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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

FREDDIE EUGENE OWENS,

APPELLANT.

Appellate Case Nos. 1999-011364 and 2024-001397

RETURN TO OBJECTION TO CERTIFICATION

Director Bryan P. Stirling certified under section 24-3-530 that all three methods of execution authorized by the General Assembly are available for carrying out the execution of Freddie Eugene Owens. Owens now objects to the Certification's explanation that lethal injection is available. His objections, however, are baseless and no reason to drag on "[t]he seemingly endless proceedings that have characterized capital litigation." *Baze v. Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring).

I. Owens's objections on lethal injection are meritless.

Owens offers four objections related to lethal injection. *First*, Owens attacks that the certification does not address "basic facts about the drug's creation." Obj. 2. Owens cites this Court's decision in *Owens* for this language, but he ignores the fact that the language he quotes is an alternative formulation of what this Court required. This Court "agree[d]" that the Director must "disclose some basic facts about the drugs creation, quality, and reliability," which meant "the

drugs' potency, purity, and stability"—words that the Court took directly from Owens's "counsel . . . at oral argument." *Owens v. Stirling*, No. 2022-001280, 2024 WL 3590797, at *20 (S.C. July 31, 2024) (emphasis added) (cleaned up).

The certification explicitly addresses the "potency, purity, and stability" of the pentobarbital that would be used for Owens's execution. *See* Aff. of Bryan P. Stirling ¶ 9. Nothing in *Owens* required the Director to address the alternative formulation of the drug's characteristics. Suggesting otherwise is a belated attempt to add to what the *Owens* Respondents told this Court: "[T]here ought to be some, at least, *minimum disclosure* of the purity, potency, and stability of these drugs." Oral Argument Video, 42:45, *Owens v. Stirling*, No. 2022-001280 (S.C. Feb. 6, 2024) (Blume) (emphasis added).

Moreover, "the drug's creation" is of little relevance now. What matters is whether the drug is sufficient for its intended purpose of carrying out a constitutionally compliant execution. The results of the SLED test confirm that the pentobarbital meets that standard.

Second, and "most critically" according to Owens, he questions when the drugs were tested and "Beyond Use Date." Obj. 2–3. The Director would not have certified that lethal injection was available if the drug would expire by Owens's execution date. To raise questions about the potential expiration of the drugs is really a challenge to whether Director Stirling told the truth in his certification.

Owens's argument presents at least one other problem. If Dr. Almgren's claim about the timing of the testing is taken to its logical conclusion, Owens (or any other inmate) could demand testing of the drugs up to the day before (or even the day of) his execution.

Third, Owens challenges the details of the SLED testing, objecting to the lack of details in the Certification about the specifics of the testing. *Id.* at 3. This is a gross overreading of *Owens*.

Relying on SLED testing was the upper "extreme" of the basis for the Director's Certification. "[I]f the Director certified in the affidavit that scientists at [SLED's] Forensic Services Lab," who had the necessary "experience and qualifications," "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," an inmate would presumably not have "any legitimate legal basis" to challenge the certification. *Owens*, 2024 WL 3590797, at *21. Given this description of a more-than-sufficient certification, it's implausible to demand now that the Director provide a play-by-play of the testing. Indeed, this part of Owens's objection is no more than a challenge to the SLED Forensic Services Lab more generally.

Fourth, Owens demands to know more about the storage of the pentobarbital. Yet nothing in *Owens* requires the Director to certify how the drug is stored. As with his timing argument, taking the storage argument to its logical conclusion would demand a minute-by-minute accounting of the drug from the time it comes into SCDC's possession until moments before the execution. That's an implausible standard, to put it mildly. SCDC stores medicine of all varieties for inmates, and the suggestion that SCDC is not storing pentobarbital for potential use in an execution properly is unfounded.

II. The Court should not permit Owens to delay his execution further.

Owens has been on death row since his sentence was finally affirmed in 2008 for a murder that he committed in 1999. *See State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008). The Court should not countenance this last-minute attempt to delay his execution further. "The people of [South Carolina and] the surviving victims of Mr. [Owens]'s crimes . . . deserve better." *Bucklew v. Precythe*, 587 U.S. 119, 149 (2019).

For one thing, Dr. Almgren's affidavit that accompanied the Objection is almost as speculative as her declaration in *Owens*. *See* Am. Final Reply Brief 23–24, *Owens v. Stirling*, No. 2022-001280 (S.C. Jan. 8, 2024). Owens's attempt to use her affidavit to inject uncertainty about the pentobarbital that SCDC has secured should be rejected. Indeed, federal courts have rejected last-minute challenges with declarations challenging execution protocols and their "specific provisions for the proper storage of the execution drugs" (or lack thereof). *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1281 (11th Cir. 2015).

For another, the Court should be wary of backdoor attempts to decipher the source of the pentobarbital. It's no secret "that pentobarbital has become difficult to acquire: a fact that is no surprise to them given that death penalty opponents have vigorously lobbied drug manufacturers to make this drug entirely unavailable for use in American executions." *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1326 (11th Cir. 2020); *see also Glossip v. Gross*, 576 U.S. 863, 869–71 (2015) (discussing efforts by "anti-death-penalty advocates" to thwart corrections officials' attempts to secure lethal injection drugs). Every additional piece of information about the pentobarbital that the Director has to disclose "is a puzzle piece" that someone "may put them together to identify an individual or entity protected by the Shield Statute." Am. Final Reply Brief 22, *Owens v. Stirling*, No. 2022-001280 (S.C. Jan. 8, 2024). By enacting the Shield Statute, the General Assembly intended to enable SCDC to be able to obtain lethal injection drugs, and interpretation of the Shield Statute should not thwart that legislative intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("cardinal rule" is legislative intent).

And for a third, "due process" is not some talisman to get a condemned inmate whatever he wants. Owens seeks to take a constitutional floor and transmogrify it into some extreme disclosure mandate. The law does not support that. The Eleventh Circuit, for instance, has rejected

the idea that an inmate has, under the Due Process Clause, a "broad right to know where, how, and by whom the lethal injection drugs will be manufactured." *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) (cleaned up).

CONCLUSION

The Director's certification is sufficient, and any election should be made by the statutory deadline. *See* S.C. Code Ann. § 24-3-530(A), (C).

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