No. 24-

IN THE

Supreme Court of the United States

BRAD KEITH SIGMON,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

EXECUTION OF APPELLANT SIGMON SCHEDULED FOR MARCH 7, 2025, 6:00 P.M

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under South Carolina law, a death-sentenced prisoner "shall suffer the penalty by electrocution" unless he makes a written election fourteen days before his execution date between "firing squad or lethal injection, if...available." S.C. Code § 24-3-530. The South Carolina Department of Corrections (SCDC) must certify the availability of those methods "by affidavit under penalty of perjury to" the state supreme court. *Id.*

These "choice provisions" confer a liberty interest upon a condemned prisoner that ensures he will "never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens v. Stirling*, 904 S.E.2d 580, 608 (S.C. 2024). For lethal injection, both the statute and "the Due Process Clause" require SCDC's certification to "disclose some basic facts about the drug's creation, quality, and reliability[.]" *Owens*, 904 S.E.2d at 604.

South Carolina's procedures have proven inadequate to protect this right. The three men South Carolina has executed since September suffered prolonged executions and received twice the "single dose of pentobarbital" SCDC certified as sufficient; two suffered pulmonary edema. But the state still permits SCDC to certify only that the drugs were tested by the state's forensic laboratory and withhold information confirming they are not expired, sub-potent, or spoiled. The scope of the certification and compressed schedule for election made it impossible for Brad Sigmon to assess which method is the more inhumane; to avoid the electric chair, he chose firing squad.

The question presented is: Does South Carolina's compressed timeline and arbitrary denial of information necessary for a condemned prisoner to exercise his statutory right "never [to] be subjected to execution by a method he contends is more inhumane than another method that is available" violate Due Process?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are all listed in the caption.

STATEMENT OF RELATED PROCEEDINGS

Sigmon v. State of South Carolina, S.C. Appellate Case No. 2025-000187. Judgment entered March 4, 2025.

Brad Sigmon v. Bryan Stirling, No. 20-6166, Supreme Court of the United States. Certiorari denied January 11, 2021.

Brad Sigmon v. Bryan Stirling, No. 8:13-cv-01399-RBH, United States District of South Carolina. Amended Order Entered April 15, 2020.

Brad Sigmon v. Bryan Stirling, No. 18-7, United States Court of Appeals for the Fourth Circuit. Judgment entered October 1, 2018.

Brad Sigmon v. South Carolina, No. 13-6379, Supreme Court of the United States. Certiorari denied November 18, 2013.

Brad Sigmon v. South Carolina, No. 27233, Supreme Court of South Carolina. Decided May 8, 2013.

Brad Sigmon v. South Carolina, No. 05-10465, Supreme Court of the United States. Certiorari denied June 26, 2006.

Brad Sigmon v. South Carolina, No. 26087, Supreme Court of South Carolina. Decided December 19, 2005; rehearing denied January 13, 2006.

South Carolina v. Brad Sigmon, Greenville County, Court of General Sessions. 2001GS2307630, 2001GS2307631, 2001GS2307629.

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OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is not reported but is reproduced in the Appendix to this petition at App. 1a.

JURISDICTION

The Supreme Court of South Carolina entered judgment on February 19, 2025, App. 8a, and denied Mr. Sigmon's timely motion for reconsideration on March 4, 2025. This Court accordingly has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 2002, Mr. Sigmon was convicted and sentenced to death for the murders of Gladys and David Larke in Greenville County, South Carolina. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005), cert. denied, 548 U.S. 909 (2006).

On July 31, 2024, the South Carolina Supreme Court issued a decision resolving a challenge by Mr. Sigmon and other death-sentenced prisoners to the state's amended execution statute and authorizing the resumption of executions after a thirteen-year pause. *Owens*, *supra*. The challenged statute provides that a death-sentenced prisoner will be executed by electrocution unless he affirmatively elects another of two statutorily authorized methods: the firing squad and lethal injection. S.C. Code § 24-3-530. The prisoner must make this election "in writing fourteen days before each execution date or

it is waived." § 24-3-530(A). Per the South Carolina Supreme Court, these "choice provisions" are meant to ensure that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens*, 904 S.E.2d at 608.

Also per the statute, the director of the South Carolina Department of Corrections must "determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] provided" by the state's capital punishment statute—electrocution, the firing squad, and lethal injection—"are available." S.C. Code § 24-3-530(B). As to lethal injection in particular, the certification must "disclose some basic facts about the drug's creation, quality, and reliability"—a requirement that the South Carolina Supreme Court seated in both the text of § 24-3-530 and "the Due Process Clause." *Owens*, 904 S.E.2d at 603-604.[1] Per *Owens*, the purpose of requiring Director Stirling to detail how he has "satisf[ied] himself that the drugs are capable of carrying out the death sentence according to law" is to provide notice so "a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Id*. But *Owens* also concluded that a certification asserting merely that the lethal injection drugs have passed stability and

[1] Another provision of South Carolina law prohibits the disclosure of identifying information of "any person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence . . . . in any administrative, civil, or criminal proceeding in the courts, administrative agencies, boards, commissions, legislative bodies, or quasilegislative bodies of this State, or in any other similar body that exercises any part of the sovereignty of the State." S.C. Code § 24-3-580(A)(1), (B).

purity testing by the South Carolina Law Enforcement Division (SLED) would suffice. *Id.*

Owens acknowledged that these choice provisions “create[] a potential timing problem for the filing of the Director's affidavit and the inmate's election of a method of execution,” which it “encourage[d] our General Assembly to address.” *Owens,* 443 S.C. at 292 n.23. In the meantime, the South Carolina Supreme Court determined to “(1) issue notices of execution only on Fridays, and (2) require the Director to file the subsection 24-3-530(B) affidavit within five days of the Notice of Execution,” which would afford the condemned prisoner “at least eight days in which to evaluate the affidavit and file any motion.” *Id.*

In response to this timing problem, Mr. Sigmon and other condemned prisoners filed a motion seeking a reasonable interval of no fewer than 13 weeks (or 91 days) between execution dates. The movants noted that if the South Carolina Supreme Court were to issue one execution notice while another was still pending, the prisoner with the later execution date "would be required to elect their method prior to the execution of the first.” This problem was of particular concern because “South Carolina’s authorized methods of execution are either antiquated or entirely novel,” and “the question of which is the ‘more inhumane’ has yet to be informed by their actual use.” Indeed, movants argued, “[i]f a method is used and is botched, or otherwise reveals itself to be ‘more inhumane, a compressed execution schedule might subject a prisoner to execution by a method that they would never have chosen had the execution that revealed its ‘inhuman[ity]’ occurred before their election date.” *Moore et al. v. State*, Motion, Appellate Case No. 2024-001373 (Aug. 21, 2024).

The South Carolina Supreme Court granted movants' motion in part, providing a 35-day interval between executions. *Moore et al. v. State*, Order, Appellate Case No. 2024-001373 (Aug. 30, 2024).

Between September 20, 2024, and January 31, 2025, the state executed three prisoners: Freddie Owens, Richard Moore, and Marion Bowman. For each man, SCDC certified that "lethal injection is available via a single dose of pentobarbital," (App. 47a; *see also* App. 50a; App. 58a), and, tracking the example provided in *Owens*, certified that the drug had been tested by SLED and that "the appropriate and responsible Department staff" had deemed it "sufficiently potent such that administration in accordance with the protocol will result in death." *Id.*

Mr. Owens elected lethal injection and was executed on September 20, 2024. The execution began at 6:35 p.m., but Mr. Owens was not declared dead until 6:55 p.m.[2] Per Mr. Owens's religious beliefs, no autopsy was conducted.

Mr. Moore also elected lethal injection and was executed on November 1, 2024. The execution began at 6:01 p.m., but Mr. Moore was not pronounced dead until 6:24 p.m.[3]

Prior to the execution of Mr. Bowman, SCDC released Mr. Moore's autopsy, which documented that he had been injected with a second dose of pentobarbital after ten minutes had passed. Supp. App. 61a; Supp. App. 65a. Even after receiving two doses

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[2] SCDC Press Conference Concerning Execution of Freddie Eugene Owens, WYFF News (available at: FULL PRESS CONFERENCE Freddie Owens Execution: 9.20.2024) (last visited January 8, 2025).

[3] *Witnesses speak after execution of South Carolina inmate Richard Moore*, WYFF News 4 (available at Witnesses speak after execution of South Carolina inmate Richard Moore) (last visited January 10, 2025).

of pentobarbital, Mr. Moore was not declared dead for another ten minutes. Supp. App. 61a; 65a. Mr. Moore's autopsy also showed that his lungs were heavy and swollen with fluid—an excruciating condition known as pulmonary edema, which causes the sensation of drowning. Supp. App. 62a.

Mr. Bowman elected lethal injection and was executed on January 31, 2025.[4] The execution began at 6:04 p.m., but Mr. Bowman was not declared dead until 6:27 p.m. Shortly after Mr. Bowman's execution, an SCDC spokesperson was asked how many doses of pentobarbital had been administered to him. She declined to answer, saying only, "we followed our protocol and that is not disclosed."[5] *Id.* at 12:51-13:06.

