

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Case No. 2002-024388

BRAD KEITH SIGMON
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

MOTION FOR STAY OF EXECUTION

Brad Keith Sigmon, an indigent prisoner under sentence of death, respectfully requests that this Court stay his execution, currently scheduled for **June 18, 2021**, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Mr. Sigmon submits a stay is in order to prevent his execution before the retroactivity and constitutionality of South Carolina's amended death penalty statute—the subject of his pending, expedited challenge in the Richland County Court of Common Pleas—can be adjudicated. Despite the General Assembly's express intent to provide condemned prisoners with a choice in the manner of their death, the South Carolina Department of Corrections (SCDC) has advised this Court that it has the means to conduct an execution only by electrocution, the most painful and torturous of the methods authorized by the revised version of S.C. Code Ann. § 24-3-530 (2021). As forcing Mr. Sigmon to die in the electric chair both violates the statute under which he was sentenced and ignores the mandate of the statute as amended, this Court should grant a stay. In support of this motion, Mr. Sigmon apprises this Court of the following facts and legal principles.

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S.C. SUPREME COURT

I. Relevant Procedural History

In 2002, Mr. Sigmon was convicted of murder and sentenced to death in Greenville County, South Carolina. Mr. Sigmon subsequently sought appellate and post-conviction relief, which were denied. *State v. Sigmon*, 366 S.C. 552 (2005); *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394 (2013); *Sigmon v. Stirling*, 2018 U.S. Dist. LEXIS 168699; *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020). Mr. Sigmon filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on January 8, 2021. This Court then issued an execution date for Mr. Sigmon for February 12, 2021. Order, *State v. Sigmon*, No. 2002-024388 (Jan. 21, 2021).

When the United States Supreme Court declined to hear Mr. Sigmon's federal habeas appeal the then-operative version of S.C. Code § 24-3-530 (2007) allowed an inmate to select between lethal injection and electrocution, and defaulted to lethal injection if the inmate did not make a choice. Because SCDC had not disclosed its protocols for either of the authorized methods of execution, Mr. Sigmon declined to make an election of execution method and the method of execution defaulted to lethal injection.

When SCDC subsequently informed this Court it would not be able to obtain lethal injection drugs for Mr. Sigmon's execution, this Court issued a stay of execution until SCDC informed this Court that it "has the ability to carry out the execution by lethal injection, that the petitioner has made an election to be electrocuted, or that there has been some change in the law which will allow the execution to take place." Order, *State v. Sigmon*, No. 2002-024388 (Feb. 4, 2021).

During its 2021-2022 Session, the General Assembly took up legislation that would amend the execution methods statute by changing South Carolina's default method of execution to electrocution. A bipartisan pairing of senators, however, sponsored an amendment to that

legislation that would allow a condemned prisoner to elect the firing squad instead, contending that it “is more humane than the electric chair,” while also contending “that lethal injection is the most humane.”¹

On May 14, 2021, the General Assembly adopted amendments to § 24-3-530 that, inter alia: 1) added the firing squad to the methods of execution that the condemned prisoner could elect; and 2) made electrocution the default method of execution if an inmate did not make a choice or if one or both of the other authorized methods are unavailable.² The governor signed these amendments into law on May 15, 2021. The revised bill is attached as Exhibit A.

On May 17, 2021, Mr. Sigmon filed a lawsuit in the Court of Common Pleas challenging the revised statute as violative of the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution; the prohibitions on ex post facto punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution. That litigation is pending, and a hearing on Mr. Sigmon’s motion for preliminary injunction has been set for June 7, 2021. The complaint and motion are attached as Exhibit B.

On May 19, 2021, only four days after the new bill was signed into law, SCDC sent a letter

¹ Emily Bohatch, *SC Senate adds firing squad as method of execution as it advances electric chair bill*, The State (March 2, 2021) (<https://www.thestate.com/news/politics-government/article249627543.html>). The Republican sponsor of the bill, Senator Hembree, stated that “[c]arrying out justice is important....But you don’t want to torture anybody needlessly. That’s not the government’s place.” Senator Harpootlian, the Democratic sponsor, stated that the electric chair is “an extraordinarily gruesome, horrendous process where they essentially catch on fire and don’t die immediately.”

