

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FREDDIE EUGENE OWENS,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

Case No. 2006-038802

**REPLY IN SUPPORT OF
MOTION FOR A STAY OF EXECUTION**

Execution Date: June 25, 2021

This Court should stay Mr. Owens’s execution because the South Carolina Department of Corrections (SCDC) has not demonstrated that lethal injection and/or the firing squad are truly “unavailable.” In adopting the amendments to S.C. Code § 24-3-530, it is clear that the General Assembly intended to offer a condemned prisoner the right to exercise some kind of choice regarding the method of execution. The General Assembly did not adopt a bill to change South Carolina’s method strictly to electrocution, and for good reason – by any objective measure, death by electrocution is the least humane and most barbaric method of execution. *See e.g., State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (stating electrocution’s “proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man”). The electric chair has been overwhelmingly rejected by the majority of state legislatures, and the last two state supreme courts to consider it have held that use of the electric

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chair is unconstitutional.¹ *Dawson v State*, 554 S.E.2d 137, 143 (Ga. 2001) (holding electrocution “inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment”); *Mata*, 745 N.W.2d at 278 (finding electrocution “has proven itself to be a dinosaur more benefitting the laboratory of Baron Frankenstein than the death chamber of state prisons.”).

Lethal injection is the primary method of execution in every other state that retains the death penalty, and since that development, no jurisdiction has forced an inmate to die in the electric chair against his will. Respondent’s claim that they may do so here is belied by the plain language of Section 24-3-530, and their own actions. On June 4, 2021, SCDC provided Brad Sigmon (who is scheduled to be executed one week prior to Mr. Owens) with a written notice of his “right to election of method of execution.” *See* Sigmon Election Notice, attached as Exhibit A. The notice then stated that the only method Mr. Sigmon could “elect” was electrocution. *Id.* This is obviously contrary to the statutory requirement that SCDC provide the inmate with written notice of his right to elect a method of execution.² S.C. Code § 24-3-530(E).

Mr. Owens maintains that SCDC has not demonstrated that lethal injection drugs are “unavailable” to them. Neither Director Stirling’s certification affidavit nor his letter in response to this Court’s request for “an explanation as to why two methods of execution under the statute . . . are currently unavailable” provide sufficient information to determine what effort SCDC made

¹ In 1999, the United States Supreme Court granted certiorari in *Bryan v. Moore* to address the question of whether Florida’s use of the electric chair violated the Eighth Amendment. 528 U.S. 960 (1999). Thereafter, Florida mooted the case by quickly adopting lethal injection as its primary method of execution, as has virtually every death penalty state in the country.

² As explained in his Motion for Stay of Execution, Mr. Owens and Mr. Sigmon filed a lawsuit in the Richland County Court of Common Pleas challenging the amendments to Section 24-3-530 on grounds of vagueness, non-delegation and ex post facto violations. On June 8, 2021, Judge Newman denied the plaintiffs’ request for injunctive relief. This litigation remains pending, however, and the plaintiffs have appealed to this Court.

to procure lethal injection drugs or that the drugs are truly “unavailable” pursuant to the statute. Stirling Aff. (June 3, 2021); Letter from Bryan Stirling to Daniel Shearouse (June 8, 2021), attached as Exhibits B and C, respectively.

Thirteen states and the federal government have carried out 207 executions by lethal injection in the past eight years, including one in Texas as recently as May 19, 2021. *Execution Database*, Death Penalty Information Center (“DPIC”) available at <https://deathpenaltyinfo.org/executions/execution-database>. Unlike these other states, Stirling asserts without support that SCDC cannot obtain lethal injection drugs through manufacturers or compounding pharmacies. Regarding manufacturers, Stirling submitted a single letter from a pharmaceutical company, Hikma Pharmaceuticals in New Jersey, which simply reminded SCDC of the company’s public opposition to its medicines being used for lethal injections.³ Nothing in the letter indicates it was in response to a specific request from SCDC for lethal injection drugs. Hikma’s letter does not provide any support for SCDC’s claim that it has made affirmative efforts to obtain lethal injections drugs and does not demonstrate that lethal injection drugs are unavailable from manufacturers.

