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Jun 02 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FREDDIE EUGENE OWENS,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

Case No. 2006-038802

MOTION FOR A STAY OF EXECUTION

Freddie Eugene Owens (aka, Khalil-Divine Black Sun-Allah),[1] an indigent prisoner under sentence of death, respectfully requests that this Court stay his execution, currently scheduled for **June 25, 2021**, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 741 S.E.2d 140 (1996).

Mr. Owens 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. Moreover, despite the General Assembly's express intent to provide condemned prisoners with a choice among multiple methods of execution, 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.

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[1] By order of the Dorchester County Family Court, Mr. Owens's legal name was recently changed to Khalil Allah. However, all previous pleadings in this case have been filed under the name Freddie Owens.

§ 24-3-530 (2021). Because forcing Mr. Owens to be put to death by electrocution 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. Owens apprises this Court of the following facts and legal principles.

Relevant Procedural History

In February 1999, Mr. Owens was convicted and sentenced to death for his role in the 1997 armed-robbery of a Speedway convenience store in Greenville that resulted in the death of Ms. Irene Graves, its cashier. At the time of the crime, Mr. Owens was nineteen years old. This Court twice reversed Mr. Owens's death sentences, *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004), before affirming his third sentence, *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008). After Mr. Owens completed state post-conviction and federal habeas review, this Court issued an execution order on April 22, 2021. In accordance with S.C. Code Ann. § 23-4-530 (1995) – the statute under which Mr. Owens was sentenced – he elected lethal injection in writing via a sworn affidavit on April 23, 2021. *See* Notice of Election, attached as Exhibit A. Based on SCDC's claim that it could not obtain lethal injection drugs in time for Mr. Owens's execution, this Court issued a stay until SCDC had "the ability to perform the execution as required by law." *See* May 4, 2021 Order Staying Execution, attached as Exhibit B.

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 from lethal injection 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 the firing squad "is more humane than the electric chair," while also

contending "that lethal injection is the most humane."[2]

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 a 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.[3] The governor signed these amendments into law on May 15, 2021. The revised bill is attached as Exhibit C.

On May 17, 2021, Mr. Owens 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. Owens's motion for a preliminary and/or permanent injunction has been set for June 7, 2021.

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

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[2] Emily Bohatch, *SC Senate adds firing squad as method of execution as it advances electric chair bill*, The State (Mar. 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."

[3] As discussed infra, Mr. Owens has initiated litigation challenging, inter alia, the vagueness of the amended statute. That lawsuit was filed on behalf of both Mr. Owens and Brad Sigmon. The relevant documents were previously provided to this Court as attachments to Mr. Sigmon's motion for a stay of execution, filed on May 28, 2021. *See Sigmon v. South Carolina*, No. 2002-024388, Motion for Stay of Execution (May 28, 20210).

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—options specified by the recently-enacted legislation—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.[4] Counsel for Mr. Owens immediately responded, taking the position that his stay of execution 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, June 1, 2021, stating in the accompanying letter that the notice from SCDC "dissolved" the prior stay order and that it now has a "ministerial duty to issue an execution notice in this case." Order, *State v. Owens*, No. 2008-038802 (June 1, 2021). Thus, Mr. Owens will be required to "select" from available methods (i.e., only electrocution) on Friday, June 11, and his execution is set to take place on Friday, June 25, 2021.

Reasons to Enter a Temporary Stay of Execution

Per this Court's rubric, there are three "exceptional circumstances," *In Re Stays*, 321 S.C. at 548, 471 S.E.2d at 142, that warrant the entry of a stay of execution in this case: (1) SCDC does not have the means to lawfully carry out this execution under the revised version of S.C. Code Ann. § 23-4-530 (2021); (2) the constitutionality of the law itself is currently being litigated; and, (3) counsel has not been able to adequately prepare for end-stage proceedings in the pandemic.

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[4] *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/).

I. Permitting an execution to proceed with only one authorized method 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. In the recently enacted legislation, the General Assembly expressly confirmed its intention 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, recently 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."[5]

Moreover, 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 Government that lethal injection is the most humane method of execution"). After being informed

[5] 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).

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. Owens's statutory and constitutional rights.

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

Mr. Owens (along with Brad Sigmon) filed a complaint and request for preliminary injunction in the Richland County Court of Common Pleas on Monday, May 17, 2021, challenging the constitutionality of the revised statute. 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 parties to complete briefing by Sunday, June 6th – just four days from today—and will convene a hearing on Monday, June 7th. To allow for this expedited consideration of the constitutionality of the statute, and to avoid carrying out executions under an unconstitutional law, a stay should be entered.[7]

III. 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

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[6] Bohatch, *supra* note 2 (quoting Hembree and Harpootlian, respectively).

[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 its own orders.

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. Owens in keeping with the ABA standards[8] and the dictates of the United States Supreme Court, counsel would need meaningful access to Mr. Owens, the ability to conduct the necessary investigation, and adequate expert access to Mr. Owens. *See, e.g., Harbison v. Bell,* 556 U.S. 180, 184–86 (2009). Because of the COVID-19 pandemic, however, none of these has been fully available for nearly fourteen months. Moving forward with only the 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. Owens of meaningful representation; and would prevent Governor McMaster from considering the "wide range of factors" necessary to carry out his solemn duty and determine whether an intervention through clemency is warranted in Mr. Owens's case.

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[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 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).

A stay of execution is necessary to allow adequate time for Mr. Owens's counsel to advise him on the newly enacted election process and to prepare for and develop a clemency petition.

CONCLUSION

For the reasons stated above, this Court should enter a stay of execution.

Respectfully submitted,

s/Emily C. Paavola

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June 2, 2021