

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

FREDDIE EUGENE OWENS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2006-038802

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

This Court issued an Execution Notice on June 1, 2021 for Petitioner Freddie Eugene Owens. Owens filed a motion for stay of execution on June 2, 2021.¹ The State opposes and submits Owens 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). Owens’s sentence has been repeatedly affirmed through challenges in both state and federal courts. In his June 2, 2021 motion for stay, Owens has not relied upon any present or pending challenge to his convictions (murder, armed robbery, conspiracy to commit armed robbery and possession of a weapon during the commission of a violent crime) or the validity of his death sentence.²

¹ This motion is nearly identical to the motion for stay filed on May 28, 2021, in *Sigmon v. State*, Appellate Case No. 2002-024388, which is, as of this filing, still pending disposition by this Court. Consequently, this response is also nearly identical to the State’s response in *Sigmon*.

² Owens was convicted in February 1999, and sentenced to death three times (the first by his original trial jury; and twice more after remands for resentencing, once by a circuit court judge then by another jury impaneled for sentencing). The convictions and death sentence resulted from Owens’s November 1, 1997 murder of Ms. Irene Graves. Ms. Graves was shot and killed during an armed robbery of the convenience store where she worked. Ms. Graves was shot for being

Rather, he seeks to delay his own execution by challenging the amended execution statute, S.C. Code § 24-3-530 (2021). Owens’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 the jury determined was appropriate. This Court should deny the motion.

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

1. Owens 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 Owens’s petition to review his federal habeas action. *See Owens v. Stirling*, No. 20-975, 2021 WL 1520801 (U.S. Apr. 19, 2021). Because no further stays were in place after the federal action was completed, the Clerk issued an Execution Notice on April 22, 2021. *See* S.C. Code § 17-25-370. By operation of statute, the execution was set for May 14, 2021. On May 4, 2021, this Court granted the motion and stayed the “execution until SCDC advises the Court it has the ability to perform the execution as required by the law.” (Order, May 4, 2021, p. 1).

2. After this Court’s May 4, 2021 stay, the Legislature passed an amendment to S.C. Code § 24-3-530, which sets out the methods of execution. The amended statute was delivered 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 Owens,

unable to open the store safe. Owens “took credit” for having shot Ms. Graves, confirming this to a then-girlfriend, and investigating officers. Two co-defendants testified at trial, one confirming Owens was the shooter, another confirming Owens stated he shot the victim. *Owens v. Stirling*, 967 F.3d 396, 404 (4th Cir. 2020). While awaiting sentencing, Owens murdered another inmate. *Id.*, at 404-05.

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...

Compare S.C. Code 24-3-530 (A) (1995) *with* S.C. Code § 24-3-530 (A) (2021). 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, Owens, along with another death-sentenced inmate with an existing notice of execution, Brad Keith 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. Owens claims in his motion to this Court that a stay is warranted because the statute is unconstitutional and his Richland County proceedings should resolve before an execution is allowed. (Motion, p. 6). Two obstacles are immediately identifiable.

First, the 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

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.”

the current protocol and that “Defendants should be preliminarily and then 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 alter the sentence and certainly does not increase the sentence; thus, such

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).

change 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* 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, Owens 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 violating Mr. Owens’s statutory and constitutional rights.” (Motion, p. 6).⁵ As demonstrated above, constitutional rights guarding against *ex post facto* changes do not attach

⁵ Owens has asked to join in Sigmon’s federal action seeking an injunction and arguing, in part, that lethal injection, adopted as the primary method over the electric chair, is more humane than electrocution. (C/A 3:21-cv-01651) (S.C. District Court). Sigmon has also asked the federal court to find electrocution is unconstitutional. Both assertions are unlikely to prevail. First, the Supreme Court of the United States has cautioned that simple acceptance of a new method should not be used to create a presumption that the former method is unconstitutional. *See Bucklew v. Precythe*, 139 S.Ct. 1112, 1125 (2019) (“Nor do *Baze* and *Glossip* suggest that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available. There are, the Court recognized, many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner’s preferred method of execution. *See, e.g., Glossip*, 576 U.S., at ___, 135 S.Ct., at 2737–2738 (a State can’t be faulted for failing to use lethal injection drugs that it’s unable to procure through good-faith efforts)”). Second, the non-incident recent electrocutions and arguments in support of electrocution as the better method in Tennessee tend to undercut the allegations asserted against the method in the federal litigation. *See n. 4, supra*.