On February 5, 2025, Mr. Sigmon moved the South Carolina Supreme Court not to issue his execution notice until he had received and reviewed Mr. Bowman's autopsy report. App. 36a. Mr. Sigmon noted that he had "previously conceded a single dose of pentobarbital is constitutional if properly administered using reliable and effective drugs." *Owens*, 904 S.E.2d at 599. But during at least one execution, and likely all three, SCDC has been required to administer a double dose before the inmate's death. Mr. Sigmon noted that all three men executed by lethal injection had remained alive for more than twenty minutes "even after receiving the single, massive dose of pentobarbital prescribed by South Carolina's execution protocol and contemplated by this Court," App. 36a; he also cited the findings of a second dose and pulmonary edema in Mr. Moore's autopsy, and SCDC's refusal to reveal how many doses had been

[4] 00:33-00:40, ABC News 4, *Execution witnesses provide startling details on death of Marion Bowman Jr.* (available at: https://www.youtube.com/watch?si=Gx7QpGRUONCRPemx&v=QYdswxKhbc4&feature=youtu.be) (last visited February 11, 2025).

administered to Mr. Bowman. *Id*. Mr. Sigmon proffered an affidavit from Dr. David Waisel, an anesthesiologist, attesting that a single dose of so much pentobarbital should make a death as protracted as those suffered by Mr. Owens, Mr. Moore, and Mr. Bowman "a physiological and pharmacological impossibility"—which raised the prospect "1) that the drugs were either not properly administered, not reliable and effective, or all of the above; and 2) that, like Mr. Moore, Mr. Owens and Mr. Bowman also suffered from pulmonary edema during their prolonged deaths." App. 37-38a; see also App. 42a. Mr. Sigmon accordingly argued that he could not "begin to assess, much less contend, which method is the more inhumane" between the firing squad and lethal injection with the information available to him, and that Mr. Bowman's autopsy was "necessary for him to have a meaningful opportunity to identify and reject the more inhumane of South Carolina's available methods of execution." App. 37-38a. On February 6, 2025, the South Carolina Supreme Court denied his motion.

On February 7, 2025, the South Carolina Supreme Court issued a notice scheduling Mr. Sigmon for execution on March 7, 2025.

On February 11, 2025, SCDC served Mr. Sigmon and the South Carolina Supreme Court with a certification that was materially identical to those previously provided to Mr. Owens, Mr. Moore and Mr. Bowman. App. 34a; *see also* App. 47a; App. 50a; App. 58a.

On February 14, 2025, Mr. Sigmon filed a motion for stay of execution and objection to the sufficiency of SCDC's certification, on the grounds that its scope and timetable, as set by *Owens*, had proven inadequate to protect his statutory and due process rights when electing the method of his execution. App. 21a. Mr. Sigmon cited: South Carolina's three protracted lethal injections; the second dose and pulmonary

edema documented in Mr. Moore's autopsy; the unavailability of Mr. Bowman's autopsy report, and SCDC's refusal to answer how many doses of pentobarbital it had administered to him; and the affidavit of Dr. Michaela Almgren, a professor of pharmacy, who explained the need for SCDC to certify the beyond-use or expiration date of its drugs, the type and results of the tests performed on them, and their storage conditions. Mr. Sigmon asserted that, especially in light of the three executions that had gone awry, that information fell within the "basic facts about the drug's creation, quality, and reliability" that South Carolina law and the Due Process Clause require SCDC to disclose. App. 21a. Only with this information, Mr. Sigmon argued, could he meaningfully exercise his statutory right "never [to] be subjected to execution by a method he contends is more inhumane than another method that is available." App. 24a. The South Carolina Supreme Court denied Mr. Sigmon's objection on February 19, 2025.

On February 21, 2025, Mr. Sigmon was required by § 24-3-530 to elect between lethal injection and the firing squad or die in the electric chair. Mr. Sigmon chose the firing squad.

On February 24, 2025, SCDC released the autopsy report for Mr. Bowman. "Per information provided by" SCDC, the report notes that Mr. Bowman, whose execution lasted for 23 minutes, was injected with a total of "10 grams of pentobarbital." Supp. App. 62a. It also records that Mr. Bowman died with his lungs massively swollen with blood and fluid. *Id.* at 3 Supp. App. 66a.

On February 26, 2025, Mr. Sigmon filed a motion for reconsideration of the denial of his objection and motion for stay of execution, arguing that Mr. Bowman's autopsy confirmed that,"[c]ontrary to the certifications SCDC has provided..., lethal

injection 'via a single dose of pentobarbital' is not 'available' in South Carolina. App. 15a. In response, Respondent admitted that "[a] second series" of pentobarbital injections "was administered according to SCDC's protocol," presumably in all three of the lethal injections South Carolina has conducted since September. App. 12-13a.

On March 3, 2025, the South Carolina Supreme Court denied Mr. Sigmon's reconsideration motion. This timely petition for writ of certiorari follows. Mr. Sigmon's execution remains scheduled for this Friday, March 7, 2025.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." This Court "has long recognized" the applicability of procedural Due Process protections when a "state statute, regulation, or policy" creates "a liberty interest." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015) (citing *Meachum v. Fano*, 427 U.S. 215 (1976), and *Wolff v. McDonnell*, 418 U.S. 539 (1974)). Such state laws "may create enforceable liberty interests in the prison setting" when they create an "objective expectation… that an inmate could reasonably expect to enforce them against the prison officials." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461, 465 (1989).

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). To that end, "[a]n elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" implicating their liberty interests and "an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). When determining what process is due, a court must balance: (a) the nature of the private interest that will be affected by

the governmental action; (b) the risk of erroneous deprivation through the procedures used and the probable value of requiring additional procedural safeguards; and (c) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The choice provisions of Section 24-3-530 confer a liberty interest upon condemned prisoners in South Carolina, ensuring they will "never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens*, 904 S.E.2d at 608. Where a liberty interest exists, then the procedural due process inquiry calls on courts to fashion remedies that balance the interest of those seeking additional procedural protections with the government's ability to implement its own interests without undue burden. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) ("Because the requirements of due process are flexible and cal[l] for such procedural protections as the particular situation demands, we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.") (internal citations and quotations omitted).

In *Owens*, the South Carolina Supreme Court recognized the Due Process component of the statute's requirement of notice to death-sentenced prisoners, and created a procedure designed to provide both notice and an opportunity to protect that interest by establishing a scope and timetable for Director Stirling's certification. In operation, however, those requirements have proven inadequate to safeguard a condemned prisoner's Due Process rights.

In denying Mr. Sigmon adequate procedures to exercise his state-created right to choose his the least inhumane method of execution, South Carolina has decided an important question of federal law that has not been, but should be, settled: when a state confers a liberty interest in choosing a method of execution, what process is due a

prisoner exercising the right to choose? The state supreme court's ratification of the existing, arbitrary, and inadequate procedure implicates an important question of federal law in a novel context that both appears to conflict with this Court's precedent on procedural due process and decides it in a way that has not been and should be settled by this Court. *See* Supreme Court Rule 10(c). The South Carolina Supreme Court's decision cannot be reconciled with the text or the animating purpose—notice and an opportunity to be heard—of this Court's due process.

1. The Scope

In *Owens,* the South Carolina Supreme Court held that when Director Stirling fulfills his statutory obligation to "determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] are available," he must disclose, *inter alia*, "some basic facts about the [lethal injection] drug's creation, quality, and reliability, or…the drugs' potency, purity, and stability." *Owens,* 904 S.E.2d at 605.

The Court then "illustrate[d] the scope of this requirement" with the following example of a sufficient certification: "that scientists at the Forensic Services Lab of the South Carolina Law Enforcement Division (SLED), whose experience and qualifications were verified by the Director and the Chief of SLED, recently performed testing according to widely accepted testing protocols and found the drugs were not only stable, but of a clearly acceptable degree of purity[.]" *Id.* at 293. Although this example omits many "basic facts" essential to determining the drug's quality and reliability, as discussed *infra*, the Court concluded that such a certification would leave no "legitimate legal basis on which to mount a challenge." *Id.* SCDC has parroted this language in all four of its certifications.

But this certification is inadequate to protect Mr. Sigmon's rights. As detailed in the affidavit of Dr. Michaela Almgren, a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcomes Sciences at the University of South Carolina College of Pharmacy, SCDC's now standard certification does not provide the basic facts needed "to assess the qualities and reliability of the lethal injection drugs the department has obtained for use in [Mr. Owens's] execution." App. 53a.[6] It provides neither "the date when the drugs were tested" nor their "'Beyond Use Date,' or BUD"—the basic facts needed to assess whether "the drugs will still be effective ...when the department intends to use them." *Id.* As SCDC's drugs appear to be compounded, "their stability over time is less certain," amplifying the importance of knowing the BUD and the testing date. *Id.* Indeed, it is unclear from Director Stirling's certifications whether any subsequent testing of these drugs has been conducted.

The certification provides no facts about the "quality[] and reliability" or the "potency, purity, and stability" of the drugs. *Owens,* 904 S.E.2d at 604. While it "describes reports the director received from SLED personnel concerning the testing of the drugs," it "does not specify the test methods used, the testing procedures followed, or the actual results obtained from those tests." App. 54a.[7] As a result, the certification does not establish that "the SLED laboratory followed all established steps for pharmaceutical drug quality analysis as specified in the USP compendium, which

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[6] Dr. Almgren's declaration was initially submitted to the South Carolina Supreme Court by Mr. Owens in response to SCDC's first certification as to lethal injection. As the certificate submitted for Mr. Sigmon's execution is identical, Dr. Almgren's critique remains apt.

[7] Dr. Almgren also observes that the affidavit's language describing the testing results—such as its conclusory statement that SLED personnel "'acknowledged the substance's concentration in terms of its purity and stability"—"lacks clarity." *Id.* at ¶ 6.

usually differ from typical forensic practice." *Id.* The absence of these basic facts could be corrected by the provision of "the actual analytical reports from the testing of the drugs," which are "standard records produced during this type of laboratory analysis." *Id.*[8]

The certification also provides no facts about "how the storage conditions [of the drugs] will be monitored between" its date and the execution—a nearly three-week timeframe that would provide "ample opportunity for quality issues to arise with these drugs if they are not stored correctly, as medications—especially compounded drugs—are sensitive to moisture, light, and temperature." App. 54-55a . This, too, underscores the importance of knowing the date that these drugs were tested, as SCDC's certification could rely on testing that predated any problems that improper storage would cause.

