between the balls of the feet," "between the penis, the scrotum and the thigh," and "[i]f you have a mask on . . . you can get arcing from the mask to the—to the face." R. p. 1209, line 15 – R. p. 1210, line 13.

"severe charring"; "blackened flesh"; "a circular band of tissue of the scalp that's literally destructed"; and "a rendering of the subcutaneous fat," meaning an electrical burn "liquefied the fat . . . [and] you can see a sloughing off of skin on—on the side of the face." R. p. 1187, lines 3–7, R. p. 1203, lines 1–7; R. p. 1206, line 18–R. p. 1207, line 9; R. pp. 1335–1338; R. pp. 1342–1345; R. p. 1348, lines 4-24.[9] Additionally, autopsies from electric chair executions indicate "cooking" of internal organs as they are "exposed to substantial heat." R. p. 1348, line 18–R. p. 1349, line 4.

This evidence demonstrates that there is a substantial risk that the electric chair "inflict[s] unnecessary and excessive pain that goes well beyond what is reasonably necessary to carry out death," and the mechanisms thought to cause death are not likely to render a person insensate to the extreme pain and burning associated with the method of execution. Op. at 16. The circuit court, which was properly positioned to consider and credit the evidence and information presented to it, specifically reached this determination, finding that "even under the most demanding methods-of-execution analysis, . . . whether the punishment creates a substantial risk that a prisoner will suffer unnecessary and wanton pain in an execution . . . the electric chair carries that risk." R. p. 27. Accordingly, electrocution meets the definition of "cruel" set forth by this Court, and the circuit court's ruling should be upheld.

III. THE QUESTION OF WHETHER OTHER METHODS ARE AVAILABLE HAS NO BEARING ON THE QUESTION OF WHETHER ANY GIVEN METHOD IS CRUEL, UNUSUAL, OR CORPORAL.

An inmate's ability to choose how he dies loomed large in this Court's constitutional analysis. However, as Chief Justice Beatty and Justice Kittredge conclude, the availability of other

[9] Dr. Arden testified that the burns and injuries are "quite representative" of one another across autopsies from electric chair executions, but they can be more extreme, including "one of the cases in Florida where basically they set the head on fire during the electrocution." R. p. 1347, lines 6–21.

methods should have no bearing on the question of whether any given method is cruel, unusual, or corporal. Op. at 58 (Beatty, C.J., concurring in part and dissenting in part), 88 (Kittredge, J., concurring in part and dissenting in part). An otherwise unconstitutional method does not become constitutional simply because another method is available. *See generally Bucklew v. Precythe*, 587 U.S. 119 (2019). Furthermore, applying the majority's framework, hanging and other barbaric methods of execution would be constitutional if offered as a choice because an inmate would be free to choose whichever method "he and his lawyers believe will cause him the least pain." Op. at 39.

The majority states that "the element of choice that South Carolina provides in section 24-3-530 would have changed the constitutional analysis" in *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001), and *State v. Mata*, 745 N.W.2d 229 (Neb. 2008), in which Georgia and Nebraska, respectively, found that electrocution was unconstitutional. Op. at 38. There is no support in either case for such a conclusion. While both courts did deem lethal injection to be superior to electrocution, there is no indication in either case that had that been an available option, they would have reached a different conclusion.[10] In fact, the Georgia Supreme Court specifically found electrocution to be unconstitutional even though lethal injection was already available in the state. *Dawson*, 554 S.E.2d 137.

[10] Both courts cited the barbaric nature of the electric chair as reasons for determining that it was unconstitutional. The *Mata* court noted "[e]lectrocution's proven history of burning and charring bodies" and concluded that "electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body." 745 N.W.2d at 278. The *Dawson* court noted that the evidence "reveals uncontrovertedly that the bodies of condemned prisoners in Georgia are mutilated during the electrocution process," suffering burns, blisters, and skin slippage, and held that "death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment in Art. I, Sec. I, Par. XVII of the Georgia Constitution." 554 S.E.2d at 143.

IV. THE MAJORITY'S PROPOSED REQUIREMENTS FOR ENSURING THE QUALITY OF LETHAL INJECTION DRUGS DO NOT SUFFICIENTLY SAFEGUARD PLAINTIFFS' RIGHTS UNDER ARTICLE I, SECTION 15.

The Court recognizes that SCDC must provide information to ensure that "the [lethal injection] drugs [are] of sufficient 'potency, purity, and stability' to carry out their intended purpose." Op. at 35. The relevant part of the opinion states:

> [I]f the [SCDC] Director certified in the affidavit that scientists at the Forensic Services Lab of the South Carolina Law Enforcement Division (SLED), whose experience and qualifications were verified by the Director and the Chief of SLED, recently performed testing according to widely accepted testing protocols and found the drugs were not only stable, but of a clearly acceptable degree of purity, then we doubt there could be any legitimate legal basis on which to mount a challenge.

Id. By contrast, the majority maintains that "accepting the word of an unnamed person with unknown qualifications . . . would clearly be insufficient." *Id.* at 34–35.

Either option, or any option in between, requires inmates to accept the good-faith word of the Director without requiring any affirmative proof of findings on the part of SCDC or SLED. Blind trust in an agency's good faith is not a sufficient safeguard of due process. *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 596, 86 S.E.2d 466, 471 (1955) ("The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.").

It is not clear whether SLED has the qualifications or technology necessary to perform the analyses that will be required to ensure the quality of the lethal injection drugs, and Director Stirling does not have the training necessary to be able to certify that information on his own. Nevertheless, it is entirely possible for SCDC to provide affirmative proof that the drugs are sufficiently potent, stable, and pure to carry out an execution while complying with the shield law. For example, at the very least, providing the results of any testing or analyses performed on the drugs would afford an inmate greater assurances of the drugs' quality and effectiveness than only

the Director's say-so. Provision of the testing results (redacted to avoid disclosing the identity of the analyst(s)) would enable undersigned counsel to review the methodology and results with a pharmacological expert to determine whether appropriate methodology was followed by SLED and that the testing supports the Director's certification of "potency, purity, and stability." Without this information, counsel will not be able to advise their clients on lethal injection as a method of execution beyond asking their clients to trust the word of the Director and SLED Chief.

CONCLUSION

For the reasons stated above, this Court should grant rehearing and issue an amended opinion, finding South Carolina Code section 24-3-530 unconstitutional.

Respectfully submitted,

s/Lindsey S. Vann

Lindsey S. Vann (No. 101408)
Emily Paavola (No. 77855)
Allison Franz (No. 105189)
Rosalind S.D. Major (No. 106017)
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

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

Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
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

August 15, 2024.