

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

BRAD KEITH SIGMON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2002-024388

**RESPONSE IN OPPOSITION TO MOTION
FOR STAY OF EXECUTION**

This Court issued an Execution Notice on May 27, 2021 for Petitioner Brad Keith Sigmon. Sigmon filed a motion for stay of execution on May 28, 2021. The State opposes and submits Sigmon has not shown “that there are exceptional circumstances warranting the issuance of the stay.” *In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996). Sigmon’s sentence has been repeatedly affirmed though challenges in both state and federal courts. In his May 28, 2021 motion for stay, Sigmon has not relied upon any present or pending challenge to his convictions (two counts of murder and one count of burglary first degree) or the validity of his death sentence. Rather, Sigmon seeks to delay his own execution by challenging the amended execution statute, S.C. Code § 24-3-530 (2021). Sigmon’s position cannot support relief and fails as a matter of law. His motion for stay is only a late attempt to avoid the sentence he earned by the atrocity of his crimes. This Court should deny the motion.

In support of its position, Respondent would respectfully show the Court:

1. Sigmon does not contest that he has exhausted his available remedies. Respondent advised the Clerk of this Court that no stays were currently in place after the Supreme Court of the United States denied Sigmon’s petition to review his federal habeas action.¹ *See Sigmon v. Stirling*, 956 F.3d 183, 199-201 (4th Cir. 2020), *cert. denied* 2021 WL 78320 (U.S. Jan. 11, 2021). Because no further stays were in place after the federal action was completed, the Clerk issued an Execution Notice on January 21, 2021. See S.C. Code § 17-25-370. Sigmon’s execution was set for February 12, 2021. On February 4, 2021, this Court vacated the January notice until

...the State notifies this Court that the Department of Corrections 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. [FN 1]

[FN 1] Bills are currently pending before the General Assembly which would amend Section 24-3-530. Senate Bill 200; House Bill 3755.

(Order, February 4, 2021, p. 2).

2. The Legislature passed an amendment to S.C. Code § 24-3-530, delivered same to the Governor on May 13, 2021, and the Governor signed the amended statute into law on May 14, 2021. The amended statute provides first and foremost that an inmate under a sentence of death “shall suffer the penalty by electrocution,” and then provides a qualified, conditional election of the method of execution. S.C. Code § 24-3-530 (A). This statute, which is applicable to Sigmon, *see* S.C. Code § 24-3-530 (Section 3), does not increase the punishment, and in fact, it does not change the opening phrase of the statute:

A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution...

¹ A Greenville County jury returned a sentence of death in July 2002. From July 2002 until January of 2021 — nearly two decades since trial — Sigmon has been challenging, testing, and examining the evidence, the process, the representation, essentially any and all aspects of his judicial proceedings. None of these heavily litigated challenges have been successful in undoing the jury’s verdict.

Compare S.C. Code 24-3-530 (A) (1995) with S.C. Code § 24-3-530 (A) (2021).² The statute does differ as to methods that may be elected, the waiver or default process, and adds the alternative method of firing squad if available. However, it is inescapable electrocution has consistently been in the statute – the first method mentioned – and a method of execution that is presently available.³

3. On or about May 17, 2021, in light of the amendment, Sigmon filed a complaint and request for injunction in the Richland County Court of Common Pleas making various arguments that the amendment either does not apply to him or the amended statute is unconstitutional. (See Motion, p. 6). He claims in his motion to this Court that a stay is warranted “to avoid carrying out executions under a possibly unconstitutional law....” (Motion, p. 7). Two obstacles are immediately identifiable.

First, even Sigmon expresses some hesitation in the strength of his position (*i.e.*, describing “a possibly unconstitutional law”). That is understandable given that all of his arguments against the statute lack merit. Similar litigation in a Tennessee capital case is instructive and shows the logic as to why there is no *ex post facto* violation. It has one major distinguishing feature, though – the inmate in that action argued for electrocution asserting it was *less* harsh than lethal injection:

Plaintiff alleges that lethal injection pursuant to the current TDOC protocol violates the Ex Post Facto Clause because it “constitutes harsher punishment than execution by electrocution, the punishment to be inflicted on Plaintiff West at the time of his crimes.”(Doc.No. 11 at 21–28.) Specifically, he alleges that electrocution “involves a significantly shorter duration of pain and suffering than lethal injection” under the current protocol and that “Defendants should be preliminarily and then

² Sigmon admits in his Richland County filing that he was sentenced to death, and that could be “carried out” either “by electrocution or by lethal injection in the manner provided by law.” (Motion Attachment, p. 5). Electrocution has never been an unknown option.

