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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

BRAD KEITH SIGMON,

Movant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2025-000187

RETURN TO OBJECTION TO CERTIFICATION

Director Bryan P. Stirling certified under S.C. Code Ann. § 24-3-530(B) that all three methods of execution authorized by the General Assembly are available for carrying out the execution of Brad Keith Sigmon. Sigmon now objects and generally rests on previously rejected concerns and speculation. His arguments are particularly baseless when considering that the certification follows the upper "extreme example[]" set out by this Court for what a certification might include, *Owens v. Stirling*, 443 S.C. 246, 293, 904 S.E.2d 580, 605 (2024), *reh'g denied* (Aug. 16, 2024), and that this Court has rejected a similar challenge (notably, based on the same expert opinion, Dr. Almgren) to the virtually identical certification filed in advance of the Owens execution. (Appellate Case No. 2024-001397, Order, September 5, 2024). The Court should similarly reject Sigmon's objection.

I. Sigmon's arguments that other condemned inmates suffered are baseless.

Though largely redundant to arguments the Court rejected in Owens's challenge to the

certification, Sigmon seeks to add another layer of speculation in support by asserting the existence of "disturbing facts" associated with the executions of Owens, Moore, and Bowman. Mot. 10. He contends the executions were "protracted" and each suffered "an excruciating condition known as pulmonary edema." Mot. 3 and 8. That contention is meritless.

As an initial point, "speculation" about a drug "cannot substitute for evidence" about it. *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010); *see also Creech v. Tewalt*, 94 F.4th 859, 862–63 (9th Cir. 2024) (refusing to stay an execution based on "arguments about the provenance, quality, and reliability of the drug" that were "purely speculative"). Sigmon's expert, Dr. David Waisel (who was the expert in Bowman's failed effort to obtain an injunction/restraining order based on a due process challenge in district court, *see* n. 2 *infra*), opines about what would happen "if" an inmate was sensate. Mot. Ex. 5, ¶ 9. That's a big "if." It's also the same type of expert speculation that this Court rightly rejected about electrocution in *Owens*. *See* 443 S.C. at 275–76, 904 S.E.2d at 595-96.[1] His opinion also shows immediate flaws so clear that no further fact development is necessary to reject the assertions.

Dr. Waisel concedes that the massive dose used should render the inmate unconscious within "a minute or less" and cause death. *See* Mot. Ex. 5, ¶¶ 7, 10. It did. However, electrical activity may be observed on a heart monitor for some time after breathing stops. *Cf. Owens*, 443 S.C. at 276-77, 904 S.E.2d at 596 (discussing evidence of how the brain and heart don't necessarily

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[1] Both Dr. Almgren and Dr. Waisel opine that the information presented in the certification is insufficient to allow an "informed decision" about methods of execution. (*See* Mot. Ex. 7, ¶ 4 and Ex. 5 ¶¶ 4, 12). Dr. Waisel goes somewhat further asserting an "inadequate transparency," and that the Department is "declining" to release what they consider necessary information for a choice. (*See* Mot. Ex. 5 [unnumbered] p. 2). Their legal opinions and the characterizations of the Department's actions are neither relevant nor appropriate. Lastly, in response to similar arguments from Owens, this Court found the similar "affidavit provide[d] sufficient detail for Appellant to make an informed election of his method of execution...." (Appellate Case No. 2024-001397, Order, September 5, 2024).

cease functioning at the same time). In other words, a condemned inmate may (and typically does) stop breathing before all electrical activity from his heart ceases. As Dr. Antognini (who also provided an opinion in the Bowman federal action) explains, a person's body must use up any stored oxygen after breathing stops, which results in "periodic irregular beats" before "the heart stops all together." Antognini Decl. ¶¶ 7, 26. (Attachment 1). Both the circulatory and respiratory systems must completely stop before the inmate is declared dead. *See* S.C. Code Ann. § 44-43-460. And some lag time between when breathing stops and when death is pronounced is typical. Consider that Sigmon concedes all three were declared dead at around 20 minutes. Indeed, this lag is consistent with the fact that "it would not be unexpected that some heart electrical activity persists after 10 minutes," meaning that the second injection would likely happen under protocol, not an unexpected necessity. Antognini Decl. ¶ 28. Sigmon fails to show a redundancy round indicates that there is any issue with the drug or its administration.

