THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appellate Case No. 2010-154746
Case No. 2025-000889

The State,
Respondent,
v.

Stephen Christopher Stanko,
Appellant.

REPLY TO STATE'S RETURN TO MOTION FOR EXECUTION METHOD CERTIFICATION OVERSIGHT AND OBJECTION TO CERTIFICATION OF EXECUTION METHODS

Stephen Stanko, through undersigned counsel, submits the following in reply to the State's Return to Motion for Execution Method Oversight ("Return") and objects to the Affidavit of Joel Anderson, Acting Director of the South Carolina Department of Corrections (SCDC) certifying the available methods of execution. The State asserts this Court is powerless to oversee the certification process—regardless of issues arising from prior executions so long as the Director of SCDC's certification contains the language previously approved by this Court. That undermines the authority placed in this Court by the execution method statute's designation of the Court as the entity receiving the certification. *See* S.C. Code § 24-3-530(B); *Owens v. Stirling*, 443 S.C. 246, 292–93, 904 S.E.2d 580, 604–05 (2024) (describing the certification requirements and procedures). In short, this Court has the authority to order SCDC to provide additional information to allow Stanko to make an informed election of execution method and for his counsel to

"understand whether there is a basis for challenging the constitutionality of the impending execution." *Owens*, 443 S.C at 293, 904 S.E.2d at 605.

Aware of the circumstances of the five recent executions, Stanko made this motion with the hopes SCDC would clarify the circumstances requiring the administration of second doses of pentobarbital for the executions of Freddie Owens, Richard Moore, and Marion Bowman and explain why the entire firing squad failed to directly strike the heart during the execution of Mikal Mahdi. SCDC declined to do so.

I. THE REQUESTED RELIEF IS NOT MOOT.

The State's assertion that the Interim Director's certification on May 21, 2025, renders Stanko's Motion for Execution Method Certification Oversight ("Motion") moot is incorrect. This Court was certainly aware it set the State's deadline to respond to Stanko's Motion two days after the certification deadline and would not have done so if it anticipated the certification would render Stanko's Motion moot. Instead, the Court's deadline allowed the Department of Corrections time to review the Motion and potentially address Stanko's concerns in the certification. That the Interim Director chose not to address any of those concerns—by submitting a certification materially identical to previous certifications—does not render Stanko's request for relief moot. Indeed, it requires the Court to exercise its oversight of the certification process because the Department has failed to address changing circumstances in the certification process itself.

Additionally, *Owens* explicitly contemplates this Court's authority to determine the sufficiency of the Director's certification after it is submitted to the Court. *Id.* ("If a challenge is made, this Court will promptly decide if the challenge warrants relief."); *id.* at 292, n.23, 904 S.E.2d at 605, n.23 ("If the inmate claims the information in the affidavit does not comply with the requirements of section 24-3-530, he must file a motion for stay of execution. . . . This procedure gives the inmate at least eight days in which to evaluate the affidavit and file any

motion."). Further, if this Court finds the certification of Interim Director Anderson insufficient, the Court could simply issue an order staying Stanko's execution, direct SCDC to provide additional information, and issue a new notice of execution, which would reset the certification and election process. S.C. Code § 24-3-530(A) ("If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date."). A finding of mootness here, as suggested by the State, would render the certification unreviewable and be clearly contrary to *Owens*.[1]

II. THE FACTUAL DISPUTES OVER THE MAHDI FIRING SQUAD EXECUTION REQUIRE ADDITIONAL FACT FINDING.

Contrary to the evidence presented by Stanko that Mahdi's firing squad execution deviated from the certification and protocol, the State maintains Mahdi's firing squad "execution was properly caried out." In support of this assertion, the State relies on a "comment" in Mahdi's autopsy to demonstrate that all three bullets fired and struck Mahdi. This "comment" does not support the State's heavy reliance. It is not a finding; in fact, it is separated from reported "Evidence of Injury" and other findings in the autopsy. *See* Motion Ex 1., at 2–3. Further, the comment only indicated "[i]t is believed that [the] gunshot labeled (A) represents two gunshot wound pathways." Motion Ex. 1, at 2–3. This "belief" on the part of the pathologist is far from a

[1] Even if the certification technically mooted Stanko's Motion, refusal to consider his motion on that basis would be inappropriate given that he filed his motion as soon as practicable after the issuance of his execution notice (and five days before the certification). A finding of mootness would make Stanko's claims capable of repetition, yet evading review because the certification could be filed at a time to prevent this Court from ever ruling on any certification-related motions. Further, this issue—information related to carrying out executions—is one of public interest, satisfying both exceptions to mootness. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26–27, 630 S.E.2d 474, 478 (2006) ("Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of public interest.").

finding to a reasonable degree of medical certainty and it is not based on any examination of the firearms used by SCDC or evidence from the autopsy and bullet path tracing to justify the "belief." Rather, this "belief" appears to be based on representations of an unidentified SCDC employee. Motion Ex. 3, at 5 ("When Dr. Marcus found only two entrance gunshot wounds, he related that he was told by SC Department of Corrections about the practice shootings by the firing squad members, in which it was represented to him that those targets sometimes had only one or two holes from three bullets.")

Additionally, the State ignores clear evidence that the execution did not go as planned, most significantly that most of the damage was to Mahdi's pancreas and liver, not his heart. In asserting the bullets hit Mahdi's heart, the State ignores that merely a bullet shard perforated a single ventricle of Mahdi's heart, whereas the firing squad execution of Sigmon "completely fragmented" his heart. [2] Motion Ex. 2, at 3.