³ By letter filed with this Court on May 21, 2021, the South Carolina Department of Corrections informed the Court and the parties “that, due to the recent amendment to S.C. Code Ann. Section 24-3-530,” it “is now able to carry out executions by electrocution.”

permanently enjoined from carrying out Plaintiff's execution under a midazolam-based, three-drug protocol." (*Id.* at 27, 28.)

Sutton v. Parker, No. 3:19-CV-00005, 2019 WL 4220896, at *14 (M.D. Tenn. Sept. 5, 2019), *aff'd*, 800 F. App'x 397 (6th Cir. 2020).⁴ The federal court, reviewing several claims presented by Sutton in a 42 U.S.C. § 1983 action, quoted from and relied heavily upon findings from Sutton's state court litigation regarding an alleged *ex post facto* violation. The state litigation resolved that Sutton, with other defendants challenging changes in the state's execution statute, "have no vested interest in being executed by electrocution as opposed to lethal injection, and the change does not criminally punish conduct that was lawful when committed or increase the punishment of the convicted." *Id.*, at 14. The state court concluded that changing the method of execution violated neither the federal or state *ex post facto* constitutional provisions. *Id.*

In sum, whether a change to electrocution or a change to lethal injection, a change in method simply does not change the sentence and does not offend *ex post facto* constitutional provisions. *See, e.g., Malloy v. South Carolina*, 237 U.S. 180, 185 (1915) (rejecting *ex post facto*

⁴ *See also West v. Parker*, No. 3:19-CV-00006, 2019 WL 2341406, at *14 (M.D. Tenn. June 3, 2019), *aff'd*, 783 F. App'x 506 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 25, 204 L. Ed. 2d 1181 (2019) (inmate alleging state's lethal injection method " 'constitutes harsher punishment than execution by electrocution,' and 'that electrocution 'involves a significantly shorter duration of pain and suffering than lethal injection' under the current protocol"). Several Tennessee death row inmates chose electrocution which they contended would be a less painful method of execution. *See* <https://www.abajournal.com/news/article/some-tennessee-death-row-inmates-opt-for-electric-chair-over-lethal-injections> (last checked June 4, 2021) ("Inmates are declining lethal injections because they fear that they would feel intense pain that is masked by a paralytic drug used in the procedure, according to lawyers and inmate advocates."). In media coverage from Sutton's execution, an AP article reported that the execution by electrocution was "over in just under a minute," and that the witnesses stated that "they saw nothing unusual." <https://apnews.com/article/7121e608498fe4c24359035853801ff3> (last visited June 4, 2021). Media reports reflect three others conducted "without problems" and one where "a small plume of white smoke" was sighted "above the right side of [the inmate's] head," that the Tennessee Department of Corrections described as "steam, not smoke, as a result of the liquid and heat." <https://newschannel9.com/news/local/fifth-condemned-tennessee-inmate-opts-for-the-electric-chair-01-23-2020> (last visited June 4, 2021).

claim on change of execution from hanging to electrocution because “the statute under consideration did not change the penalty-death-for murder, but only the mode of producing this”); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) (“the sentence was death, and that sentence remains in place. The change in method does not make the sentence more burdensome and so does not violate the Ex Post Facto Clause.”); *United States v. Chandler*, 996 F.2d 1073, 1096 (11th Cir. 1993) (rejecting *ex post facto* argument where method of execution not established at time death sentence was imposed finding “[f]uture legislation would not increase the punishment, but would only provide for the method by which the punishment would be carried out; a change in procedure, not the sentence.”).

Second, Sigmon seeks to elevate a statutory election option to a *de facto* stay. He argues “[a] stay of execution is necessary until SCDC certifies that two or more of the authorized methods are available to avoid violation Mr. Sigmon’s statutory and constitutional rights.” (Motion, p. 6). As demonstrated above, constitutional rights guarding against *ex post facto* changes do not attach to procedural changes in method of execution. As to a statutory right to election, that right (both pre- and post-amendment) is limited by construction. If not available or held unconstitutional, there is no election of that method. The State has recognized three methods but plainly places limits on the possibility of election (*i.e.*, if available).⁵ What could be “in dispute is whether the State’s chosen method of execution cruelly superadds pain to the death sentence, a prisoner must

⁵ Sigmon admits that he did not elect lethal injection for his execution originally scheduled for February. (Motion Attachment, p. 5). Implicit in that admission is that Sigmon considered electrocution at that time as lethal injection and electrocution were the only possible methods at that time. Moreover, in his motion for stay of the February execution, Sigmon asserted restrictions related to the pandemic “impaired their ability to assist him with the difficult decisions concerning the selection of execution method – which requires the painstaking evaluation of lethal injection versus electrocution.” (Jan. 11, 2021 Motion, p. 11). Again, Sigmon did not summarily reject electrocution – that is, not until it became the default.

