

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.*

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Case No. 2006-038802

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**MOTION TO STAY THE SETTING OF AN EXECUTION DATE**

Petitioners Brad Keith Sigmon and Freddie Eugene Owens (aka, Khalil-Divine Black Sun-Allah) are indigent prisoners, each under a sentence of death. They respectfully request that this Court decline to set execution dates at this time or, alternatively, stay any execution dates pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 741 S.E.2d 140 (1996). This Court should not allow Petitioners’ executions to proceed pending the resolution of ongoing litigation in the lower court – which, by consent of the parties, can be heard on **April 4, 2022** – concerning, among other things, the constitutionality of the electric chair and the firing squad.

This Court previously stayed Petitioners’ executions after SCDC certified that electrocution was the only available method of execution, finding that offering only one method violated Petitioners’ “statutory right . . . to elect the manner of their execution.” *See State v. Sigmon*, No. 2002-024388 (June 16, 2021); *State v. Owens*, No. 2006-038802 (June 16, 2021). The Court further directed the clerk not to issue another execution notice “until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out

executions by firing squad.” *Id.* On Friday, March 18, 2022, the State sent a letter notifying the Court that SCDC is prepared to use the firing squad, in addition to electrocution. For the reasons set forth below, this Court should decline to issue execution orders at this time, or stay any execution dates it does set.

**I. The State Courts Should Be Given an Opportunity to Decide What is Constitutional Under South Carolina Law.**

On September 27, 2021, Petitioners filed a complaint in the Richland County Court of Common Pleas challenging the constitutionality of the firing squad and the electric chair; the Defendants are SCDC, its commissioner, Bryan Stirling, and, following his earlier intervention in this litigation, Governor Henry McMaster.<sup>1</sup> *Owens v. Stirling*, No. 2021-CP-40-04851. On the same day, Petitioners moved for a preliminary injunction, expedited discovery and an expedited hearing. The progress of this litigation was substantially delayed by the Defendants’ attempt to remove the action to federal court.

Whether the firing squad and the electric chair violate the South Carolina Constitution are open questions. No court has ever resolved a methods-of-execution challenge in South Carolina. The firing squad has never been used (and thus its legality never considered) in South Carolina, and it was last addressed by the United States Supreme Court in 1878—nearly 100 years before the Eighth Amendment was incorporated and applied to the states in *Robinson v. California*, 370 U.S. 662 (1962). See *Wilkerson v. Utah*, 99 U.S. 130 (1878). The constitutionality of the electric chair has also never been considered in South Carolina, and the Supreme Court of the United States has never ruled on whether it violates the Eighth Amendment to the United States Constitution.

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<sup>1</sup> Petitioners also requested that these claims be consolidated with their previous and still pending action challenging S.C. Code Ann. § 24-3-530 (2021) as violating state and federal ex post facto, due process and non-delegation doctrines.

The last time the constitutionality of the electric chair reached the Supreme Court in 2000, after a series of spectacularly botched executions, Florida—seeing the writing on the wall—elected to moot the case by changing its method from electrocution to lethal injection, and the Court dismissed the case as improvidently granted. *See Bryan v. Moore*, 528 U.S. 960 (Oct. 26, 1999) (granting a stay of execution and a petition for writ of certiorari to the Supreme Court of Florida to decide whether execution by electrocution violates the Eighth Amendment), *dismissed by* 528 U.S. 1133 (Jan. 24, 2000) (“In light of the representation by the State of Florida, through its Attorney General, that petitioner's ‘death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution’ pursuant to the recent amendments to Section 922.10 of the Florida Statutes, the writ of certiorari is dismissed [sic] as improvidently granted.”).

The electric chair has been overwhelmingly rejected by the majority of state legislatures, and the last two states to consider it have found it violates their constitutions. *Dawson v. State*, 554 S.E.2d 137, 143 (Ga. 2001) (holding electrocution “inflicts purposeless physical violence and needless mutilation that makes no measurably contribution to accepted goals of punishment”); *State v. Mata*, 745 N.W.2d 229, 277–78 (Neb. 2008) (finding electrocution “will result in unnecessary pain and agonizing suffering” and “has proven itself to be a dinosaur more benefitting the laboratory of Baren Frankenstein than the death chamber of state prisons.”).<sup>2</sup>

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<sup>2</sup> When electrocution was first adopted as a method of execution in the late 1800s and early 1900s, it was believed to cause a quick and painless death. That view has proven to be scientifically unsound, and over two centuries of experience have demonstrated that electrocution causes torturous suffering and mutilation of the body even if carried out according to plan. *See* Affidavit of Dr. John Wikswo, attached as Exhibit A. The process has not been (and cannot be) improved since the time of the first electrocution, carried out by the State of New York in 1890, went horribly wrong. Stuart Banner: *THE DEATH PENALTY: AN AMERICAN HISTORY*, pp. 186-88 (Harvard Univ. Press 2002). Electrocution also carries a substantial risk of a “botch” event, such as fire, sparking, power outages and failed executions, and there have been numerous botched electrocutions since