As Dr. Almgren confirms, all of the "basic facts" to which a prisoner weighing the election of lethal injection is entitled can be established through the provision of the actual testing results, along with confirmation that the drugs are not beyond their BUD and are being maintained through these well-established and straightforward measures. App. 55a.[9]

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[8] To comply with South Carolina's shield statute, any identifying information for the SLED analysts who conducted the testing could be readily redacted from the analytical reports.

[9] While South Carolina law prohibits the disclosure of identifying information of "any person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence," S.C. Code § 24-3-580(A)(1), (B), the information Mr. Sigmon seeks does not fall within the purview of that statute. Any incidental identifying information could simply be redacted.

The concerns about the quality and reliability of South Carolina's drugs are not abstract. All available evidence about the three lethal injections South Carolina has conducted since September corroborate Mr. Sigmon's concerns about the adequacy of SCDC's certifications. In all three, the condemned prisoner was not declared dead for at least twenty minutes. In all three, "[a] second series" of pentobarbital injections "was administered." At least two of the three resulted in pulmonary edema. And it seems virtually certain that Mr. Owens's execution, which also lasted twenty minutes, was the same. If SCDC's attestations as to the quality and reliability of its lethal injection drugs ever deserved the benefit of the doubt, that deference is now indefensible.

Mr. Sigmon previously "conceded…that execution by lethal injection using a single dose of pentobarbital is constitutional if properly administered using reliable and effective drugs"—a "limited concession" that the South Carolina Supreme Court cited as rendering any further analysis of "the constitutionality of lethal injection…unnecessary." *Owens*, 904 S.E.2d at 599. But the certification outlined in *Owens* to ensure that SCDC's drugs fall within this concession—which allows SCDC to assert merely that the drugs have passed stability and purity testing by the South Carolina Law Enforcement Division (SLED)—has proven inadequate to ensure they are reliable and effective. *Id.* at 605.

The only way to ensure that condemned prisoners have a choice meaningful enough to satisfy the statute and Due Process is to require more from SCDC. A starting point would be certifying the information Mr. Sigmon has requested. Were SCDC to disclose the beyond use or expiration date of its drugs, the type and results of the tests performed on them, and their storage conditions, any problems with the reliability and effectiveness of the drugs themselves would necessarily be revealed and could be remediated.

That requirement, in turn, would secure Mr. Sigmon's right of election. The South Carolina Supreme Court has recognized the protected liberty interest created by Section 24-3-530's choice provisions and the "objective expectation… that an inmate could reasonably expect to enforce them against the prison officials." *Thompson*, 490 U.S. at 461. It held that there is "a Due Process Clause component to [its] analysis" of what SCDC's certification must include; it also states that the purpose for requiring the certification to detail why SCDC concluded "the drugs are capable of carrying out the death sentence according to law" is so "a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Owens*, 904 S.E.2d at 605.

But the Court's continued acceptance of SCDC's certifications—which have parroted the example *Owens* provided—thwarts that purpose. Even as one execution after another demonstrates the inadequacy of the certifications, the court below has continued to set the bar too low for SCDC to fail. Mr. Sigmon is thus left with the ostensible right to "some basic facts about the [lethal injection] drug's creation, quality, and reliability, or…the drugs' potency, purity, and stability," but with no means of enforcing that right against SCDC. *Owens*, 904 S.E.2d at 604. Due process cannot countenance the provision of a right without a remedy.

2. <u>The Timetable</u>

The "timing problem" that the South Carolina Supreme Court recognized as potentially infringing upon a condemned prisoner's rights under the "choice provisions" has not been solved by *Owens*'s timetable for SCDC's certification; indeed, Mr. Sigmon's case illustrates its inadequacy. Following SCDC's certification on February 11, 2025, Mr. Sigmon had only ten days to elect his method of execution. Opting not to elect would

result in electrocution, which he considered the most inhumane of the statutory methods. But identifying the more inhumane between lethal injection or the firing squad was, with the elliptical information provided, impossible. Mr. Sigmon promptly presented his due process concerns to the South Carolina Supreme Court, filing his objection within three days, on February 14, 2025. When the Supreme Court denied his objection on February 19, 2025, however, he had less than two days before his election. Moreover, as Mr. Sigmon's execution notice issued just one week after Mr. Bowman's execution, he was forced to elect his method of execution before receiving Mr. Bowman's autopsy report—which, as discussed, contained evidence underscoring the need for the additional information about the quality and reliability of South Carolina's drugs that Mr. Sigmon has requested.

If the purpose of the "choice provisions" is to ensure that Mr. Sigmon "never be subjected to execution by a method he contends is more inhumane than another method that is available," this timetable ensures only that he can make no contention whatsoever. *Owens,* 904 S.E.2d at 608.

3. The Arbitrary Scope and Timetable of South Carolina's Certification and Election Procedures Violate Due Process

When "a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). Even when "all that is involved in th[e] case is the denial of a procedural right of exclusively state concern..., it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law," as "that liberty

interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Here, the combination of the narrow scope of information required for the certification and the compressed timeline for election have diminished Mr. Sigmon's right of election to a guessing game. This arbitrary abrogation of Mr. Sigmon's state-created right is unconstitutional.

CONCLUSION

In *Owens*, the South Carolina Supreme Court analogized South Carolina's choice provisions to lethal injection, identifying each "as innovation[s]" reflecting "the General Assembly's sincere effort to make the death penalty less inhumane while enabling the State to carry out its laws." *Owens*, 904 S.E.2d at 608. But the choice provisions and lethal injection can only fulfill that purpose if they work as intended. South Carolina could not have intended for lethal injection to require twice the "single dose" anticipated, or to leave three prisoners strapped to a gurney for twenty minutes before declared dead, or drowning in blood and fluid from their own lungs. And South Carolina could have intended a condemned prisoner to choose his method of execution not because he contends that the other options are more inhumane, but because he cannot trust the accuracy or honesty of SCDC's certification. Even if South Carolina did so intend, Due Process so forbids; the scope and timetable for the certification and election render Mr. Sigmon's "choice provisions" a hollow right. A single, simple measure would redeem it: a certification that actually provides the basic facts needed to assess, and identify problems with, the quality and reliability of SCDC's lethal injection drugs.

The petition for certiorari should be granted, and this matter remanded to the lower courts for the provision of procedures for the certification of available methods of

execution that, in scope and timetable, ensure the protections of Due Process for Mr. Sigmon's statutory right to elect.

Dated: March 5, 2025

Respectfully submitted,

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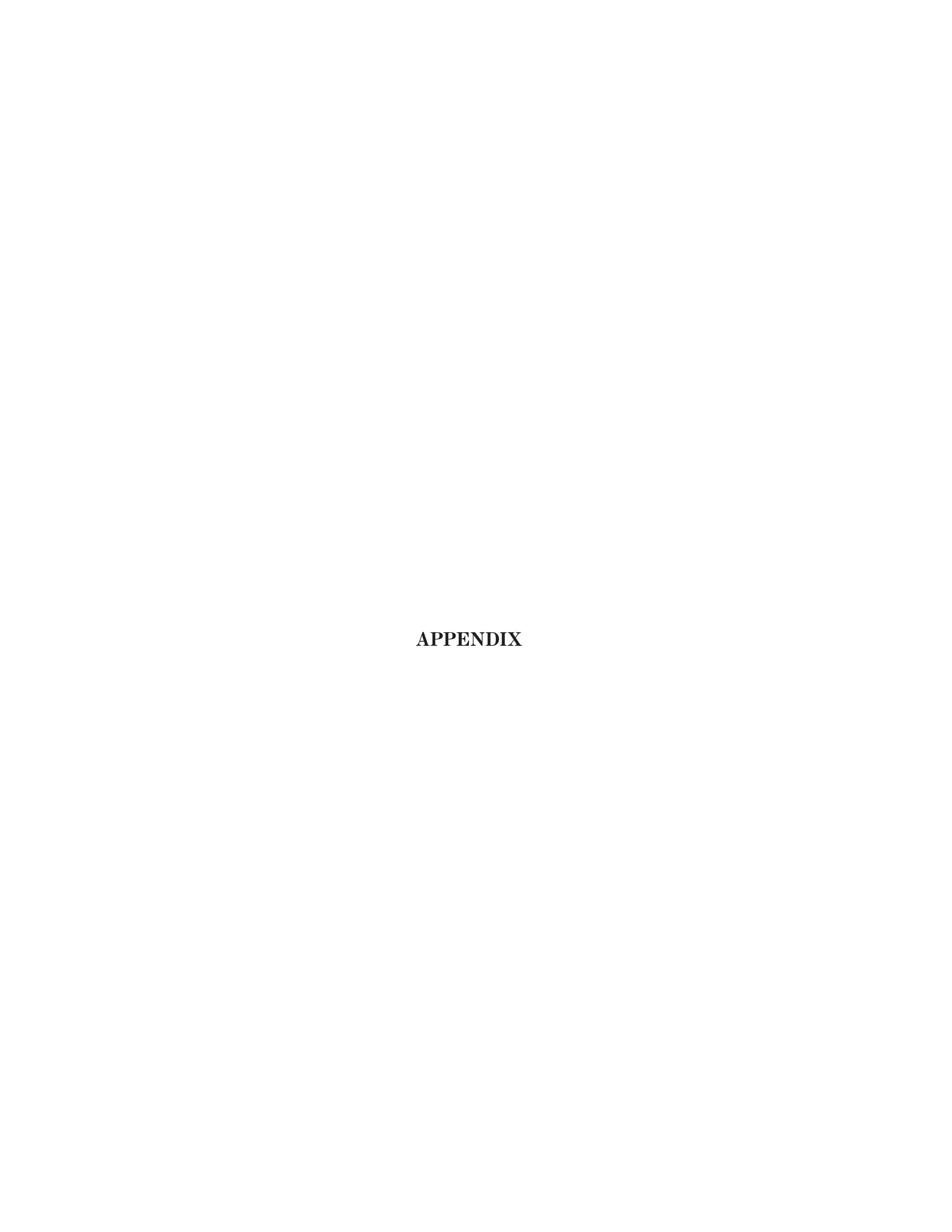

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The Supreme Court of South Carolina

The State, Respondent,

v.