The available information demonstrates material disputes related to Mahdi's execution.[3] As the entity that issues notices of execution and to which the execution method and completion

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[2] In an attempt to minimize the issues with Mahdi's execution, the State misrepresents Dr. Arden's report by stating, "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.'" Return, at 5. Dr. Arden distinguished between the groans at 45 seconds, which were likely made consciously, and the groans that occurred later. Motion Ex. 3, at 7.

[3] The State seemingly asserts additional information cannot be provided because Mahdi's family requested his cremation. *See* Return, at 5. None of the information requested in Stanko's motion concern additional review of Mahdi's remains. Instead, Stanko requested information about SCDC's already-conducted after-action review, the procedures it employs for locating an inmate's heart, analysis of the recovered bullet fragments, and a description of the training undertaken by the firing squad team members. Motion, at 11–12. This is all information in the possession of SCDC. Nor would any of this information violate the shield law, S.C. Code § 24-3-580, because Stanko acknowledged the information would need to be redacted to remove any identifying information. *See* Motion, at 11 n.11.

are certified, this Court should exercise its oversight authority and require SCDC to provide more information in light of the evidence that Mahdi's execution did not go according to plan.[4]

III. THE LETHAL INJECTION INFORMATION REQUESTED HAS NOT PREVIOUSLY BEEN DENIED BY THIS COURT AND SHOULD BE PROVIDED.

The State relies on this Court's previous rejection of inmate requests for additional information regarding lethal injection; however, Stanko has requested different information. Previous requests have not sought SCDC's after-action review or the information relied on to decide whether to administer the second dose of pentobarbital. *Compare* Objection, *Sigmon v. State*, No 2025-000187, at 11 (Feb. 14, 2025), *with* Motion, at 11–12. Further, Stanko has not requested the beyond use or expiration dates or storage conditions. *Id.* While Stanko has requested SLED's testing, as did prior inmates, Stanko's focus is a request for updated testing given the problems with prior pentobarbital administration and no indication that SLED has updated its testing since the initial certification in *Owens* in September. Nothing would prohibit SCDC from providing updated testing information. In fact, it provided exactly such information regarding the electric chair, which it certified was subject to updated testing on May 15, 2025. Affidavit of Joel E. Anderson, *State v. Stanko*, No. 2010-154746, at ¶ 8 (May 21, 2025).

The State also asserts there is no cause for concern with the administration of a second dose of pentobarbital in the prior lethal injection executions because "there is no discretion in the administration of the second series of pentobarbital." Return, at 7. This is incorrect on two fronts. First, the certification—now in all six execution method certifications—indicated "lethal injection

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[4] The State's assertion that attacking the firing squad is an "urgent priority for anti-death penalty groups," Return, at 6, n.3, is misplaced in response to Stanko's Motion. Undersigned counsel did not request this information as part of anti-death penalty advocacy. Rather, they requested this information as part of their duty to advise their client on the choice between execution methods. Counsel recognized gaps in the information they had to allow them to provide this advice and requested information in order to fulfill their appointed role as Stanko's counselors and advisors.

is available via a single dose of pentobarbital." Certifications, at ¶ 10. The State has offered no explanation for why SCDC continues to assert it can carry out lethal injection execution by a single dose when it has, in fact, taken two doses in each of the prior executions and itself has asserted it must administer a second series of pentobarbital. Second, this Court is aware from its review of the protocol in the *Owens* litigation that the State misrepresents the execution protocol in asserting "there is no discretion in the administration of the second series of pentobarbital." Return, at 7. The protocol, filed under seal with this Court, indicates the execution team must decide whether to administer the second dose of pentobarbital ten minutes after administration of the first dose. Sealed ROA (Vol. V) 1748 (filed in *Owens v. Stirling*, No. 2022-001280) (describing the process for determining whether to administer a second dose of pentobarbital). Because that information could indicate whether the inmates were still alive and, possibly, conscious after ten minutes during the prior lethal injection executions, Stanko has asked that this Court order SCDC to turn over the information it relied on in making that decision. Motion, at 16.

Finally, the State is incorrect in asserting the information Stanko has requested cannot be provided pursuant to the shield law. Return, at 8 (citing S.C. Code § 24-3-580). Stanko has not asked for identifying information of the execution team members and has specifically acknowledged that any identifying information could be redacted. To the extent the State believes some of the requested information could lead to identifying information, the State should specifically explain how that is so, rather than providing a conclusory statement that all the information requested would violate the shield law.

CONCLUSION

For the reasons stated above and in Stanko's Motion, this Court should order the Department of Corrections to meaningfully inform Stanko about its firing squad and lethal

injection methods. The requested information is necessary for undersigned counsel to adequately advise Stanko regarding his prospective election and to fully determine the extent of the "bas[e]s for challenging the constitutionality of the impending execution." *Owens*, 443 S.C at 293, 904 S.E.2d at 605.

To the extent a stay of execution is needed to permit SCDC to collect and provide the information in order for Stanko to make use of it in relation to his election, which is currently due by Friday, May 30, 2025, Stanko requests this Court stay his execution and reset the certification and election deadlines by issuing a new notice of execution. *See* S.C. Code § 24-3-530 (A), (B).

Respectfully submitted,

By s/ *Lindsey S. Vann*

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