On January 13, 2022, the United States District Court for the District of South Carolina remanded the case back to the South Carolina courts, finding Defendants’ request for removal untimely, in part, and inappropriate because “the questions being raised here are novel and/or complex issues of State law that *have not been decided by the South Carolina Courts.*” See Remand Order at p.7, Case No. 3:21-cv-03564-JD, attached as Exhibit B (emphasis added). The District Court concluded that “as an overriding issue of fairness and comity” the state courts should adjudicate Petitioners’ claims. *Id.*

Upon return to state court, the parties agreed – for the specific purpose of expediting resolution of the pending litigation – to a proposed scheduling order with a hearing date of **April 4, 2022**.<sup>3</sup> See Consent Motion to Designate Consolidated Cases Complex and Assign Exclusive Jurisdiction, attached as Exhibit C. The parties agreed that Petitioners would file an amended complaint containing all claims pending in state court; Defendants would respond to the consolidated complaint by March 15 and Petitioners would reply by March 22. *Id.* In addition, the parties moved to designate the case complex and requested that a single judge be assigned exclusive jurisdiction to handle the case on an expedited basis. *Id.* No action has been taken by the circuit court on this motion. The parties also jointly requested a status conference, to no avail. See Motion for Status Conference, filed February 23, 2022, attached as Exhibit D.

Nevertheless, the parties have complied with the proposed scheduling order. Petitioners filed a consolidated complaint on February 7, 2022. On Friday, March 4, 2022, Defendants’ counsel requested confirmation that Petitioners would abide by the parties’ proposed schedule

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it was first used in South Carolina in 1912.

<sup>3</sup> Petitioners proposed a hearing date of March 28, but the date was extended by one week at the Governor’s request.

even though the circuit court had not yet addressed the motion. *See* Email Correspondence Dated March 4, 2022, attached as Exhibit E. Petitioners confirmed their intent to follow the expedited schedule. *Id.* Defendants filed a motion to dismiss on March 15, 2022, as the schedule required. Three days later, Defendants announced their plans to use the firing squad – an action that would moot the pending litigation. Petitioners’ response to the Motion to Dismiss is due on Tuesday, March 22.

This Court should decline to set execution dates because the pending litigation raises novel and important questions of South Carolina law that should be decided before any executions take place. Moreover, Petitioners have done everything within their power to have these issues decided by the State courts in a timely manner. This Court should not allow Petitioners’ executions to moot the pending litigation before any court in South Carolina has addressed such weighty issues as whether the only methods of execution offered to them are unconstitutional. Instead, this Court should assign a single judge exclusive jurisdiction and order the lower court to decide the issues in this case on an expedited schedule. *See* S.C. Const. Art. V, § 4.

## **II. SCDC Has Provided No Evidence That it Has Made a Good Faith Effort to Obtain Lethal Injection Drugs.**

Although S.C. Code Ann. § 24-3-530 (2021) provides for *three* methods of execution, including lethal injection (which has been repeatedly upheld by the United States Supreme Court, *see e.g., Baze v. Rees*, 553 U.S. 35, 62 (2008)), Defendants assert that lethal injection is unavailable because they are unable to obtain the necessary drugs. However, Defendants have steadfastly refused to produce any evidence that they have even attempted to purchase lethal injection drugs since Stirling became the Director of SCDC in 2013. Meanwhile, thirteen states and the federal government have carried out 223 executions by lethal injection in the past eight years, including

two in Oklahoma and one in Alabama within the past two months.<sup>4</sup>

When this Court asked Stirling to explain why lethal injection was not available in June of 2021, he provided a letter from Hikma Pharmaceuticals, a New Jersey pharmaceutical company, which simply reminded SCDC of Hikma's public opposition to its products being used for lethal injection.<sup>5</sup> See Stirling Letter dated June 8, 2021, attached as Exhibit F. Nothing in the letter indicates that it was in response to a specific request from SCDC for lethal injection drugs.<sup>6</sup> More significantly, Hikma does not sell *any* of the drugs listed by SCDC as potential drugs for its lethal injection protocols.<sup>7</sup> Its letter therefore provides no 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.

SCDC's description of its efforts to identify a compounding pharmacy to supply the drugs prove even less informative. In his letter to this Court, Stirling asserted that "SCDC has also explored having a licensed pharmacy and pharmacist compound the drugs," and "[t]hose efforts

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<sup>4</sup> *Execution Database, Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/execution-database> (last visited March 20, 2022).

<sup>5</sup> This policy is clearly stated on Hikma's website, which 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/>.

<sup>6</sup> Hikma has a practice of sending similar letters to departments of corrections across the country. E.g., David Ferrara, *Company Demands Return of Drug Planned for Zane Floyd Execution*, June 25, 2021, <https://perma.cc/F9HK-U25Z>.