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). What could be “in dispute is whether the State’s chosen method of execution cruelly superadds pain to the death sentence, a prisoner must 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). Owens makes no showing that could satisfy that high bar.⁶

⁶ Owens would apparently fault SCDC for not obtaining the necessary drugs, (see Motion, p. 6), but, in actuality, it is Owens 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 suppliers 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. Moreover, South Carolina does not have a shield law specific to lethal injection drugs, though requests for specific legislation have been repeatedly made and documented. In fact, Justice 360, which represents Owens in this action, argued against the necessity or advisability of a shield law. Owens’s present assertion that “SCDC was ... unwilling to obtain the lethal injection drug” is not well supported. (Motion, p. 6). See <https://www.thestate.com/article64471007.html> (Justice 360 opposed shield law); <https://www.greenvilleonline.com/story/news/2018/01/20/south-carolina-secrecy-laws-shield-botched-executions/1044087001/> (Justice 360 director asserting “greater risk of something going wrong” with protecting information). As noted in the Sigmon response, (Resp. in Opp., June 4, 2021, p. 6 n. 6), there have been no offered concessions to better allow SCDC to obtain drugs (such as agreement to non-disclosure of names/companies of providers, or offer 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)), though similar protections have proven effective against concerted efforts to block the state’s supplies of appropriate drugs. See generally *Jordan v. Comm’r, Mississippi Dep’t of Corr.*, 947 F.3d 1322, 1341 (11th Cir.), *cert. denied sub nom. Jordan v. Georgia Dep’t of Corr.*, 141 S. Ct. 251, 208 L. Ed. 2d 25 (2020) (“To summarize, and as recognized by the Supreme Court in *Glossip*, the historical record reveals that disclosure of the supplier for a particular drug used by a state in executions will have predictable consequences: anti-death penalty advocates will hound the supplier of that drug until the supplier capitulates and

4. Finally, Owens argues his counsel cannot “effectively” advise as to election and also that his counsel needs more time to prepare to seek clemency. (Motion, pp. 6-7). The first assertion is rebutted by Owens’s own motion indicating a preference for lethal injection, and the fact of his prior election under the April 22, 2021 execution notice. The second is rebutted by the record. It can hardly be a surprise that finality was approaching,⁷ and his background and circumstances have been repeatedly investigated through different actions over many years. *See Owens v. Stirling*, 967 F.3d 396, 406-10 (4th Cir. 2020). To the extent Owens is suggesting that the Richland County action may be part of the request for clemency, the statutory structure, does not illuminate any feature or fact from his background or his character.⁸

5. Twelve qualified jurors after careful deliberations assessed death was the appropriate sentence (actually twenty-four and a circuit court judge when considering all the proceedings Owens has had). Owens 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

ceases supplying the drug. ... To ensure a continuing source of supply, some states have enacted statutes that protect the anonymity of the source or to otherwise assure confidentiality.”). Without some protection, it appears there is an impasse. However, the broader and dispositive point here is that an individual is not guaranteed a certain method of execution.

⁷ If Owens has waited until now, it is simply not understandable. Moreover, his background and circumstances that have been repeatedly investigated through different actions should be available for review. To the extent Owens 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 inexorable commands” when “*Strickland* stressed” they “are ‘only guides’ to what reasonableness means, not its definition.”).

⁸ 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.

relief. Ms. Graves’s family has patiently waited through all these many challenges for resolution. Further delay is not warranted. *See 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) (“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.”)). *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. This last minute quest for avoidance should be deemed insufficient to meet the exceptional requirement of *In re Stays, supra*, and the motion for stay should be denied.

CONCLUSION

Owens’s motion to stay his legal, proper, and authorized execution should be denied.

Respectfully Submitted,

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