Dr. Waisel's additional contention that his theory is supported by media witness reports has an immediate flaw — the reports do not support his supposition. According to press summaries, Owens "appeared to lose consciousness after about a minute," after which "his eyes closed and he took several deep breaths." Jeffrey Collins, *South Carolina Inmate Dies by Lethal Injection in State's First Execution in 13 Years*, Associate Press (Sept. 20, 2024), https://tinyurl.com/3x7662j8. Then, "[h]is breathing got shallower and his face twitched for another four or five minutes before the movements stopped." *Id.* This is remarkably consistent with the witnesses' description of Richard Moore's execution, which began at 6:01 p.m.: "Moore took several deep breaths that sounded like snores over the next minute. Then he took some shallow breaths until about 6:04, when his breathing stopped. Moore showed no obvious signs of discomfort." Jeffrey Collins, *South Carolina Executes Richard Moore Despite Broadly Supported*

Plea to Cut Sentence to Life, Associated Press (Nov. 1, 2024), https://tinyurl.com/2s4tc4vr. And Marion Bowman stopped breathing "in less than a minute," and there were no reports that he otherwise moved before being declared dead. Jeffrey Collins, *South Carolina Puts Inmate Marion Bowman Jr. to Death in State's Third Execution Since September*, Associated Press (Jan. 31, 2025), https://tinyurl.com/5a9bmbz4. These statements contradict Dr. Waisel's prediction of conscious pain, and they leave Dr. Waisel only speculating about what would happen "if" an inmate was "sensate." Mot. Ex. 5, ¶ 9.

As it relates to witnesses, two other things are true of all three executions. First, Owens, Moore, and Bowman had a lawyer sitting in the front row of the witness room. Second, no lawyer has claimed that any of three inmates showed any signs of pain during his execution.

These witness statements (or lack of statements, in the case of the lawyers) align with Dr. Antognini's declaration. He explains how quickly pentobarbital renders a person insensate, at which point that person would not feel anything. *See* Antognini Decl. ¶¶ 8–13.

Finally, Dr. Waisel's pulmonary edema contention has multiple shortcomings. In the first place, claims of pulmonary edema are nothing new in lethal injection. This objection has been lodged against lethal injection generally in recent years, even before South Carolina resumed executions last year. *See, e.g.*, Noah Cadwell, et al., *Gasping for Air*, NPR (Sept. 21, 2020), https://tinyurl.com/4f8aj9ha; *Owens,* 433 S.C. at 297, 904 S.E.2d at 607 ("Even as to the protocol the inmates in this case concede is constitutional—a single dose of pentobarbital—by 2021, multiple condemned inmates around the country filed constitutional challenges in federal courts"). Arguments about the risk of pulmonary edema are thus a criticism of lethal injection generally, not of South Carolina specifically. Plus, it can be found in any death, based on post-mortem CT scans and other studies. *See* Antognini Decl. ¶¶ 16–23.

In the second, courts have already rejected Dr. Waisel's pulmonary edema argument. A district court stayed federal executions because, according to those inmates' expert, they would "suffer[] flash pulmonary edema" during their executions. *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 218 (D.D.C. 2020). The Supreme Court of the United States reversed the last-minute preliminary injunction noting that the government had offered evidence to the contrary—from Dr. Antognini, in fact, *see id.* at 219—that "any pulmonary edema occurs only *after* the prisoner has died or been rendered fully insensate," and the inmate was unable to carry his burden of showing a likely successful Eighth Amendment claim. *Barr v. Lee*, 591 U.S. 979, 980-981 (2020). Again, nothing Dr. Waisel offers proves that the edema occurs, when or if it occurs, before the inmate is rendered insensate.

And in the third, Dr. Waisel doesn't suggest that the effects of any pulmonary edema—"if" sensate—would last more than a few moments. As Dr. Antognini observes, if Moore was feeling pain for 23 minutes before his death was pronounced, he would have displayed some signs of suffering. *See* Antognini Decl. ¶ 27. Or as the Eleventh Circuit pointed out in rejecting Dr. Waisel's objections to pentobarbital in another case, "Dr. Waisel admitted that 'any "suffering" was short lived as it clearly ended within a few minutes—three minutes at the most—after the pentobarbital was injected.'" *DeYoung v. Owens*, 646 F.3d 1319, 1326 (11th Cir. 2011); *see also* Antognini Decl. ¶ 16 (a person would be quickly rendered insensate and not feel anything after that moment). The Constitution, however, prohibits only "serious harm" and "substantial risk," *DeYoung*, 646 F.3d at 1327, because pain is "an inescapable consequence of death," *Baze v. Rees*, 553 U.S. 35, 50 (2008).

II. The Director's certification satisfies section 24-3-530.

Sigmon insists that he is entitled to more information than the Director has provided. *See*

Mot. 5–8. Sigmon is wrong.

At the outset, two things jump out. First, and as Sigmon admits, *see* Mot. 5, the Director's certification tracks what this Court gave as the upper "extreme example[]," to which the Court "doubt[ed] there could be any legitimate legal basis on which to mount a challenge" to the certification. *Owens*, 443 S.C. at 293, 904 S.E.2d at 605. By insisting that tracking this example is, in fact, insufficient, Sigmon is implicitly asking this Court to overrule *Owens*. But this Court already denied the rehearing petition in that case. *See* Order, No. 2022-001280 (S.C. Aug. 16, 2024).