<sup>7</sup> SCDC has indicated that it has a three-drug protocol involving Pentobarbital, Pancuronium Bromide and Potassium Chloride. See Letter from Daniel Plyler regarding SCDC's lethal injection protocol dated November 20, 2020, attached as Exhibit G. SCDC has further stated that if sufficient quantities of these three drugs cannot be obtained, it intends to use a single dose of Pentobarbital Sodium. *Id.* None of these drugs is listed as a product that Hikma produces. See <https://www.hikma.com/products/us-products/>.

have also failed.” *Id.* This provides no explanation of the extent of SCDC’s efforts or why those efforts failed, and in other settings Stirling has stated that SCDC declined to ask the legislature for funding to construct a compounding pharmacy because they could purchase drugs more cheaply on the open market. *See* John Monk, *Controversial bill proposed to get stalled SC executions back on track*, The State, Mar. 6, 2016, <https://www.thestate.com/news/local/article64471007.html> (“[I]t just didn’t make a lot of sense to use tax dollars to buy something we could get for a lot less on the open market.”).

When Defendants repeated their claim that they had made a good faith effort to acquire lethal injection drugs in front of the District Court of South Carolina (and relied on the same basis they offered to this Court), Judge Bryan Harwell asked if Defendants wished to supplement the record. Tellingly, Defendants twice declined this suggestion—first asserting that the district court could simply take judicial notice of Defendants’ submission in State court (*See* District Court Transcript Excerpt at p. 34-35, attached as Exhibit H); and second, claiming “[n]o matter what we put in there, it’s never going to be enough.” *Id.* at p. 42. Defendants have declined to answer Petitioners’ requests for discovery about what, if any, efforts they have made to obtain lethal injection drugs. Instead, they filed a motion asking the circuit court to stay discovery and/or issue a protective order. *See* Motion for Protective Order, attached as Exhibit I. The circuit court has not ruled on the motion, and Defendants have not responded to Petitioners’ discovery requests.

The electric chair and the firing squad are antiquated, barbaric methods of execution that virtually all American jurisdictions have left behind in favor of lethal injection.<sup>8</sup> Petitioners should

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<sup>8</sup> American jurisdictions have spent the last 150 years implementing more humane methods of execution, culminating with every death penalty jurisdiction in the country using lethal injection as its only or default method of execution. They did so because, as the Supreme Court of the United States has recognized, lethal injection is the most humane method available. *Baze v. Rees*, 553 U.S. 35, 62 (2008). Indeed, in 1995, South Carolina made lethal injection its default method of

not be forced to die by either of these methods without, at a minimum, a reasonable showing that SCDC is unable to obtain lethal injection drugs, despite a demonstrable and good faith effort. In addition, this Court has concluded that S.C. Code Ann. § 24-3-530 (2021) provides a “statutory right of inmates to elect the manner of their execution.” *See State v. Sigmon*, No. 2002-024388 (June 16, 2021); *State v. Owens*, No. 2006-038802 (June 16, 2021). In order for an inmate to make a meaningful election, SCDC must offer at least two methods of execution that are both independently constitutional. A choice between one constitutional method and one that is unconstitutional is no choice at all. Whether the electric chair, the firing squad, or both violate the South Carolina Constitution are all open questions that must be first be resolved, lest this Court sanction an unconstitutional and/or statutorily unlawful execution.

### **III. The Issues in this Case will Reoccur.**

The time to decide the questions in this case is now. There are thirty-seven men on South Carolina’s death row. If the litigation currently pending in the circuit court is rendered moot by the executions of Petitioners, they will arise again for any subsequent executions in South Carolina. When this Court issues an execution order, it sets the execution date for the fourth Friday following entry of that order – meaning the inmate will have four weeks or less to attempt to raise and resolve any future legal claims.<sup>9</sup> S.C. Code Ann. § 17-25-370 (1976). In prior litigation, Defendants successfully argued that once this Court issues an execution order, the circuit court does not have the power to enter an order enjoining the execution. Thus, in Defendants’ view, this Court’s execution order sets in motion a plan of action that will culminate in an execution without any

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execution because it is “more humane than dying in the electric chair.” *Legislative Watch: Death Penalty*, The Times & Democrat (Orangeburg, S.C.), Mar. 2, 1985, at 2B.

<sup>9</sup> Were the Court to issue an execution order this week, the execution would be scheduled for Friday, April 15 – Good Friday.

realistic possibility for the courts to resolve the legal disputes at hand. This position, combined with SCDC's consistent refusal to share information about what methods it considers available until the inmate's election date (which takes place fourteen days before the scheduled execution), makes it virtually impossible for any inmate to obtain a fair resolution of his claims before the execution takes place. This Court should not allow an execution to take place before the issues raised below can be resolved, once and for all.

### **CONCLUSION**

For the reasons stated above, this Court should decline to set an execution date at this time or enter a stay of execution. This Court should also assign a single judge to maintain exclusive jurisdiction and assist the parties in obtaining an expeditious resolution of the legal issues in this case before allowing Petitioners to be executed.

Respectfully submitted,

***s/Emily C. Paavola***

Emily Paavola  
900 Elmwood Avenue, Suite 200  
Columbia, SC 29201  
(803) 765-1044  
[Emily@Justice360.org](mailto:Emily@Justice360.org)

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