Brad Keith Sigmon, Petitioner.

Appellate Case No. 2025-000187

AND

Brad Keith Sigmon, Petitioner,

v.

Bryan P. Stirling, Director of the South Carolina Department of Corrections, and the South Carolina Department of Corrections, Respondents.

Appellate Case No. 2025-000309

ORDER

Brad Keith Sigmon has filed a petition for a writ of habeas corpus in this Court's original jurisdiction and a motion to stay his March 7, 2025, execution while this Court considers his petition for a writ of habeas corpus. Further, Sigmon has filed a motion for reconsideration of this Court's February 19, 2025 order. That order denied his request to stay the execution, require the director of the South Carolina Department of Corrections (SCDC) to provide further information, and extend the interval between executions for the completion and review of any autopsy reports from the most recent execution. Finally, Sigmon has filed a motion to seal the Marion Bowman autopsy report (Exhibit 8), which Sigmon attached to his motion for reconsideration.

These motions come after an extensive procedural history. Sigmon was convicted in 2002 of two counts of murder and first-degree burglary. He was sentenced to death for murder and thirty years' imprisonment for burglary. We affirmed Sigmon's conviction on direct appeal. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). The United States Supreme Court denied Sigmon's petition for writ of certiorari from that decision. *Sigmon v. South Carolina*, 548 U.S. 909 (2006). In 2006, Sigmon applied for post-conviction relief (PCR), which was denied. We affirmed the PCR court's denial of Sigmon's application. *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394 (2013).

In 2013, Sigmon filed a petition for a writ of habeas corpus in the U.S. District Court, which denied the petition. *Sigmon v. Stirling*, 8:13-cv-01399-RBH, 2018 WL 4691197, at *1 (D.S.C. Sept. 30, 2018). The Fourth Circuit Court of Appeals affirmed. *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020). The United States Supreme Court then denied Sigmon's petition for a writ of certiorari. *Sigmon v. Stirling*, 141 S.Ct. 1094 (2021).

On August 21, 2014, Sigmon filed a second PCR application, which the PCR court denied as untimely and impermissibly successive. We dismissed the notice of appeal under Rule 243(c), SCACR. *Sigmon v. State*, S.C. Sup. Ct. Order filed Aug. 21, 2017.

In 2021, Sigmon petitioned for a writ of habeas corpus in this Court's original jurisdiction. We denied that petition. *Sigmon v. State*, S.C. Sup. Ct. Order filed June 16, 2021. Sigmon now raises the stated motions. We, therefore, address each in turn.

Petition for a Writ of Habeas Corpus

Sigmon contends he is entitled to a writ of habeas corpus because (1) no jury has heard the mitigating evidence of his bipolar II disorder, neurocognitive deficits, and traumatic and abusive childhood; (2) ineffective assistance of trial and post-conviction relief (PCR) counsel in investigating and presenting mitigation evidence; and (3) the insufficiency of this Court's 2005 proportionality review and the disproportionality of his death sentence.

Habeas corpus relief is available to prisoners in South Carolina in this Court's original jurisdiction. *See* S.C. Const. art. I, § 18. Writs of habeas corpus are seldom used—only when necessary to ensure fundamental constitutional rights—and the applicant bears a much higher burden in a habeas corpus proceeding.

Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008). Therefore, a writ of habeas corpus will be issued "only under circumstances where there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quoting *State v. Miller*, 84 A.2d 459 (N.J. Super. 1951)); *see also Moore v. Stirling*, 436 S.C. 207, 218–19, 871 S.E.2d 423, 429 (2022) ("Two components are needed to meet the standard articulated in *Butler* and other cases. The petitioner must prove (1) the existence of a constitutional violation; and (2) the denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice."); *McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) (stating a writ of habeas corpus will be granted only under "unique and compelling circumstances"). This Court has noted that "[a]t some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Williams*, 380 S.C. at 480, 671 S.E.2d at 603.

Mitigating Evidence

Sigmon asserts that his execution would be a denial of fundamental fairness shocking to the universal sense of justice because no jury has heard the mitigating evidence of his bipolar II disorder, neurocognitive deficit, and traumatic and abusive childhood. *See Butler*, 302 S.C. at 468, 397 S.E.2d at 88.

Sigmon has shown no constitutional violation regarding the lack of mitigating evidence. Trial counsel in a capital case must conduct a reasonable and thorough investigation into mitigation evidence and present the same at sentencing. *Williams v. Taylor*, 529 U.S. 362, 393 (2000); *see also Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Rosemond v. Catoe*, 383 S.C. 320, 326, 680 S.E.2d 5, 9 (2009). Here, trial counsel presented extensive evidence of Sigmon's medical, family, and social history through numerous witnesses at sentencing.

Further, even if trial counsel's performance were deficient, the deficiency was not prejudicial because the mitigating evidence Sigmon now presents, taken as a whole, would not likely have influenced the jury's appraisal of Sigmon's culpability in light of the significant evidence supporting the aggravating circumstances found by the jury. *See Rosemond*, 383 S.C. at 326, 680 S.E.2d at 9 (holding when determining whether counsel's failure to present adequate mitigation evidence resulted in prejudice, this Court must determine whether the mitigating evidence,

taken as a whole, might have influenced the jury's appraisal of the defendant's culpability). Therefore, any deficiency would not render Sigmon's execution shocking to the universal sense of justice.

Proportionality

Sigmon also argues he is entitled to a second proportionality review under *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022). Sigmon contends his death sentence is disproportionate because no court has had an opportunity to consider his mental illness, neurocognitive deficits, and traumatic and abusive childhood. Sigmon presents a study examining datasets including South Carolina homicide cases and capital prosecutions, alleging the study shows South Carolina's use of the death penalty is not driven by rational factors.

Sigmon is not entitled to a second proportionality review and has shown no constitutional violation based on disproportionality. *Moore* held that this Court is not statutorily required to limit the pool of "similar cases" for comparative proportionality review to only those cases in which the death penalty was imposed. 436 S.C. at 230, 871 S.E.2d at 435. However, *Moore* did not set forth a retroactive rule requiring a new proportionality review that includes cases in which the death penalty was not imposed. Because Sigmon is not entitled to a second proportionality review, it is unnecessary to reach his arguments for why his death sentence was disproportionate.

Ineffective Assistance of Counsel

Sigmon contends his execution would be a denial of fundamental fairness shocking to the universal sense of justice because trial counsel failed to interview or sufficiently interview critical witnesses and failed to follow up on leads that would have led to the discovery of the mitigating evidence of Sigmon's bipolar II disorder, neurocognitive deficits, and traumatic and abusive childhood. Sigmon also argues PCR counsel for his 2006 PCR proceedings were ineffective for failing to raise arguments about the ineffective assistance of trial counsel for failing to discover the mitigating evidence he now presents.

Sigmon's ineffective assistance of counsel arguments fail to show a constitutional violation for reasons similar to his mitigating evidence argument. As mentioned, trial counsel's investigation into Sigmon's medical, family, and social history was extensive, and counsel interviewed and called numerous witnesses to testify at the sentencing hearing about Sigmon's history.

Further, even if counsel's failure to interview specific witnesses was deficient, there was no prejudice because, taken as a whole, the mitigating evidence supplied by the interviews would not have influenced the jury's appraisal of Sigmon's culpability. *See Rosemond*, 383 S.C. at 326, 680 S.E.2d at 9.

Sigmon's ineffective assistance of PCR counsel argument fails because he alleges no reason other than the mere deficient performance of PCR counsel to consider his ineffective assistance of PCR counsel claim. *See Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding the contention that prior PCR counsel was ineffective is not *per se* a sufficient reason allowing for a successive PCR application).

In any event, Sigmon has filed and received review of two prior PCR applications, providing an opportunity to raise these claims. We have held that "a matter which is cognizable under the [Uniform Post-Conviction Procedure Act] may not be raised by a petition for a writ of habeas corpus" as habeas relief should not substitute for direct appeal or other available remedies. *Simpson v. State*, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998); *see Williams*, 380 S.C. at 479–80, 671 S.E.2d at 603 (holding review below was "more than sufficient" for a petitioner for a writ of habeas corpus where the petitioner already received review of his PCR claims in state PCR and federal habeas proceedings). Accordingly, we find Sigmon has failed to show a denial of fundamental fairness shocking to the universal sense of justice or a constitutional violation; therefore, the petition for a writ of habeas corpus is denied. *See Moore*, 436 S.C. at 218, 871 S.E.2d at 429 (holding to successfully petition for a writ of habeas corpus, a petitioner must prove (1) the existence of a constitutional violation; and (2) a denial of fundamental fairness that, in the setting, shocks the universal sense of justice).

Motion to Stay Execution

Under *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996), a motion for a stay of execution pending the filing of a successive PCR action or a petition for a writ of habeas corpus must demonstrate exceptional circumstances warranting the issuance of a stay. Because Sigmon has not shown exceptional circumstances, we deny the motion to stay the execution.

Motion for Reconsideration

Sigmon moves for this Court to reconsider its order denying his request to stay the execution, require the director of SCDC to provide further information, and extend the interval between executions for the completion and review of any autopsy reports from the most recent execution. Sigmon argues the Bowman autopsy report corroborates his concerns about the adequacy of SCDC's certifications as to its lethal injection drugs.