Second, and as Sigmon again acknowledges, *see* Mot. 8, this Court rejected Owens's demand for the same additional information that Sigmon seeks. In other words, the Court has already rejected this argument. Sigmon offers nothing new to reconsider that conclusion. Indeed, he offers the same affidavit from Dr. Almgren that Owens did. *See* Mot. Ex. 7. He then rehashes arguments from other condemned inmates about whether the information that the Director has included in his certification is sufficient to explain how he "satisf[ied] himself that the drugs are capable of carrying out the death sentence according to law." *Owens*, 443 S.C. at 293, 904 S.E.2d at 605. Like other inmates, Sigmon reads *Owens* as requiring the Director to provide "basic facts," *id.* at 292, 904 S.E.2d at 604, that *the inmate wants to know* before making an election. That's not, of course, what *Owens* held.

Sigmon's assertion of a due process violation is off base. He appears to assert a violation of procedural due process. *See* Mot. 4–5. At its "core," "due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). Sigmon has received that process: The State gives a condemned inmate (1) notice of the Director's certification, *see* S.C. Code Ann. § 24-3-530(E) (requiring written notice), and (2) the opportunity

to challenge—directly in this Court, no less—whether the Director provided enough information in his certification, *see Owens*, 443 S.C. at 292–93, 904 S.E.2d at 604–05. Indeed, he is in the process of doing so at this time. However, what Sigmon actually seems to be complaining about is whether the Director has provided enough information. That's a substantive question. And that's a question that this Court has already answered in denying Owens's objection.[2] Sigmon provides no reason to reconsider that answer.

III. If the timing of executions is changed, the scheduled should be condensed, not extended.

Sigmon's last argument and requests for relief rest on timing— he requests not just a stay of his execution but would also have this Court revisit the timing of notices established in this Court's August 30, 2024 Order. *See* Mot. 9–10. Neither contention withstands scrutiny.

A few more days or weeks won't give Sigmon (or any other condemned inmate) any additional information. Again, the debate over pulmonary edema in lethal injection executions isn't new, and tellingly, even with Moore's autopsy, Dr. Waisel adds nothing new to that debate. Sigmon offers no reason to suggest that Bowman's autopsy will do so. Moreover, Sigmon's insistence that the formal report is crucial to his understanding of the findings is a bit of a red herring. The autopsy was conducted on February 1, 2025, the day after Bowman's execution. Upon information and belief, an expert for Sigmon has already discussed the pathologist's findings

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[2] Similarly, a federal district court rejected Bowman's motion for a preliminary injunction/temporary restraining order relying on this Court's analysis of the Director's certification obligations and finding the statutory provision did not create a "liberty interest" in additional information. (Attachment 2, at 20). Further, the district court concluded Bowman failed to show a liberty interest violation in the ability to choose his method of execution as he was "given all the information that the Death Penalty Statute entitled him to and" was "allowed to make the choice that the Statute entitled him to make...." (Attachment 2, at 21-22). To put a fine point on it, injunctive relief was denied because Bowman failed to "demonstrate[] any likelihood of success on the merits...." (Attachment 2, at 22).

to be reported. Had any proposed finding caused concern, the concern could certainly have been placed in an affidavit and provided to this Court. That is notably absent.

As to revisiting the August 30, 2024 Order, the inmates, jointly, have previously requested and received a pause in the schedule. (Appellate Case No. 2024-001373, Order, November 14, 2024). It is curious that Sigmon asks to revisit the timing for *other* executions in this request for stay of his execution scheduled for March 7, 2025. There is an obvious standing problem which is not addressed in the summary request for relief. However, should the Court choose to allow him to argue for other inmates, the facts show that the time should be *reduced*, not extended.

This Court has already granted the condemned inmates five weeks between executions – an interval that S.C. Code Ann. § 17-25-370 does not contemplate.[3] Consequently, these inmates have already received more time than state law typically allows. If anything, any change to the execution schedule should go the other way. The State has now carried out three executions by lethal injection without incident. However understandable and cautious the initial 35-day schedule was after more than a decade without any executions, the concerns prompting the 35-day intervals have been shown not to exist. The notices should issue in accordance with the statute, or, alternatively, with significantly less time between issuances.[4]

To be clear, the State is not asking—at least not yet—to amend the schedule. But making such a request remains a possibility, particularly if this 35-day schedule should be considered for

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[3] Section 17-25-370 provides that the Clerk of this Court should issue a notice to carry out the duly imposed death sentence at the conclusion of remedies. *Roberts v. Moore*, 332 S.C. 488, 488, 505 S.E.2d 593 (1998) (describing the act of issuance under section 17-25-370 as "a ministerial duty of the Clerk of this Court").

[4] Separately, this Court directed that the Clerk would only issue notices on Fridays to address a potential timing issue with challenges to the Director's affidavit. *Owens,* 443 S.C. at 292, 904 S.E.2d at 604, n. 23. That provision is not challenged here.

use in delaying notices for other inmates, or otherwise as a baseline for delay in future close-in-time executions.

CONCLUSION

For all the above reasons, the Court should overrule the Objection; deny the stay of execution; and deny the requested modification of the schedule of the remaining two executions as set out in the August 30, 2024 order.

Respectfully submitted,

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