

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 26 2024

S.C. SUPREME COURT

Richard Bernard Moore, Brad Keith Sigmon,
Freddie Eugene Owens, Mikal D. Mahdi, and
Marion Bowman, Jr.,

Movants,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2024-001373

Response in Opposition to Motion to Direct or Stay the Issuance
of Execution Dates at Intervals of No Less Than 13 Weeks

This Court has ruled that the execution methods statute, as amended, “does not violate the South Carolina Constitution.” *Owens v. Stirling*, Opinion No. 28222 (S.C. Sup. Ct. filed July 31, 2024) (Howard Advance Sheet No. 29 at 18). Six death-sentenced inmates who had exhausted their ordinarily available state and federal remedies were granted stays to allow for completion of the *Owens* litigation.¹ The order denying the inmates’ petition for rehearing was issued on Friday, August 16, 2024, and this Court issued the remittitur on August 23, 2024. (*See* Appellate Case No. 2022-001280). Thus, the case has concluded. On August 21, 2024, counsel for five of

¹ In order of exhaustion: *Richard Bernard Moore*, Appellate Case No. 2001-021895, April 20 and 22, 2022 Orders); *Brad Keith Sigmon*, Appellate Case No. 2002-024388 (April 22, 2022); *Freddie Eugene Owens*, Appellate Case No. 2006-038802 (May 5, 2022 Administrative Order in 2021-CP-40-02306); *Mikal D. Mahdi*, Appellate Case No. 2014-002131 (February 9, 2023 Order); *Steven Bixby*, Appellate Case No. 2007-054161 (June 8, 2023 Order); and *Marion Bowman*, Appellate Case No. 2002-023546 (June 8, 2023 Order).

the six inmates² filed a motion seeking an expansive timeframe in which to set the executions.³ The State submits that the inmates request an unreasonable amount of time between executions. Upon consultation with the Department of Corrections, Respondent has confirmed that the Department stands ready to meet its obligations as required, but respectfully suggests that no more than 28 days between executions would be reasonable as executions resume. Thus, the State opposes the inmates' motion for more than 90 days between executions. In support of this position, Respondent would respectfully show the Court:

There is no basis in law or fact for a delayed pace in executions. The inmates offer only speculation as to the "heightened risk of serious error" if the executions are scheduled less than 13 weeks apart. They offer no specific need, and in the absence of a specific need, there could be only unnecessary delay. Further, to demonstrate the true measure of the delay anticipated in the inmates' motion, one need only look at the dates that would result. Under their proposal, only two executions could be completed this year, (September 20, 2024, and December 20, 2024). It would take all next year to complete the remaining four executions, (March 21, 2025, June 20, 2025, September 19, 2025, and December 19, 2025).⁴ The *de facto* stay is unwarranted and out-of-step with past procedures.

As this Court noted in the *Owens* opinion, the State "has a long-established public policy of punishment that includes using the death penalty for the most heinous of crimes." (Slip Op. at

² Steven Bixby is not included.

³ This Court issued a notice of execution for Freddie Eugene Owens on August 23, 2024. On that same day, this Court issued an order staying "issuance of execution notices for all other eligible death-sentenced inmates pending a decision on the request to ensure a reasonable interval between execution dates." Appellate Case No. 2024-001373. Mr. Owens's execution is now set for Friday, September 20, 2024.

⁴ This does not account for other inmates who may exhaust their ordinary remedies within that time, and what impact an interim execution may have.

13). It follows, then, that the State also has a history of multiple executions. Our modern execution history shows that two executions have been conducted within a day (*Gilbert and Gleaton*, Dec. 4, 1998, lethal injection); and one week apart (*Lucas and Middleton*, November 15 and 22, 1996). The time between December 4, 1998, and January 22, 1999, is instructive. Six executions were scheduled and completed within that time-period:

Larry Gilbert, December 4, 1998
J.D. Gleaton, December 4, 1998
Louis Joe Truesdale, December 11, 1998
Andrew Laven Smith, December 18, 1998
Ronnie Howard, January 8, 1999
Joseph Ernest Atkins, January 22, 1999

Whether within one day, one week or two weeks, nothing supports the necessity of *three months* between each execution as inmates now request. To be sure, in every execution, regardless of the procedural path to exhaustion, there is an anticipation of last-minute filings and litigation.⁵ Nevertheless, the inmates offer that a “frenetic pace” (defined, by the inmates, as less than 91 days between each execution) would cause “hurried litigation and adjudication” of last-minute litigation in their cases. The logic is strained at the outset because the very reason for the issuance of the notices at this time is the fact that ordinary state and federal remedies have been exhausted and, additionally, that the *Owens* methods litigation has been completed. There should be very little viable litigation, “hurried” or otherwise.

