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May 23 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

Respondent,

v.

STEPHEN STANKO (Horry County),

Appellant.

Appellate Case No. 2025-000889

STATE'S RETURN TO MOTION FOR EXECUTION METHOD CERTIFICATION OVERSIGHT

The Clerk of this Court issued Stephen Stanko's execution notice on May 16, 2025. That same day, Stanko filed a motion for execution method certification oversight. As a threshold issue, Stanko's motion is now moot. The Interim Director filed his affidavit certifying the availability of all three constitutional methods on May 21, 2025. But even so, the motion lacks merit because Stanko is not entitled to the additional information he requests. Further, Stanko's claims of error in the recent executions are simply wrong. Notably, the same arguments as to recent lethal injection executions were previously offered in objections to prior certifications. Those arguments failed to force disclosure of additional information and should similarly fail here. In support of this position, Respondent would respectfully show the Court:

1. The Interim Director filed his affidavit with the certification of available execution methods on Wednesday, May 21, 2025. The request for "oversight" in the certification process is now moot. *See, e.g., Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect

upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court."). The motion should be denied for that reason. But even if the Court were to reach the merits, and Respondent maintains it should not, Stanko has identified nothing that allows or warrants the requested judicial "oversight" of the Director's certification.

2. Stanko essentially seeks to enforce a right to information via a request for certification oversight; however, Stanko has no such right.[1] The certification provision in S.C. Code Ann. § 24-3-530 places a duty on the Director both to "make the determination" and disclose the availability of the methods by affidavit filed with this Court. A plain reading of the statute shows its focus on the Director's steps. *Owens v. Stirling*, 443 S.C. 246, 293, 904 S.E.2d 580, 605 (2024) ("To make the determination, the Director necessarily goes through a process that he decides is appropriate for satisfying himself that the drugs are capable of carrying out the death sentence according to law."), *id.*, at 290, 904 S.E.2d at 603–04 (referencing the Director's "responsibilities."). Further, as to the affidavit filed with this Court: "The text of section 24-3-530 requires nothing more than that the Director set forth that process," *i.e.*, his process for assertion of availability, "in sufficient detail that a condemned inmate and his attorneys may understand

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[1] Stanko's argument treads well-worn ground. In particular, Brad Sigmon argued for more information in certification, and alleged that prior executions were not conducted according to expected lethal injection protocol. This Court twice rejected that argument. *See State v. Sigmon,* Appellate Case No. 2025-000187, February 19, 2025 Order (denying motion) and March 4, 2025 Order (denying reconsideration). Moreover, federal courts have agreed there is no such right to information under the certification process or, for that matter, various other theories. *See* Attachment 1, *Bowman v. Stirling*, 3:25-cv-00199-JDA, ECF No. 21 at 20 ("Because the Statute does not create a liberty interest in Plaintiff's being given the Additional Information as part of the Director's Reporting Duty, Plaintiff cannot show that he was deprived of any such interest."); *Just. 360 v. Stirling*, 42 F.4th 450, 459–60 (4th Cir. 2022) (in challenges under freedom of speech, finding "[e]ven if we were to grant Justice 360 the exact relief it has requested, Stirling would still retain pure discretion over whether to provide (or not provide) the execution-related information the organization is seeking" noting protocol information had been deemed "security plans" not subject to disclosure). Nothing has changed as to scope of the statute and particularly as to the Director's duty. This latest motion following those failed lines of argument should also be denied.

whether there is a basis for challenging the constitutionality of the impending execution." *Owens,* at 293, 904 S.E.2d at 605. Notably, this Court has "*decline[d]*" to instruct the Director on specifics of his review and affidavit, finding "that is initially for the Director to decide." *Id* (emphasis added).

In recognizing the Director's well-defined duty under the statute, this Court has repeatedly rejected inmates' attempts to obtain more information under a challenge to the certification affidavit. *See State v. Owens,* Appellate Case No. 2024-001397, Sept. 5, 2024 Order; *State v. Sigmon,* Appellate Case No. 2025-000187, February 19, 2025 Order and March 4, 2025 Order. After *Owens v. Stirling,* the Director's certifications have all followed the "extreme example[]" set out in the opinion for sufficient information. 443 S.C. at 293, 904 S.E.2d at 605. Though Stanko appears to criticize adherence to that structure, that the Director consistently follows the offered example confirms the effort to adequately provide the necessary and allowable information consistent with his obligations under both S.C. Code §§ 24-3-530 and 580. *See Owens*, at 291, 904 S.E.2d at 604 (the Director "must comply with the confidentiality requirements of the shield statute as set forth in section 24-3-580" in providing his assertions in the affidavit).