After reviewing the autopsy report and finding nothing that changes our conclusion from the February 19, 2025, order, we deny the motion for reconsideration.

Motion to Seal

Sigmon moves to seal Marion Bowman's autopsy report that was filed with his motion for reconsideration, arguing sealing the autopsy report will safeguard extensive medical information. We find no compelling reason to seal the autopsy report. *See State v. Price*, 441 S.C. 423, 442, 895 S.E.2d 633, 642–43 (2023) ("Pursuant to the First Amendment to the United States Constitution, article I, section 9 of the South Carolina Constitution, and section 14-5-10 of the South Carolina Code, no South Carolina court—not this Court, the court of appeals, nor any trial court—may seal any portion of a court record from public view unless there is a specific provision of law permitting it."); 441 S.C. at 435, 895 S.E.2d at 639 (holding "no court records may be sealed from public view unless the . . . sealing is authorized by a specific provision of law"); 441 S.C. at 440, 895 S.E.2d at 641–42 ("Judicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and [article I, section 9 of] the state constitution." (quoting *Ex parte Cap. U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006))). Therefore, the motion to seal is denied.

In summary, we deny Sigmon's petition for a writ of habeas corpus; motion to stay his March 7, 2025, execution; motion for reconsideration; and motion to seal the Marion Bowman autopsy report.

C.J.

J.

J.

J.

J.

Columbia, South Carolina
March 4, 2025

cc:
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Joshua Snow Kendrick
Alan McCrory Wilson
Donald J. Zelenka
Melody Jane Brown
Brian P. Stirling
Salley Wood Elliott
Gerald W. King, Jr.
Danielle Smith
Gretchen Swift

The Supreme Court of South Carolina

The State, Respondent,

v.

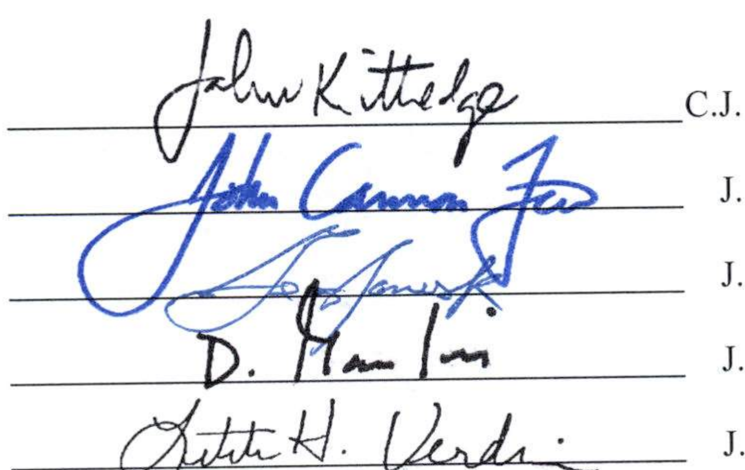
Brad Keith Sigmon, Petitioner.

Appellate Case No. 2025-000187

ORDER

Following the submission of the affidavit of Bryan P. Stirling, Director, South Carolina Department of Corrections, certifying the available methods of execution as required by section 24-3-530(B) of the South Carolina Code (2025), Petitioner filed an objection to the affidavit and certification. Petitioner asks that the Court stay his execution, require Director Sterling to provide further information, and extend the interval between executions for the completion and review of any autopsy reports from the most recent execution. We deny the requests.

Petitioner has also filed a motion to seal Exhibit 6 (the autopsy report of Richard Bernard Moore), which is attached to the Objection to Affidavit and Certification of Bryan P. Stirling, Director, South Carolina Department of Corrections. We grant the motion to seal Exhibit 6.



C.J.

J.

J.

J.

J.

Columbia, South Carolina
February 19, 2025

cc:
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Danielle Smith

RECEIVED
Feb 28 2025
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

BRAD KEITH SIGMON,

Movant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2025-000187

RETURN TO MOTION FOR RECONSIDERATION

This Court has already rejected Brad Keith Sigmon's plea for more information about lethal injection drugs, and he offers no reason—much less a compelling one—to reconsider that question. In the first place, Sigmon has elected a different method, which means he waived any argument about lethal injection. In the second, Sigmon points to nothing new from Marion Bowman's autopsy that changes anything about his original Objection. And in the third, Sigmon implies something about the previous executions that he knows is not true, given that Sigmon has a copy of SCDC's execution protocols.

I. Sigmon has elected a different method, so he has waived any arguments about lethal injection.

At the start, Sigmon's argument fails because he has elected a different method. He therefore no longer has any standing to challenge anything about lethal injection because no order about lethal injection could redress any supposed harm. *Cf. Lebron v. Rumsfeld*, 670 F.3d 540, 561 (4th Cir. 2012) (plaintiff must have standing throughout the case).

By way of analogy, the U.S. Supreme Court has held that an inmate who elects a method of execution other than the State's default method waives a right to challenge that method. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999); *see also, e.g.*, *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) ("if Stanford chooses electrocution over lethal injection, the constitutionality of which he does not challenge, he will waive any objection to electrocution"); *Orbe v. Johnson*, 601 S.E.2d 547, 549 (Va. 2004) (adopting *Stewart*'s rule). To hold otherwise would promote procedural gamesmanship and delay carrying out capital sentences beyond the already decades' long delays that already exist. *Cf. Bucklew v. Precythe*, 587 U.S. 119, 149 (2019) ("The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better" than more delay.). In the same vein, an inmate should not be permitted to delay his execution by challenging something about a method he didn't elect.

It doesn't do Sigmon any good to frame his argument as a renewed due process one. He simply rehashes the same argument that he has made previously, and doing that does nothing to wipe away the waiver rule.

II. Bowman's autopsy adds nothing new to Sigmon's argument.

Even if Sigmon didn't waive the argument in his Motion, his Motion still fails. Reconsideration along the lines Sigmon seeks typically requires newly discovered evidence, some change in the controlling law, or a need to correct a manifest injustice. *E.g.*, *Wojcicki v. SCANA/SCE&G*, 947 F.3d 240, 246 (4th Cir. 2020).

Sigmon can show none of those. As for evidence, nothing Sigmon points to from Bowman's autopsy is new. In both his Objection (p. 3) and his Motion (p. 5), he insists that previous inmates suffered from pulmonary edema.

As the State explained in opposing the Objection, this pulmonary edema debate over lethal

injection is nothing new, and neither Sigmon nor any other inmate has overcome two points. First, there is strong evidence (including both Dr. Antognini's declaration and the media witness descriptions) on the State's side that condemned inmates—including Owens, Moore, and Bowman—were insensate quickly and felt nothing after that before being declared dead. And second, Sigmon has not rebutted the fact that pulmonary edema is common in many overdose deaths. Nothing Sigmon points to now helps him on either front.

As for controlling law, Sigmon fares no better by recalling his legal argument on due process. *See* Mot. 4–5. In fact, he cites many of the same cases again. *Compare* Mot. 4–5, *with* Objection 4. This Court has considered this argument twice already—once from Owens and once from Sigmon. And it has rejected it both times. (For good measure, so have the federal courts.) A cursory recast of that argument adds nothing new. *Cf. Dockins v. Benchmark Commc'ns*, 180 F.R.D. 294, 295 (D.S.C. 1998) ("Motions under Rule 59 are limited in scope and are not to be used to rehash the same arguments and facts previously presented." (cleaned up)).

And as for manifest injustice, Sigmon again repeats what he has already said. Which is what this Court has already rejected. There's no injustice here. Sigmon simply disagrees with the Court ruling against him.

III. Sigmon's contention about previous executions are unwarranted.

In claiming that the previous executions went awry, Sigmon asserts that previous executions "required a second dose" of pentobarbital. Mot. 3. Depending on what Sigmon means by "required," his assertion is, at best, misleading.

A second series was administered according to SCDC's protocol. As Sigmon knows because Sigmon has the protocol (the revised protocol was provided to Sigmon under a confidentiality order as part of the *Owens v. Stirling* litigation challenging the methods of

execution and section 24-3-530), there is no discretion in the administration of the second series of pentobarbital. Nor is there, as Dr. Antognini explained, anything unusual about death by lethal injection taking more than ten minutes. Thus, to the extent that Sigmon suggests that the second series was needed to bring about death, he has *nothing* to support that, and the Court should give it no credence.

CONCLUSION

For all the above reasons, the Court should deny the Motion.

Respectfully submitted,

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FOR SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS AND DIRECTOR STIRLING

February 28, 2025

RECEIVED
Feb 26 2025
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Case No. 2025-000187

Brad Keith Sigmon,
Movant,
v.

STATE OF SOUTH CAROLINA,
Respondent.

MOTION FOR RECONSIDERATION OF DENIAL OF OBJECTION TO AFFIDAVIT AND CERTIFICATION OF BRYAN P. STIRLING, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND STAY OF EXECUTION

On Monday, February 24, 2025, the South Carolina Department of Corrections (SCDC) released the autopsy report for Marion Bowman, who was executed by lethal injection on January 31. "Per information provided by" SCDC, the report notes that Mr. Bowman, whose execution lasted for 23 minutes, was injected with a total of "10 grams of pentobarbital." Ex. 8 at ¶¶ 2.[1] It also records that Mr. Bowman died with his lungs massively swollen with blood and fluid. *Id.* at 3.

Mr. Bowman's autopsy is a grisly echo of Richard Moore's. Both men died only after South Carolina injected them with twice the "single dose of pentobarbital" that

[1] Mr. Sigmon has retained the numbering of the exhibits to his initial objection to this Court. Mr. Bowman's autopsy is his only new exhibit; he has numbered it Ex. 8 and is filing a contemporaneous motion to file it under seal with this Court.