² As discussed infra, Sigmon has initiated litigation challenging, inter alia, the vagueness of the amended statute.

to this Court and to undersigned counsel stating that “the Department is now able to carry out executions by electrocution.”. SCDC made no representations as to the availability of lethal injection or the firing squad, but has made public statements indicating that it has no lethal injection drugs and protocol or facility for the firing squad, although development is underway.³

Counsel for Mr. Sigmon and Freddie Owens immediately responded, taking the position that the stay should remain in place as SCDC did not (and still does not) “have the ability to perform the execution as required by law” if only one of the methods the General Assembly expressly intended to provide is currently available.

This Court issued a second execution warrant yesterday, May 27, 2021, stating in the accompanying letter that the notice from SCDC “dissolved” the prior stay order and that it now had a “ministerial duty to issue an execution notice in this case.” Order, *State v. Sigmon*, No. 2002-024388 (May 27, 2021). Thus, Brad Sigmon will be required to select from available methods (i.e., only electrocution) next Friday, June 4, and his execution is set to take place on Friday, June 18, 2021.

II. Reasons to Delay Setting an Execution Date or Issue a Stay of Execution.

Because SCDC does not have the means to lawfully carry out this execution under the revised version of S.C. Code Ann. § 23-4-530, the constitutionality of the law itself is currently being litigated, and counsel has not been able to adequately prepare for end-stage proceedings in the pandemic, “exceptional circumstances” warrant issuance of a stay. *See In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140 (1996).

³ See Chris Lavender, *Spartanburg man's death penalty case under review by South Carolina Supreme Court*, Herald-Journal (May 7, 2021) (available at <https://www.goupstate.com/story/news/2021/05/07/sc-supreme-court-reviewing-richard-moores-death-penalty-case-spartanburg-firing-squad-electric-chair/4986179001/>).

A. *Permitting an execution to proceed with only one authorized method to select from contradicts the General Assembly's intent in amending the statute.*

In advising this Court that executions can proceed by electrocution only, SCDC negates much of § 24-3-530. The General Assembly expressly decided to retain a condemned prisoner's right to elect his method of execution. The statute requires that an inmate select a method of execution 14 days prior to his scheduled execution date. If the General Assembly contemplated that only one method may be available, thus negating any 'choice,' it would not have retained this requirement. It is unclear how SCDC intends to comply with the statute without offering an inmate a choice between two or more methods. In fact, State Senator Dick Harpootlian, a sponsor of the bill, clearly stated that SCDC "shouldn't be electrocuting anybody until they have the alternative of a firing squad in place. If they aren't doing that, they are violating the statute that we just passed [...] If there are no drugs, Corrections must offer the inmate a choice between a firing squad and the electric chair — that is what we passed."⁴ While SCDC does not have a firing squad protocol at this time, they have publicly stated they are actively working on developing one.⁵

The General Assembly originally added lethal injection as an alternative method of execution to ensure inmates had the option to select what the Supreme Court and others have consistently identified as the most humane method of execution. *See, e.g., Baze v. Rees*, 533 U.S. 35, 62, (2008); *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020); *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007) (finding that there is a "consensus among the States and the Federal

⁴ John Monk, *Prison system tells Supreme Court: SC's electric chair is ready for go*, The State (May 22, 2021) (available at <https://www.thestate.com/news/local/crime/article251598683.html>).

⁵ See Chris Lavender, *Spartanburg man's death penalty case under review by South Carolina Supreme Court*, Herald-Journal (May 7, 2021) (available at <https://www.goupstate.com/story/news/2021/05/07/sc-supreme-court-reviewing-richard-moores-death-penalty-case-spartanburg-firing-squad-electric-chair/4986179001/>).