Moreover, Stanko's premise for this latest attempt is flawed legally and factually. Stanko asserts that oversight is warranted because of "evidence that recent executions by both firing squad and lethal injection have not been conducted in accordance with ... certifications and protocols." Motion, at 1. However, a claim that prior executions did not follow the protocol even if true (though it is not) cannot modify the statutory provisions for the certification. The statute is what the statute is. Even so, Stanko's allegations that recent executions went awry by failure to follow the "certifications and protocols" are incorrect.

3. As to the firing squad, Stanko liberally cites to an attachment to a one-sided "status report" submitted in Mikal Mahdi's closed execution case, (and related media reports based on that filing), as evidence of error in the Mahdi execution. Of course, repeating untested allegations does not make them any stronger. But that aside, several critical facts show that the execution was properly carried out, and that there is ample reason to reject argument to the contrary.

First, Mahdi was struck with three bullets. All three rifles were fired, each with one bullet. The autopsy shows two paths for the three bullets. Motion Exhibit 1, Mahdi Autopsy, at 2-3. [2] The autopsy also confirms that there were no exit wound(s) to suggest a through and through, separate path. *See* Motion Exhibit 1, Mahdi Autopsy, at 2.

Second, those bullets hit Mahdi's heart. The autopsy describes each tract as going through "the pericardium sac" and "the right ventricle." Motion Exhibit 1, Mahdi Autopsy, at 2. That is the heart.

Third, SCDC used an aim point on the chest, (*see* Motion, at 10 (acknowledging press release information regarding same)), and the bullets hit the target. As a media witness to the execution reported, the "target with the red bull's-eye over his heart was pushed into the wound in his chest." Jeffrey Collins, *South Carolina Executes Second Man by Firing Squad in 5 Weeks*, Associated Press (Apr. 11, 2025), https://tinyurl.com/29pfv9sy.

Fourth, the allegations of pain referenced in the motion appear tied directly to the process of death. To be sure, as this Court has said, "there is simply no elegant way to kill a man." *Owens*,

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[2] Mahdi's counsel retained an expert who opined, that in his "experience" the shared path would be "extraordinarily uncommon." Motion Exhibit 3, at 4. However, he claims no expertise in reviewing gunshots inflicted by well-qualified marksmen. And, though aware of information that "practice shootings by the firing squad members" resulted in "targets [that] sometimes had only one or two holes from the three bullets," he simply dismissed that information as not "independently verified," while noting differences in skin and paper (though a paper target is used during the execution). Motion Exhibit 3, at 5.

443 S.C. at 269, 904 S.E.2d at 592. But the firing squad (objectively or in Mahdi's case) does not "inflict unnecessary and excessive pain that goes well beyond what is reasonably necessary to carry out a death sentence." *Id.* at 272, 284, 904 S.E.2d at 594, 601. The acknowledgment of some pain in the execution process is not surprising since it results in death. "[W]hile most humans wish to die a painless death, many do not have that good fortune." *Glossip v. Gross,* 576 U.S. 863, 869 (2015). The Supreme Court has explained that "[h]olding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether" which the Court has repeatedly declined to do. *Id.* But Stanko's offer of "facts" as to extent of conscious pain is questionable. While Mahdi may have "groaned" two times around 45 seconds, even Mahdi's post-execution expert admits that "groaning or making similar noises may be conscious or involuntary." Motion Exhibit 3, at 7. As this Court has already found, speculation is insufficient to attack the method generally. *See Owens*, 443 S.C. at 275, 904 S.E.2d at 595 (refusing to find a method cruel based on "inconclusive" testimony). It is insufficient here, as well.

Fifth, to be clear, SCDC did not provide any instructions or restrictions on the pathologist regarding photographs or x-rays for the Mahdi autopsy, or, for that matter, the autopsies for Moore, Bowman, or Sigmon. And, to be clear, the autopsy was the result of an option offered to and decided by Mahdi's family. Moreover, Mahdi's counsel informed SCDC that the family requested cremation after the autopsy. Again, not a SCDC decision. Innuendo that additional evaluation cannot be made because of a SCDC decision regarding either the autopsy or cremation would be false. Likewise, attempts to pull from the absence of more photographs, etc., some negative inference as to SCDC conduct would be misplaced. At bottom, the cause of death was clear; the manner of death was clear. *See* Motion Exhibit 1, Mahdi Autopsy, at 1, ("CAUSE OF DEATH:

MULTIPLE GUNSHOT WOUNDS TO THE CHEST"), *id,* at 2, (notation "executed by the State"). The goal of autopsy is to determine both of those things. It did.