show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019). Sigmon makes no showing that could satisfy that high bar.⁶

4. Finally, Sigmon argues his counsel cannot “effectively” advise as to election and also that his counsel needs more time to prepare to seek clemency. (Motion, p. 7). The first assertion is rebutted by the complaint he attaches to this motion. Counsel has sketched out a very detailed understanding that there is only one available method.⁷ The second is rebutted by the record. It can hardly be a surprise that finality was approaching,⁸ and his background and

⁶ Sigmon would apparently fault SCDC for not obtaining the necessary drugs, but, in actuality, it is Sigmon who fails to carry his burden to show the drugs are available to SCDC. *See Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1304 (11th Cir. 2016), *abrogated in part by Bucklew, supra*; *see also Sutton*, at 19 (“that there are suppliers of pentobarbital in other countries does not establish that there are supplies willing to sell the chemical to Tennessee for use in executions.”). Simply pointing to other lethal injection executions conducted by other states does not show the availability of necessary drugs to SCDC. The State notes Sigmon has not offered any concessions to better allow SCDC to obtain drugs. He has not offered to agree to non-disclosure of names/companies of providers, and he has not offered to waive any claims or hold harmless a qualified profession who could compound the drugs, or drug companies who could otherwise supply the drug(s).

⁷ Notably, though not necessary for a default to electrocution, counsel for Sigmon has presented detailed knowledge of the execution process in seeking a temporary restraining order and injunction from the federal district court. (See C/A 3:21-cv-01651-RBH (S.C. District Court)).

⁸ Further, and quite logically, if Sigmon has waited until now, it is simply is not understandable. Moreover, his background and circumstances that have been repeatedly investigated though different actions should be available for review. To the extent Sigmon seeks to rely on the ABA guidance in capital matters, (Motion, p. 7 n. 8), the guidelines are looked to for guidance in evaluating performance. *See, e.g., Stone v. State*, 419 S.C. 370, 398, 798 S.E.2d 561, 576 (2017) (“The Supreme Court of the United States and this Court have relied on the ABA Guidelines to determine whether counsel's performance was reasonable under the first prong of *Strickland*.”). It is clearly established, though, that guidelines are not mandates. *See Bobby v. Van Hook*, 558 U.S. 4, 8–9 (2009) (finding error in the federal Court of Appeals applying ABA Guidelines “not merely as evidence of what reasonably diligent attorneys would do, but as

circumstances have been repeatedly investigated through different actions over many years. *See Sigmon v. Stirling*, 956 F.3d 183, 199-201 (4th Cir. 2020). Further, Sigmon made this same argument in January. (Jan. 11, 2021 Motion, p. 11-14). Though the execution was not stayed for that reason, it was stayed, and counsel was well aware of the need to expedite and/or focus their efforts. Sigmon fails to show any extraordinary circumstance to warrant a stay on this basis. *In re Stays, supra*. To the extent Sigmon is suggesting that the Richland County action may be part of the request for clemency, the statutory structure, logically, does not illuminate any feature or fact from Sigmon’s background or his character.⁹

5. Twelve qualified jurors after careful deliberations assessed death was the appropriate sentence. Sigmon has had multiple layers of detailed litigation over the years, with the State ultimately showing to the satisfaction of multiple courts that he is not entitled to relief. The Larke family has patiently waited nearly two decades for resolution. It is time. “Stays of executions where the conviction and sentence are valid impose a cost on the State and the family and friends of the murder victim ... [e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment.” *Bowles v. Desantis*, 934 F.3d 1230, 1248 (11th Cir.), *cert. denied*, 140 S. Ct. 26, 204 L. Ed. 2d 1182 (2019) (quoting *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983)). *See also Bucklew*, 139 S. Ct. 1112, 1133 (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). SCDC has been authorized to carry out the sentence; and, under the amended statute, it may now do so. Sigmon’s last minute quest for avoidance should be deemed

inexorable commands” when “*Strickland* stressed” they “are ‘only guides’ to what reasonableness means, not its definition.”).

⁹ The Governor is, at any rate, aware of the litigation. He has been granted the right to intervene and has answered in support and defense of the statute.

insufficient to meet the exceptional requirement of *In re Stays, supra*, and the motion for stay should be denied.

CONCLUSION

Sigmon's motion to stay his legal, proper, and authorized execution should be denied.

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