

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
TO STAY ISSUANCE OF EXECUTION NOTICE**

By letter dated March 18, 2022, the State, through Attorney General Alan Wilson, advised this Court that the Department of Corrections now has the capability of carrying out an execution either by electrocution or by firing squad. In light of this notice, Petitioner, Freddie Eugene Owens, moves “to stay the setting of an execution date.” (Motion, dated March 20, 2022). Respondent opposes the motion. Respondent submits that the only impediment to proceeding with execution has been resolved. The conviction and sentence are final, and it is appropriate for the Clerk of this Court to issue a new execution notice. In support of this position, Respondent would respectfully show the Court:

1. Owens’s sentence has been repeatedly affirmed through challenges in both state and federal courts.¹ This Court previously stayed the execution authorized by the June 1, 2021 notice in an order dated June 16, 2021. In that order, this Court provided, in pertinent part:

¹ 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

According to the Director’s response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies. Under these circumstances, in which only a single method of execution is available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court 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.

(*State v. Owens*, Appellate Case No. 2006-038802, June 16, 2021 Order).

2. In compliance with the June 16, 2021 Order, the State has notified this Court that the Department of Corrections now has the capability to carry out executions by either electrocution or firing squad. (March 18, 2022 Letter of the Attorney General, with copy of Letter from Director Stirling). Thus, the condition that served as the basis for the restriction on the Clerk has been satisfied, and the Clerk should issue a notice.² *See Roberts v. Moore*, 332 S.C. 488, 488, 505 S.E.2d 593 (1998) (“it is a ministerial duty of the Clerk of this Court to issue an execution notice pursuant to § 17-25-370”).

3. Further, the notice to the Department puts into motion the statutory provisions for setting a date of execution and the required notice to the inmate. S.C. Code §§ 17-25-370 and 17-

an armed robbery of the convenience store where she worked. Ms. Graves was shot for being 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, the other confirming “Owens took credit for” the shooting. *Owens v. Stirling*, 967 F.3d 396, 404 (4th Cir. 2020). While awaiting sentencing, Owens murdered another inmate. *Id.*, at 404-05.

² Owens has requested a stay to the setting of the date. Since the date of execution is not set by this Court, but by operation of statute, S.C. Code § 17-25-370, Respondent construes the request as a motion to prohibit the issuance of a notice.

25-400. This, in turn, allows opportunity for the inmate to elect one of the available and recognized methods of execution as set out in the statute. S.C. Code § 24-3-530.

4. Owens contends a stay of the issuance of the notice is warranted in order for him to continue litigating an existing challenge to the amended statute³ and the authorized methods of execution. (Motion, p. 2). Specifically, Owens asserts that he has a pending action filed in Richland County (Case No. 2021-CP-40-4851) questioning the constitutionality of execution by electrocution or by firing squad which should be heard. (Motion, pp. 2-8). He has alleged in the Richland County action that the 2021 amendment to S.C. Code § 24-3-530 “violat[es] state and federal ex post facto, due process and non-delegation doctrines.” (Motion, p. 2 n. 1).⁴ Owens also asserts that the Department of Corrections has failed to demonstrate by sufficient evidence that it has made a good faith effort to obtain lethal injection drugs. (Motion, p. 5). He contends that without a stay, the questions posed in the litigation are likely to evade review. (Motion p. 8). Owens has shown that civil litigation is pending, but he has not shown circumstances warranting a stay of the issuance of an execution notice.

³ The Legislature passed a bill amending S.C. Code § 24-3-530, which sets out the methods of execution, and the Governor signed the bill into law on May 14, 2021. The amended statute provides that an inmate under a sentence of death “shall suffer the penalty by electrocution,” and then provides a conditional election of the method of execution depending on whether multiple methods are available to the Department at that time. S.C. Code § 24-3-530 (A). The methods provided in the statute now include the firing squad.

⁴ None of the claims appear meritorious. Respondent notes that the circuit court previously denied a preliminary injunction during the time the prior execution notice was pending based on its finding the plaintiffs were unable to show a likelihood of success on the merits. (Appellate Case No. 2021-000606, Order Denying Plaintiffs’ Motion for Preliminary Injunction received June 11, 2021). The appeal from that denial was abandoned when this Court issued its June 16, 2021 stay. (Appellate Case No. 2021-000606). According to the current pending motion to dismiss in the circuit court action, the plaintiffs “amended their complaint on July 2, 2021, and after sending one set of discovery requests to SCDC, they did nothing more for months to pursue their claims.” (2021-CP-40-02306, Motion to Dismiss, filed March 15, 2022, p. 5).

5. Again, the Clerk’s issuance of a notice is ministerial. *Roberts*, 332 S.C. at 488, 505 S.E.2d at 593. There is no discretion to exercise. Should this Court find that the State has complied with its instructions outlined in the June 16, 2021 Order, S.C. Code § 17-25-370 requires the Clerk to issue the execution notice.

6. Further, it is the execution notice that sets into action many of the circumstances Owens only generally identifies in his current stay motion.

a. For instance, until the Clerk issues the notice, the Director does not certify which methods are available. *See* S.C. Code § 24-3-350 (B) (“Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.”).⁵

b. In another example, until the Clerk issues the notice, Owens cannot make the election allowed. *See* S.C. Code § 24-3-350 (E) (“The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.”).

7. At this point after so many levels of review without relief, Owens must show “exceptional circumstances warranting the issuance of [a] stay” of execution. *In re Stays of*

⁵ Owens spends a good portion of his motion questioning whether the Department has made sufficient effort to secure drugs for lethal injection. (Motion, pp. 5-8). The discussion, however, is devoid of any legal basis for a challenge. Nothing in the statute places a burden on the Director or the Department to make any showing about why a method of execution is not available. Moreover, S.C. Code § 24-3-530 does not guarantee or require that lethal injection will be available. In fact, a plain reading of the statute supports that there is no guarantee that all three methods must be available at the same time. An interpretation to the contrary would render superfluous the express provision included by the Legislature that the Director certify whether the listed methods are available at the time he receives the notice from the Clerk. S.C. Code § 24-3-530 (B). In light of the structure of the statute, Owens’s complaint appears, on its face, non-meritorious.

Execution in Cap. Cases, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996). However, Owens cannot seek a stay of execution because the Clerk has not yet issued a new notice and an execution has not yet been set. Nothing in *In re Stays* speaks to preventing the ministerial act of issuing the notice. The Clerk should issue the notice as required by S.C. Code § 17-25-370.

CONCLUSION

Owens's motion to stay the issuance of an execution notice should be denied.

Respectfully Submitted,

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