Government that lethal injection is the most humane method of execution”). After being informed that SCDC was unable or unwilling to obtain the lethal injection drugs this year, the General Assembly adopted firing squad as a second alternative to avoid the ““needless torture”” of an automatic default to being ““burned to death”” in the electric chair.⁶ A stay of execution is necessary until SCDC certifies that two or more of the authorized methods are available to avoid violating Mr. Sigmon’s statutory and constitutional rights.

B. The constitutionality of the revised statute must be resolved before an execution can proceed

Mr. Sigmon, along with Mr. Owens, filed a complaint and request for preliminary injunction in the Richland County Court of Common Pleas on Monday, May 17, 2021, seeking a judicial determination regarding the constitutionality of the revised statute. The complaint alleges that the revised statute violates the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution; the prohibitions against ex post facto punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution.

In order to resolve this issue in a timely fashion, Mr. Sigmon and Mr. Owens requested (and received) an expedited hearing schedule. Judge Newman has ordered the State to answer the motion by next Friday, June 4, and Mr. Sigmon and Mr. Owens must reply by the following Sunday. Judge Newman will hold a hearing on the preliminary injunction on Monday, June 7 (after Mr. Sigmon is required by statute to select a method of execution). A decision may not be rendered

⁶ Bohatch, *supra* at n.1 (quoting Hembree and Harpootlian, respectively).

until after his June 18 execution date. To allow for this expedited consideration of the constitutionality of the statute, and to avoid carrying out executions under a possibly unconstitutional law, a stay should be entered.⁷

C. The current execution date does not allow for counsel to adequately prepare for potential end-stage litigation and a clemency petition

The undecided legality and retroactivity of the amended statute, coupled with SCDC's limited fulfillment of its mandate, make it impossible for counsel to effectively advise their client of the ramifications of his election of a method of execution. Despite these outstanding legal questions counsel's ethical duty to their client obligates them to treat any execution date as "real," and prepare end-stage proceedings, including a petition for executive clemency from the Governor under Article IV, Section 14. S.C. Const. art. 4, § 14. *See also* S.C. Code §§ 24-21-910 to 24-21-1000.

Clemency plays a vital and deeply-rooted role in our system of capital punishment. *Herrera v. Collins*, 506 U.S. 390, 411, 415 (1993) (holding that because "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible," clemency is the "fail safe" to prevent miscarriages of justice after all judicial process has been fully exhausted); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281 (1998) (allowing the executive to "consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations").

To represent Mr. Sigmon in keeping with the ABA standards⁸ and the dictates of the United States Supreme Court, counsel would need meaningful access to Mr. Sigmon, the ability to conduct

⁷ While counsel has requested a preliminary injunction in Circuit Court, a stay of execution from this Court remains necessary as only this Court can stay an order issued by the Court.

⁸ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.2, p. 1088 (2003). The ABA Guidelines have been recognized by this Court as

the extensive investigation necessary, and adequate expert access to Mr. Sigmon. *See, e.g., Harbison*, 556 U.S. at 184–86. Because of the COVID-19 pandemic, however, none of these has been fully available for nearly fourteen months. Moving forward with only what limited investigation that has been performed under current conditions would violate minimum standards of performance, as the collected information would be unreliable and incomplete; would deprive Mr. Sigmon of his meaningful representation; and would prevent Governor McMaster from considering the “wide range of factors” necessary to carry out his solemn duty and determine whether Mr. Sigmon is deserving of clemency.

A stay of execution is necessary to allow adequate time for Mr. Sigmon’s counsel to advise him on the election process and to prepare for and develop a clemency petition and other collateral litigation.

CONCLUSION

These extreme and exigent circumstances warrant the issuance of a stay to protect Petitioner’s statutory and constitutional rights.

Respectfully submitted,

s/ Joshua Snow Kendrick

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codifying time-honored norms of capital representation. *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and reversing capital trial due to defense counsel’s fact investigation falling below that required by the guidelines); *see also Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008)(citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and reversing death sentence due to inadequate mitigation investigation).

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