[1]When asked directly during the press conference following Mr. Bowman's execution, an SCDC spokesperson said only, "we followed our protocol and that is not disclosed."12:51-13:06, ABC News 4, *Execution witnesses provide startling details on death of Marion Bowman Jr.* (available at: https://www.youtube.com/watch?si=Gx7QpGRUONCRPemx&v=QYdswxKhbc4&feature=youtu.be) (last visited February 25, 2025).

SCDC has sworn to this Court is "of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol." And both men died with pulmonary edema.

The evidence is clear. Contrary to the certifications SCDC has provided to this Court, lethal injection "via a single dose of pentobarbital" is not "available" in South Carolina. It is a fiction.

That fiction forced an impossible choice upon Brad Sigmon, who is scheduled for execution on March 7—nine days from now. Consistent with § 24-3-530, Mr. Sigmon was required on February 21 to elect between lethal injection and the firing squad or die in the electric chair. Per the same statute, on February 11, SCDC served Mr. Sigmon with an affidavit from its director, Bryan P. Stirling, certifying the availability and sufficiency of "lethal injection...via *a single dose of pentobarbital*." Ex. 1 at ¶¶ 7, 10 (emphasis added).

On February 14, Mr. Sigmon objected to this certification and moved this Court to stay his execution. Mr. Sigmon noted that all three of the men South Carolina has executed since September 2024—Freddie Owens, Mr. Moore, and Mr. Bowman—were not declared dead for more than twenty minutes after receiving this purportedly sufficient single dose. He noted the alarming findings in Mr. Moore's autopsy, which documented both his injections with a second dose of pentobarbital and recorded his bloated and heavy lungs. Ex. 6 at ¶¶ 2-3. Mr. Sigmon also cited the unavailability of Mr. Bowman's autopsy report, and SCDC's refusal to answer how many doses of

pentobarbital it had administered to him.[2] Mr. Sigmon then moved this Court to require SCDC to certify the beyond use or expiration date of its drugs, the type and results of the tests performed on them, and their storage conditions. Mr. Sigmon asserted that, especially in light of the three executions that had gone awry, that information fell within the "basic facts about the drug's creation, quality, and reliability" that South Carolina law and the Due Process Clause require SCDC to disclose. *Owens v. Stirling*, 443 S.C. 246, 298–99, 904 S.E.2d 580, 608 (2024). Only with this information, Mr. Sigmon argued, could he meaningfully exercise his statutory right "never [to] be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens*, 443 S.C. at 298–99, 904 S.E.2d at 608.

This Court denied that motion and objection on February 19, 2025. Two days later, Mr. Sigmon was forced to make his election. Lacking the basic facts necessary to assess the risks reflected by these lethal injections gone wrong—much less to determine which of South Carolina's methods is the more inhumane—he chose the firing squad.

Mr. Sigmon now moves this Court to reconsider its denial of his objection and his stay motion. Mr. Bowman's autopsy adds to the growing body of evidence corroborating Mr. Sigmon's concerns about the adequacy of SCDC's certifications as to its lethal injection drugs. At the very least, two thirds of South Carolina's lethal injections have required a second dose of lethal injection drugs and resulted in pulmonary edema. And it seems virtually certain that Mr. Owens's execution, which also lasted twenty minutes,

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[2]When asked directly during the press conference following Mr. Bowman's execution, an SCDC spokesperson said only, "we followed our protocol and that is not disclosed."12:51-13:06, ABC News 4, *Execution witnesses provide startling details on death of Marion Bowman Jr.* (available at: https://www.youtube.com/watch?si=Gx7QpGRUONCRPemx&v=QYdswxKhbc4&feature=youtu.be) (last visited February 25, 2025).

was the same. If SCDC's attestations as to the quality and reliability of its lethal injection drugs were dubious before Mr. Bowman's autopsy, they are now indefensible.

Mr. Sigmon previously "conceded…that execution by lethal injection using a single dose of pentobarbital is constitutional if properly administered using reliable and effective drugs"—a "limited concession" that this Court cited as rendering any further analysis of "the constitutionality of lethal injection…unnecessary." *Owens*, 443 S.C. at 282. But the certification outlined in *Owens* to ensure that SCDC's drugs fall within this concession—which allows SCDC to assert merely that the drugs have passed stability and purity testing by the South Carolina Law Enforcement Division (SLED)—has proven inadequate to ensure they are reliable and effective. *Id.* at 293, 605.

The only way to ensure that condemned prisoners have a choice meaningful enough to satisfy the statute and Due Process is to require more from SCDC. A starting point would be certifying the information Mr. Sigmon has requested. Were SCDC to disclose the beyond use or expiration date of its drugs, the type and results of the tests performed on them, and their storage conditions, any problems with the reliability and effectiveness of the drugs themselves would necessarily be revealed and could be remediated.

That, in turn, would afford Mr. Sigmon the opportunity to make a meaningful choice as to his method of execution. As detailed in his objection, his liberty interest, as created by Section 24-3-530's choice provisions, is protected by the Due Process Clause of the Fourteenth Amendment. *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015) (citing *Meachum v. Fano*, 427 U.S. 215 (1976), and *Wolff v. McDonnell*, 418 U.S. 539 (1974)). State laws such as Section 24-3-530 "create enforceable liberty interests in the prison setting" when they create an "objective expectation… that an inmate could

reasonably expect to enforce them against the prison officials." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461, 465 (1989). This Court's decision in *Owens* recognizes that expectation, noting "a Due Process Clause component to [its] analysis" of what SCDC's certification must include; it also states that the purpose for requiring the certification to detail why SCDC concluded "the drugs are capable of carrying out the death sentence according to law" is so "a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Owens*, 443 S.C. at 293, 904 S.E.2d at 605. But this Court's continued acceptance of SCDC's certifications—which have parroted the example *Owens* provided—thwarts that purpose. Mr. Sigmon and his predecessors with execution dates have brought challenges in this Court. But even as one execution after another demonstrates the inadequacy of the certifications, this Court has set the bar too low for SCDC to fail. Mr. Sigmon is thus left with the ostensible right to "some basic facts about the [lethal injection] drug's creation, quality, and reliability, or…the drugs' potency, purity, and stability," but with no means of enforcing that right against SCDC. *Owens*, 443 S.C. at 292, 904 S.E.2d at 604.

In *Owens*, this Court analogizes South Carolina's choice provisions to lethal injection, identifying each "as innovation[s]" reflecting "the General Assembly's sincere effort to make the death penalty less inhumane while enabling the State to carry out its laws." *Owens*, 443 S.C. at 298, 904 S.E.2d at 608. But the choice provisions and lethal injection can only fulfill that purpose if they work as intended. Neither the General Assembly nor this Court could have intended for lethal injection to require twice the "single dose" anticipated, or to leave three prisoners strapped to a gurney for twenty minutes before declared dead, or drowning in blood and fluid from their own lungs. And

neither the General Assembly nor this Court could have intended a condemned prisoner to choose his method of execution not because he contends that the other options are more inhumane, but because he cannot trust the accuracy or honesty of SCDC's certification. A single, simple measure satisfies both purposes: a certification that actually provides the basic facts needed to assess, and identify problems with, the quality and reliability of SCDC's lethal injection drugs.

Mr. Sigmon will be executed in nine days by a method that he chose out of necessity, fear of a torturous death, and without the information needed to assess his alternatives. Accordingly, "there are exceptional circumstances warranting the issuance of [a] stay" of his execution until these critical questions can be resolved. *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996).

Mr. Sigmon accordingly asks this Court:

1) to stay Mr. Sigmon's execution;

2) to require Director Stirling to certify and provide, with any identifying information redacted:

a) the beyond use or expiration dates for SCDC's lethal injection drugs;

b) the testing reports for SCDC's lethal injection drugs, including the dates, results, method validation, and quality control procedures; and

c) the storage conditions for the drugs, including temperature and humidity.

Respectfully submitted, this, the 26th of February, 2025.

<u>/s Joshua Snow Kendrick</u>
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Feb 14 2025
S.C. SUPREME COURT

Case No. 2025-000187

Brad Keith Sigmon,
Movant,
v.

STATE OF SOUTH CAROLINA,
Respondent.

OBJECTION TO AFFIDAVIT AND CERTIFICATION OF BRYAN P. STIRLING, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Brad Sigmon objects to the sufficiency of the February 11, 2025, affidavit of Bryan P. Stirling certifying the methods of execution available for his execution on March 7, 2025, as it does not provide the "basic facts about the drug's creation, quality, and reliability" that this Court has held South Carolina law and the Due Process Clause require. *Owens v. Stirling*, 443 S.C. 246, 298–99, 904 S.E.2d 580, 608 (2024). Mr. Sigmon respectfully submits that both the scope and timetable for the director's certification, as set by *Owens*, have proven inadequate to protect his constitutional rights. In support of his objection, Mr. Sigmon shows as follows.

Relevant Facts

This Court has scheduled Brad Sigmon's execution for Friday, March 7, 2025. Under § 24-3-530, he will die by electrocution unless he elects lethal injection or the firing squad—a choice he must make by February 21.

These "choice provisions" are meant to ensure that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more

inhumane than another method that is available." *Owens v. Stirling*, 443 S.C. 246, 298–99, 904 S.E.2d 580, 608 (2024). Accordingly, as to lethal injection in particular, the director of the South Carolina Department of Corrections (SCDC) must "disclose some basic facts about the drug's creation, quality, and reliability"—a requirement seated in both the text of § 24-3-530 and "the Due Process Clause." *Owens*, 443 S.C. at 292, 904 S.E.2d at 604.

On Tuesday, February 11, 2025, SCDC served Mr. Sigmon with an affidavit from its director, Bryan P. Stirling, certifying "under penalty of perjury" that "lethal injection is available via *a single dose of pentobarbital*" because he has "confirmed that that the pentobarbital in the Department's possession is of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol." Ex. 1 at ¶¶ 7, 10 (emphasis added).