Even if SCDC did affirmatively request lethal injection drugs from Hikma, those efforts are unsatisfactory in demonstrating unavailability. SCDC has indicated that it has a three-drug protocol involving Pentobarbital, Pancuronium Bromide and Potassium Chloride. *See* Letter from Daniel Plyer regarding SCDC’s lethal injection protocol dated November 20, 2020, attached as Exhibit D. SCDC has further stated that if sufficient quantities of these three drugs cannot be

³ Hikma’s website includes a public statement that it “object[s] in the strongest possible terms to use of any of our products for the purpose of capital punishment.” Hikma, *Use of Products in Capital Punishment*, <https://www.hikma.com/about/our-policies-and-positions/use-of-products-in-capital-punishment/>.

obtained, it intends to use a single dose of Pentobarbital Sodium. *Id.* As far as undersigned counsel can determine, Hikma Pharmaceuticals does not sell *any* of the drugs listed by SCDC as potential drugs for its lethal injection protocols. *See* <https://www.hikma.com/products/us-products/>. Asking a single company that does not even sell the drugs called for in SCDC’s protocol and publicly opposes the use of its products in executions does not demonstrate the unavailability of lethal injection drugs for the purposes of the statute.

SCDC’s description of its efforts related to identifying a compounding pharmacy to provide lethal injection drugs is even less informative, stating only that “SCDC has also explored having a licensed pharmacy and pharmacist compound the drugs,” and “[t]hose efforts have also failed.” This provides no explanation of the extent of its efforts or why those efforts failed. This is simply not sufficient to demonstrate why these drugs are “unavailable” to SCDC when fourteen other jurisdictions have been able to obtain them.

Respondent’s claim that SCDC requires a “shield law” to allow it to obtain lethal injection drugs is false. SCDC did not propose a shield law during this past legislative session, but a bill was previously proposed to make all information about the purchase of lethal injection drugs a “state secret.” *See* H. 3354 (filed on December 18, 2018). This bill failed largely because SCDC could not explain why it was necessary.⁴ Indeed, SCDC has consistently maintained that it *already has* a “shield law,” and it has continued to withhold information on the basis of its claim that S.C. Code § 24-3-580 protects from disclosure all of the information (and more) about which

⁴ Counsel for Mr. Owens opposed this bill because it was designed to deprive death-sentenced inmates of basic information that all other states in the country (including those who have so-called “shield laws”) make available to the inmate prior execution. Regardless, Mr. Owens’s statutory and constitutional rights do not turn on whether his counsel advised the General Assembly on whether or not a complete shroud of secrecy surrounding the execution process was a good or bad policy choice.

Respondent now faults Mr. Owens for not “offer[ing] concessions.” Response in Opposition to Motion to Stay at p.6, n.6; *see also*, Opinion of the S.C. Att’y General, 2015 WL 4699337 (July 27, 2015) (stating Respondent’s position that the statutory phrase “member of an execution team” includes the names of suppliers of execution drugs).

SCDC has also not demonstrated that the firing squad is “unavailable.” Rather, they simply claim that they are not *quite* ready for this method. SCDC states that it has been working on a firing squad protocol since March (when the firing squad was added to the proposed bills), but they have not yet settled on a specific protocol. Candidly, a firing squad protocol is not a complex matter. SCDC’s position that the firing squad is unavailable because they require “a few weeks” to finalize the protocols is an insufficient basis on which to force an inmate to die by the cruel and inhumane method of electrocution.

This Court should enter a stay of execution until the significant questions about what is actually “available” to SCDC (and whether SCDC has taken the necessary steps to truly demonstrate unavailability) have been litigated.⁵

CONCLUSION

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

Respectfully submitted,

s/Emily C. Paavola

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⁵ Undersigned counsel has conferred with counsel for Brad Sigmon and is authorized to indicate here that Mr. Sigmon wishes to incorporate the arguments contained in this Reply as a response to Respondent’s recent “addendum” in his case.