Sixth, comparison of certain Mahdi execution details with Sigmon execution details does not aid Stanko in his motion. Nothing requires such comparison. The method is the same. Even so, the consistency outweighs the inconsistency: each execution was completed following the same protocol; each resulted in disruption of the heart; each, beginning at 6:00, was completed within a matter of minutes, with Sigmon declared dead at 6:08, and Mahdi at 6:05; each inmate had an aim point affixed on the chest; each aim point was hit; each inmate had damage to the heart; and, critically, each inmate opted for this particular mode of execution. To be sure, execution means death, and that will continue to unsettle those opposed to the death penalty no matter the method.[3] Yet nothing here demonstrates any level of legal concern to delve further into the process of execution (much less to graft onto the certification statute some guarantee of information).

Lastly, to the extent Stanko claims he cannot choose this method because he lacked sufficient information, Stanko actually has two completed firing squad executions to consider. Nothing about those executions, though, requires that he be provided even more information under some extra-statutory process.

4. As for lethal injection, again, this is not the first time this Court has been presented with incorrect argument that prior executions did not go as planned in an attempt to force disclosure

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[3] The increased acceptance of the firing squad as a method of execution likely makes some potential challenges and arguments against it an urgent priority for anti-death penalty groups. The method is now authorized in five States: Utah, Idaho, South Carolina, Mississippi and Oklahoma. This shows a growing acceptance given that in 2022, the Supreme Court noted only four jurisdictions allowed the method. *See Nance v. Ward*, 597 U.S. 159, 163 (2022). In fact, Idaho has made it the State's primary method (though its effective date is delayed for implementation). *See* Idaho Code Ann. § 19-2716 (West). The momentum shows that legislatures, including ours, have considered the facts and varying opinions and accept the method for its superior speed and accuracy in execution.

of more information. Stanko reiterates the contention the lethal injection executions of Freddie Owens, Richard Moore, and Marion Bowman went awry and required an unexpected second dose of pentobarbital. Motion, at 5, 14, 15. These assertions were incorrect when made in the Brad Sigmon case, Appellate Case No. 2025-000187, and remain incorrect for all those same reasons previously submitted. Attachment 2, *State v. Sigmon*, Appellate Case No. 2025-000187, Return to Objection to Certification. Plus, Stanko's assertion that the Department "has resorted to administering a second dose" in the executions *see* Motion, at 14, neither adequately nor accurately conveys what has been previously acknowledged. The fact remains, as pointed out previously in the Sigmon case,

> A second series [of the lethal injection drug] was administered according to SCDC's protocol. As Sigmon knows because Sigmon has the protocol (the revised protocol was provided to Sigmon under a confidentiality order as part of the *Owens v. Stirling* litigation challenging the methods of execution and section 24-3-530), there is no discretion in the administration of the second series of pentobarbital. Nor is there, as Dr. Antognini explained, anything unusual about death by lethal injection taking more than ten minutes. Thus, to the extent that Sigmon suggests that the second series was needed to bring about death, he has *nothing* to support that, and the court should give it no credence.

Attachment 3, *State v. Sigmon*, Appellate Case No. 2025-000187, Return to Motion for Reconsideration, at 3-4.

Nothing has changed. Stanko's position, just like Sigmon's, fails in law and fact. But critically for evaluation here, nothing in the protocol or facts of the prior execution affect the limitation of S.C. Code Ann. § 24-3-530's reach. As this Court has found regarding a similar certification affidavit:

> ...The affidavit adequately explains "how [Director Stirling] determined the drugs were of sufficient 'potency, purity, and stability' to carry out their intended purpose." *See Owens v. Stirling*, Op. No. 29222 (S.C. Sup.Ct. filed July 31, 2024) (Howard Adv. Sh. No. 29 at 18, 52). Further, the affidavit provides sufficient detail for

> Appellant to make an informed election of his method of execution and for Appellant and his attorneys to "understand whether there is a basis for challenging the constitutionality of the impending execution." *See id.,* at 51.

State v. Owens, Appellate Case No. 2024-001397, September 5, 2024 Order (brackets in original).

The motion for oversight, as it merely attempts to reach the same impermissible end, should be denied.

5. Finally, Stanko's requests for specific information, particularly of past executions, as part of the certification, *see* Motion, at 11-13 and 15-16, directly collides with this Court's instructions that the Director "must comply with the confidentiality requirements of the shield statute as set forth in section 24-3-580." *Owens*, at 291, 904 S.E.2d at 604. The request also shows inconsistency between the stated purpose of the motion and the requested relief. Presumably, Stanko requests judicial oversight. In other words, if Stanko were right about the need for oversight, the information would be provided to the Court, not Stanko.

THEREFORE, for all the foregoing reasons, this Court should deny the motion.

Respectfully submitted,

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May 23, 2025

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