Recent events suggest otherwise. Since September 2024, South Carolina has executed three men—Freddie Owens, Richard Moore, and Marion Bowman—by lethal injection. Director Stirling provided each man with the same certification given to Mr. Sigmon, promising a "single dose of pentobarbital…sufficiently potent such that administration in accordance with the protocol will result in death." Ex. 1 at ¶ 10; see also Ex. 2 at ¶ 10; Ex. 3 at ¶ 10; Ex. 4 at ¶ 10.

Upon administration of that single dose, however, each man remained alive for more than twenty minutes. Moreover, Mr. Moore's autopsy—the only one currently available—documents that he was injected with a *second dose* of pentobarbital after ten minutes had passed. (Ex. 5 at ¶ 7; Ex. 6 at 2) Even after receiving twice as much pentobarbital as Director Stirling had certified as sufficiently potent, Mr. Moore was not declared dead for another ten minutes. (Ex. 5 at ¶ 8; Ex. 6 at 2) Mr. Moore's autopsy

also shows that his lungs were swollen with fluid—an excruciating condition known as pulmonary edema, which causes the sensation of drowning. Ex. 6 at 3.

Shortly after Mr. Bowman's January 31 execution, which lasted 23 minutes, an SCDC spokesperson was asked how many doses of pentobarbital had been administered to him. She declined to answer, saying only, "we followed our protocol and that is not disclosed."[1] On February 5, 2025, Mr. Sigmon moved this Court not to issue his execution notice until he had received and reviewed Mr. Bowman's autopsy report, which he hoped would answer the questions that SCDC deflected. This Court denied his motion.

Mr. Sigmon has "previously conceded a single dose of pentobarbital is constitutional if properly administered using reliable and effective drugs." *Owens*, 443 S.C. at 282, 904 S.E.2d at 599. But during at least one execution, and likely all three, SCDC has been required to administer a double dose before the inmate's death. Given that a single dose should make a death as protracted as those suffered by Mr. Owens, Mr. Moore, and Mr. Bowman "physiologically and pharmacologically impossible," Ex. 5 at ¶ 8, this raises grave concerns: 1) that during all three of SCDC's recent executions, the drugs were not properly administered, not reliable and effective, or all of the above; and 2) that all three men suffered pulmonary edema during their prolonged deaths.

Per this Court, the purpose of requiring Director Stirling to detail how he has "satisf[ied] himself that the drugs are capable of carrying out the death sentence according to law" is so "a condemned inmate and his attorneys may understand whether

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[1] 12:51-13:06, ABC News 4, *Execution witnesses provide startling details on death of Marion Bowman Jr.* (available at: https://www.youtube.com/watch?si=Gx7QpGRUONCRPemx&v=QYdswxKhbc4&feature=youtu.be) (last visited February 11, 2025).

there is a basis for challenging the constitutionality of the impending execution." *Owens*, 443 S.C. at 293, 904 S.E.2d at 605. In light of the events surrounding South Carolina's last three executions, it is hard to see how Director Stirling could be satisfied on that point. Certainly, Mr. Sigmon and his attorneys cannot understand what risks are reflected in these executions gone awry—much less determine which of South Carolina's methods is the more inhumane.

This Court declined to hold the issuance of Mr. Sigmon's death warrant until he could obtain relevant information from Mr. Bowman's autopsy. And now the clock is ticking: Mr. Sigmon must make his election in nine days, with his execution following just two weeks after. Accordingly, Mr. Sigmon's state statutory and Due Process rights are implicated.

Mr. Sigmon is Entitled to Due Process as to his State Statutory Right of Election.

The Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." The Supreme Court "has long recognized" the applicability of procedural Due Process protections when a "state statute, regulation, or policy" creates "a liberty interest." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015) (citing *Meachum v. Fano*, 427 U.S. 215 (1976), and *Wolff v. McDonnell*, 418 U.S. 539 (1974)). Such state laws "may create enforceable liberty interests in the prison setting" when they create an "objective expectation… that an inmate could reasonably expect to enforce them against the prison officials." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461, 465 (1989).

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). To that end, "[a]n elementary and

fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" implicating their liberty interests and "an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The choice provisions of Section 24-3-530 confer a liberty interest upon condemned prisoners in South Carolina, ensuring they will "never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens,* 443 S.C. at 298–99, 904 S.E.2d at 608. In *Owens*, this Court recognized the Due Process component of the statute's requirement of notice to death-sentenced prisoners, and created a procedure designed to provide both notice and an opportunity to protect that interest by establishing a scope and timetable for Director Stirling's certification. In operation, however, those requirements have proven inadequate to safeguard a condemned prisoner's Due Process rights.

1. <u>The Scope</u>

In *Owens,* this Court held that when Director Stirling fulfills his statutory obligation to "determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] are available," he must disclose, *inter alia*, "some basic facts about the [lethal injection] drug's creation, quality, and reliability, or...the drugs' potency, purity, and stability." *Owens,* 443 S.C. at 292, 904 S.E.2d at 604.

This Court then "illustrate[d] the scope of this requirement" with the following example of a sufficient certification: "that scientists at the Forensic Services Lab of the South Carolina Law Enforcement Division (SLED), whose experience and qualifications were verified by the Director and the Chief of SLED, recently performed testing according to widely accepted testing protocols and found the drugs were not only stable,

but of a clearly acceptable degree of purity[.]" *Id.* at 293, 605. Although this example omits many "basic facts" essential to determining the drug's quality and reliability, as discussed *infra*, this Court concluded that such a certification would leave no "legitimate legal basis on which to mount a challenge." *Id.*

Director Stirling subsequently provided a certification for Mr. Owens, the first of the three men South Carolina has recently executed, that mirrored this Court's example. Mr. Owens filed an objection with this Court, submitting the affidavit of Dr. Michaela Almgren, a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcomes Sciences at the University of South Carolina College of Pharmacy. Ex. 7. As Dr. Almgren detailed, Director Stirling's certification did not—and does not—provide the basic facts needed "to assess the qualities and reliability of the lethal injection drugs the department has obtained for use in [Mr. Owens's] execution." *Id.* at ¶ 4. This now-standard certification provides neither "the date when the drugs were tested" or their "'Beyond Use Date,' or BUD"—the basic facts needed to assess whether "the drugs will still be effective on September 20, when the department intends to use them." *Id.* at ¶ 5. As SCDC's drugs appear to be compounded, "their stability over time is less certain," amplifying the importance of knowing the BUD and the testing date. *Id.* Indeed, it is unclear from Director Stirling's certifications whether any subsequent testing of these drugs has been conducted.

The certification provides no facts about the "quality[] and reliability" or the "potency, purity, and stability" of the drugs. *Owens,* 443 S.C. at 292, 904 S.E.2d at 604. While it "describes reports the director received from SLED personnel concerning the testing of the drugs," it "does not specify the test methods used, the testing procedures

followed, or the actual results obtained from those tests." Ex. 6 at ¶ 6.[2] As a result, the certification does not establish that "the SLED laboratory followed all established steps for pharmaceutical drug quality analysis as specified in the USP compendium, which usually differ from typical forensic practice." *Id.* The absence of these basic facts could be corrected by the provision of "the actual analytical reports from the testing of the drugs," which are "standard records produced during this type of laboratory analysis." *Id.*[3]

The certification also provides no facts about "how the storage conditions [of the drugs] will be monitored between now" and the execution—a nearly three-week timeframe that would provide "ample opportunity for quality issues to arise with these drugs if they are not stored correctly, as medications—especially compounded drugs—are sensitive to moisture, light, and temperature." *Id.* at ¶ 7. This, too, underscores the importance of knowing the date that these drugs were tested, as Director Stirling's certification could rely on testing that predated any problems that improper storage would cause.

As Dr. Almgren confirms, all of the "basic facts" to which a prisoner weighing the election of lethal injection is entitled can be established through the provision of the actual testing results, along with confirmation that the drugs are not beyond their BUD

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[2]Dr. Almgren also observes that the affidavit's language describing the testing results—such as its conclusory statement that SLED personnel "'acknowledged the substance's concentration in terms of its purity and stability"—"lacks clarity." *Id.* at ¶ 6.
[3]To comply with South Carolina's shield statute, any identifying information for the SLED analysts who conducted the testing could be readily redacted from the analytical reports.

and are being maintained through these well-established and straightforward measures. *Id.* at ¶ 8.[4]

This Court overruled Mr. Owens's objection. As discussed *supra*, though, the protracted nature of Mr. Owens's execution and the two that followed his, along with the administration of a second dose of pentobarbital and presence of pulmonary edema in Mr. Moore's autopsy report, call the quality and reliability of these drugs into question. Mr. Sigmon respectfully submits that neither he nor any other condemned prisoner can meaningfully exercise his statutory right of election without the information Dr. Almgren details.

Denying Mr. Sigmon the information outlined in Dr. Almgren's affidavit is arbitrary and has no basis in law. In litigation prior to the executions of Owens, Moore, and Bowman, the State has repeatedly relied on Section 24-3-580(I) for the proposition that prison officials are authorized to broadly construe confidentiality provisions to deny access to the information Dr. Almgren outlines. Yet that information is not deemed confidential by the express terms of the statute. Further, State officials have never made any showing beyond bare speculation that the provision of information Dr. Almgren identifies could lead to disclosure of other information protected by state law. The application of state law in this manner is an arbitrary denial of due process.

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[4]While South Carolina law prohibits the disclosure of identifying information of "any person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence," S.C. Code § 24-3-580(A)(1), (B), the information Mr. Sigmon seeks does not fall within the purview of that statute. Any incidental identifying information could simply be redacted.