In offering some basis for the extreme delay requested, the inmates look to Oklahoma. The inmates fail to consider that Oklahoma has differing statutes on this matter and differing

⁵ The State merely underscores that the prospect of additional filings is neither unique nor unanticipated. Indeed, a present example is the inmates’ motion for 91 days between executions. Moreover, the *Owens* opinion anticipates that an inmate may challenge the certification under section 24-3-530 (B), inserted as part of the 2021 amendment, but this Court concluded that “[i]f a challenge is made” it “will promptly decide if the challenge warrants relief.” (Slip Op. at 35). Consequently, litigation close in time to the execution date is expected and expected to be addressed and handled promptly. This is not new territory in that respect.

base timelines.⁶ Even so, what Oklahoma does in no way dictates what South Carolina must do. And again, as set out above, the State has a ready history of accomplished executions which this Court may consult and consider. The State acknowledges that executions are resuming after a long delay,⁷ and that several notices may be issued at this time, but that is not so unheard of as would warrant the considerable delay requested. Consider that the federal government set multiple executions in 2020 after 17 years without one being carried out, and noted its duty to carry out the executions at that time:

Congress has expressly authorized the death penalty through legislation adopted by the people’s representatives in both houses of Congress and signed by the President,” Attorney General Barr said. “Under Administrations of both parties, the Department of Justice has sought the death penalty against the worst criminals, including these five murderers, each of whom was convicted by a jury of his peers after a full and fair proceeding. The Justice Department upholds the rule of law—and we owe it to the victims and their families to carry forward the sentence imposed by our justice system.

<https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>

Ultimately, 10 inmates were executed throughout the year, several two days apart. (See

<https://deathpenaltyinfo.org/executions/2020> (last checked August 23, 2024)).

⁶ See Okla. Stat. Ann. 22 § 1001.1 (D) and (E) (“ Should a stay of execution be issued by any state or federal court, a new execution date shall be set by operation of law sixty (60) days after the dissolution of the stay of execution. The new execution date shall be set by the Court of Criminal Appeals without necessity of application by the state, but the Attorney General, on behalf of the state, shall bring to the attention of the Court of Criminal Appeals the fact of the dissolution of a stay of execution and suggest the appropriateness of the setting of a new execution date. ... After an execution date has been set pursuant to the provisions of this section, should a stay of execution be issued by any state or federal court, a new execution date shall be set by operation of law thirty (30) days after the dissolution of the stay of execution. The new execution date shall be set by the Court of Criminal Appeals without necessity of application by the state, but the Attorney General, on behalf of the state, shall bring to the attention of the Court of Criminal Appeals the fact of the dissolution of a stay of execution and suggest the appropriateness of setting a new execution date.”).

⁷ The last execution by lethal injection was completed on May 6, 2011 (Jeffrey Motts). The last execution by electrocution was completed on June 20, 2008 (James Earl Reed).

The State acknowledges that, additionally, South Carolina is resuming executions after a new method has been added to the statute. However, the amended statute and the methods have been fully challenged, and this Court has upheld the statute, and the methods offered. The litigation door must be nearly closed at this point in time as it should be. And to consider another facet of this same point, the inmates have had years to consider the potential litigation results – the civil action was filed in 2021.⁸

Moreover, our precedent already provides for the narrow contingency that a stay close in time to the execution date may be necessary for litigation. Specifically, a request for a stay may be made to this Court “no later than fifteen (15) days prior to the date of the scheduled execution,” however, the burden is on the inmate to “demonstrate that there are exceptional circumstances warranting the issuance of the stay.” *In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996). The inmates should not be allowed to avoid the required heightened showing by asking for delay in issuance of the notices. Nonetheless, the contingency is there specifically for the possibility that this Court may determine additional time is necessary for certain litigation. Again, the delay requested is not warranted.

Lastly, the inmates’ repeated reference to concern for the Department of Corrections staff is unavailing. The Department of Corrections staff stand ready to accomplish their duty as required by our law with professionalism and dignity. In light of the Court’s call for response to the motion, and the intervening stay that indicates the Court’s desire to establish a “reasonable interval between execution dates,” Order, August 23, 2024, the State respectfully suggests a maximum of 28 days between executions as a point of equipoise between competing interests,

⁸ As noted, above, all inmates were granted stays based on the *Owens* litigation, even if they were not parties to the litigation. It would be exceedingly difficult to disavow knowledge of same.

which includes the judiciary's own interest in ensuring that properly imposed and now final judgments are carried out.

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