

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Case No. No. 2002-024388

Brad Keith Sigmon
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

REPLY TO RESPONSE TO MOTION
FOR STAY OF EXECUTION

RECEIVED

Jun 07 2021

S.C. SUPREME COURT

In opposing a stay of Sigmon’s execution, which is currently scheduled on **June 18, 2021**, Respondent asks this Court to prejudge and disregard the weighty constitutional questions presented by the General Assembly’s recently enacted bill significantly changing Sigmon’s rights and settled expectations as to how he would be put to death, which are still pending in the Circuit Court below. Respondent also elides that, if no stay is entered, Sigmon will be the first person to be put to death under a new statute that drastically changes the way in which South Carolina carries out executions—for the first time forcing an individual to die by a less humane option than previously available—without the opportunity to determine if this statute is constitutional.

This litigation is hardly, as Respondent submits, a “last minute request for avoidance.” Petitioner filed an action in Circuit Court on the first business day after the enactment of the new law to ensure a timely resolution of these substantial constitutional questions (and prior to any execution warrant being issued by this Court). Petitioner has requested, and received, an expedited scheduling

order: Monday, June 7, Judge Newman will hold a hearing on the request for a preliminary injunction.

It is neither surprising nor inappropriate that significant changes to South Carolina’s long standing execution method and surrounding procedures would result in a request for judicial review. In fact, members of the General Assembly that supported the new law expected as much. On the second to last day of debate in the Senate, Senator Hembree, one of the bill’s sponsors, attempted to assuage the concerns of some legislators over the constitutionality of the new law by stating: “[U]nder this bill, if they elected lethal injection, knowing that lethal injection is not available, quite honestly, I think the first, I think you'd probably see an appeal from that taken, because this is a new statute, and it's going to be litigated, I mean, you know, that we all know that.” He further explained to the General Assembly that he expected that “the very first execution we have is going to be litigated, probably to the United States Supreme Court. That’s how our system works. And that’s how it should be.”¹ Moreover, another sponsor of the bill has publicly stated that proceeding with an execution while making only one method available—as South Carolina is attempting with Mr. Sigmon—would “violat[e] the statute.”²

While the merits of the underlying action are not before this Court, and for the most part will not be discussed by undersigned counsel, several misstatements in Respondent’s submission will be briefly addressed. First, Respondents assert that the revised statute “does not increase the punishment” because the “opening phrase” remains the same and electrocution was always authorized. But they do not meaningfully engage with the fact that the law changes the default method

¹ 124th S.C. Gen. Assemb., Senate, May 12, 2021 (statement of Sen. Greg Hembree).

² State Senator Dick Harpootlian 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.” 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>).

of execution from lethal injection to electrocution, a change which Mr. Sigmon argues in the pending litigation *forces* an individual to die by a more tortuous method of execution in violation of the Constitution. Before the passage of the new law, an inmate could only be executed by electrocution if he affirmatively selected that method, or if lethal injection had been declared unconstitutional.³ South Carolina will be the first state to revert to electrocution as its sole method of execution, and the first to force a person to die by the electric chair in nearly nineteen years.⁴

Respondents also misstate the relevant constitutional principles when discussing Petitioner’s ex post facto claim raised in the circuit court, conflating the Eighth Amendment cruel and unusual punishment standard with the *ex post facto* standard. *Compare Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995) (holding an ex post facto violation occurs when a law “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes”); *with Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (setting forth the criterion for proposing an alternate method of execution when a petitioner alleges a certain method is cruel and unusual under the Eighth Amendment). Respondents also cite to inapposite authority when arguing that the bill does not violate the *ex post facto* clause, as none of the cases cited address whether a state reverting from what is widely accepted as the most humane method of execution to one less humane would “inflict a greater

³ In footnote 5, Respondent mischaracterizes Mr. Sigmon’s selection of method of execution when he was under the February 12 death notice. The State asserts that he “did not summarily reject electrocution [...] until it became the default.” Mr. Sigmon could not have been more clear in his election forms or in his pleadings: he did not make a choice between either method at that time, because he had not been provided with *any* information regarding how either method would be carried out. The statute at the time defaulted to lethal injection when an inmate did not make a choice. Mr. Sigmon did not choose or reject either method. Following litigation, Mr. Sigmon was provided with SCDC’s electrocution protocol pursuant to a consent order. He and undersigned counsel reviewed this protocol prior to his June 4, 2021 election date. On that date, Mr. Sigmon was presented with forms that stated the only available option was electrocution. He wrote in that he selected lethal injection as his method of execution.

⁴ The State of Alabama executed Linda Lyon by electrocution on May 10, 2002.

punishment” upon a person. *Calder v. Bull*, 3 U.S. 386, 390 (1798).⁵ A stay is necessary to allow the Circuit Court to determine whether forcing a more barbarous method of execution upon a person violates U.S. Const. art. I § 10 or the more expansive S.C. Const. art. I § 4.

In short, these significant changes in the law raise profound questions about the legality and constitutionality of how South Carolina proposes to execute Mr. Sigmon. The General Assembly expected and perhaps even depended upon litigation to resolve these questions. Mr. Sigmon—who filed a lawsuit as soon as the bill became law, and requested and received an expedited schedule—now simply requests that he not be executed before these questions can be resolved.

CONCLUSION

For the reasons stated above and in Mr. Sigmon’s Motion for Stay, this Court should enter a stay pending the resolution of Mr. Sigmon’s claims.

⁵ For example, in *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), the court failed to find an *ex post facto* violation when Tennessee added lethal injection as a method of execution but retained electrocution as an option available for an inmate to select. In the early 1900s, South Carolina moved from hanging to electrocution after the General Assembly deemed it “less barbarous,” and so the Supreme Court deemed the punishment had “not been increased” and did not find an *ex post facto* violation. *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). More recently, in *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997), the courts did not find a violation when an inmate claimed that the mere act of having to choose between methods of execution increased the punishment, yet there was a default method set forth in the statute in the case an inmate did not make a choice. And in *United States v. Chandler*, 996 F.2d 1073, 1096 (11th Cir. 1993), the Circuit Court did not find an *ex post facto* violation in the unique scenario of the inmate being sentenced to death prior to *any* method of execution being determined. None of these courts have confronted the situation where a state legislature authorizes three methods, then the prison administration only provides the inmate with the most torturous of the three options.

Respectfully submitted,

s/ Megan Barnes

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June 6, 2021.