2. The Timetable

As this Court recognized in *Owens*, these choice provisions "create[] a potential timing problem for the filing of the Director's affidavit and the inmate's election of a method of execution," which it "encourage[d] our General Assembly to address." *Owens,* 443 S.C. at 292 n.23, 904 S.E.2d at 604, n.23. In the meantime, this Court determined to "(1) issue notices of execution only on Fridays, and (2) require the Director to file the subsection 24-3-530(B) affidavit within five days of the Notice of Execution," which would afford the condemned prisoner "at least eight days in which to evaluate the affidavit and file any motion." *Id.*

In response to this timing problem, Mr. Sigmon and other condemned prisoners filed a motion seeking a reasonable interval of no fewer than 13 weeks (or 91 days) between execution dates. The movants noted that if this Court were to issue one execution notice while another was still pending, the prisoner with the later execution date "would be required to elect their method prior to the execution of the first." This problem was of particular concern because "South Carolina's authorized methods of execution are either antiquated or entirely novel," and "the question of which is the 'more inhumane' has yet to be informed by their actual use." Indeed, movants argued, "[i]f a method is used and is botched, or otherwise reveals itself to be 'more inhumane, a compressed execution schedule might subject a prisoner to execution by a method that they would never have chosen had the execution that revealed its 'inhuman[ity]' occurred before their election date." *Moore et al. v. State*, Motion, Appellate Case No. 2024-001373 (Aug. 21, 2024).

This Court grated movants' motion in part, providing a 35-day interval between executions. *Moore et al. v. State*, Order, Appellate Case No. 2024-001373 (Aug. 30,

2024). But the concern animating movants' motion remains. Mr. Sigmon does not want to be electrocuted; accordingly, he will make an election. But he is hesitant to elect lethal injection, given that: 1) all three of South Carolina's recent executions have lasted for more than twenty minutes; 2) the need for a double dose of pentobarbital in at least Mr. Moore's execution; and 3) the experience of pulmonary edema for Mr. Moore, and perhaps Mr. Owens and Mr. Bowman as well.

The autopsy report of Mr. Bowman would provide critical evidence of lethal injection's inhumanity relative to South Carolina's other methods; it could well assuage his concerns. But, as Mr. Sigmon's execution notice issued just one week after Mr. Bowman's execution—placing his own execution 35 days after Mr. Bowman's—he will have to elect his method of execution before that autopsy report is completed. The risk that Mr. Sigmon might be subjected to execution by a method that he would never have chosen, had he not been deprived of evidence showing that a more humane alternative existed, is less abstract than when he moved this Court for a reasonable interval between executions. It is no less grave.

In sum, the combination of the narrow scope of information required for the certification and the compressed timeline for election have diminished Mr. Sigmon's right of election to a guessing game. This is an arbitrary application of Mr. Sigmon's state-created right and is therefore unconstitutional.

Conclusion

In *Owens,* and when denying Mr. Owens's objection to Director Stirling's first certification, this Court recognized a condemned prisoner's Due Process right to notice as to the quality and reliability of South Carolina's lethal injection drugs. In light of the disturbing facts that the three subsequent executions have revealed about South

Carolina's drugs—and the many questions about them that remain unanswered—this Court should revisit the scope and timetable of the procedural protections it has prescribed. Mr. Sigmon respectfully submits that the current procedure, in operation, is arbitrary and does not appropriately balance State interests with those of death-sentenced prisoners like himself. Mr. Sigmon respectfully submits that the issue is both ripe and, with his election date and execution looming, desperately urgent. Accordingly, "there are exceptional circumstances warranting the issuance of [a] stay" of his execution until these critical questions can be resolved. *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996).

Mr. Sigmon accordingly asks this Court:

1) to stay Mr. Sigmon's execution;

2) to require Director Stirling to certify and provide, with any identifying information redacted:

a) the beyond use or expiration dates for SCDC's lethal injection drugs;

b) the testing reports for SCDC's lethal injection drugs, including the dates, results, method validation, and quality control procedures;

c) the storage conditions for the drugs, including temperature and humidity; and

3) to extend the interval between executions to permit time for the completion and review of any autopsy reports from the most recent judicial execution.

Respectfully submitted, this, the 14th of February, 2025.

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Feb 11 2025
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

v.

Brad Keith Sigmon,

Appellant.

Appellate Case No. 2002-024388

The Honorable Joseph J. Watson
Greenville County
Trial Court Case No. 2001GS2307630, 2001GS2307631, 2001GS2307629

AFFIDAVIT OF BRYAN P. STIRLING

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen, of sound mind, and competent to give this testimony.

2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, and February 19, 2014, when I was confirmed by the Senate as the Director. I have served as the Director of the Department since my confirmation.

3. According to S.C. Code Ann. § 24-3-530, there are three statutorily approved methods of execution: electrocution, the firing squad, and lethal injection.

4. Pursuant to S.C. Code Ann. § 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receipt of a notice of execution from this Court.

5. On February 7, 2025, in accordance with S.C. Code Ann. §§ 17-25-370, -380, the Department received an Execution Notice issued by the Clerk of this Court for Brad Keith Sigmon.

6. According to the Execution Notice for Brad Keith Sigmon, the Department is required to "execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service . . . or receipt of this notice," which is March 7, 2025.

7. I hereby certify that all three statutorily approved methods of execution—electrocution, the firing squad, and lethal injection—are available for carrying out Sigmon's execution.

8. I am certifying that electrocution is available because the appropriate and responsible Department staff informed me that the electric chair and system were tested on February 10, 2025, and all aspects performed as intended.

9. I am certifying that the firing squad is available because the appropriate and responsible Department staff informed me that the Department has in its possession the necessary firearms and ammunition and that members of the firing squad have completed all required training.

10. I am certifying that lethal injection is available via a single dose of pentobarbital. I have confirmed that the pentobarbital in the Department's possession is of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol. The Department provided pentobarbital to the S.C. Law Enforcement Division (SLED) for testing

by its Forensic Services Laboratory. SLED confirmed that its Forensic Services Laboratory is an internationally accredited forensic laboratory and that it used widely accepted testing protocols and methodologies in this matter. SLED reported to me that experienced, qualified, and duly authorized personnel tested and confirmed the concentration of the solution provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter, and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible Department staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by the Department, other States, and the federal government, the dosage called for by the Department's lethal injection protocol is sufficiently potent such that administration in accordance with the protocol will result in death.

11. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling

Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 11th DAY OF February, 2025

M. Dayne Haile (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 2/9/2034

RECEIVED
Feb 05 2025
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Case No. 2002-024388

Brad Keith Sigmon,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

MOTION FOR STAY OF EXECUTION PENDING RECEIPT AND REVIEW OF AUTOPSY OF MARION BOWMAN, JR.

Since September 2024, South Carolina has executed three men: Freddie Owens, Richard Moore, and Marion Bowman. All died by lethal injection. But even after receiving the single, massive dose of pentobarbital prescribed by South Carolina's execution protocol and contemplated by this Court in *Owens v. Stirling*, 443 S.C. 246, 904 S.E.2d 580 (2024), each man was still alive for more than twenty minutes.

Mr. Moore's autopsy—the only one conducted and available—shows that he was injected with a second, equally massive dose of pentobarbital after ten minutes had passed. (Declaration of Dr. David B. Waisel, M.D., attached as Ex. 1.) Even after receiving twice as much pentobarbital as anticipated, Mr. Moore was not declared dead for another ten minutes. *Id.* at ¶ 7.

The autopsy also showed that Mr. Moore's lungs had filled with fluid—an excruciating condition known as pulmonary edema, which causes the sensation of drowning. *Id.* at ¶ 9.

When asked how many doses of pentobarbital were administered to Mr. Bowman over his 23-minute-long execution, a spokesperson for the South Carolina Department of Corrections declined to answer, saying only "we followed our protocol and that is not disclosed."[1]

Brad Keith Sigmon could receive an execution warrant as soon as this Friday. He will be allowed to elect his method of execution pursuant to a state law ensuring that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens*, 443 S.C. at 298–99, 904 S.E.2d at 608 (discussing S.C. Code Ann. § 24-3-530). Under that statute, Mr. Sigmon will die by electrocution unless he chooses the firing squad or lethal injection. But with the information currently available to Mr. Sigmon, he cannot begin to assess, much less contend, which method is the more inhumane.

Mr. Sigmon has "previously conceded a single dose of pentobarbital is constitutional if properly administered using reliable and effective drugs." *Owens*, 443 S.C. at 282, 904 S.E.2d at 599. But on at least one occasion, SCDC has been forced to use a double dose. Given that a single dose should make a death as protracted as those suffered by Mr. Owens, Mr. Moore, and Mr. Bowman "a physiological and pharmacological impossibility," Ex. 1 at at ¶ 8, this raises grave concerns: : 1) that during all three of SCDC's recent executions, the drugs were either not properly administered,

[1]12:51-13:06, ABC News 4, *Execution witnesses provide startling details on death of Marion Bowman Jr.* (available at: https://www.youtube.com/watch?si=Gx7QpGRUONCRPemx&v=QYdswxKhbc4&feature=youtu.be)(last visited February 5, 2025).

not reliable and effective, or all of the above; and 2) that, like Mr. Moore, Mr. Owens and Mr. Bowman also suffered from pulmonary edema during their prolonged deaths.[2]

No autopsy was performed for Mr. Owens. Before Mr. Bowman's death, however, he and his next-of-kin agreed to an autopsy. The report from that autopsy will reveal whether Mr. Bowman also needed two doses of pentobarbital, and whether he, too, suffered from pulmonary edema.

Mr. Sigmon accordingly moves this Court to order its clerk not to issue an execution date until he and his counsel have received and, with expert assistance, reviewed Mr. Bowman's autopsy report. Mr. Sigmon respectfully submits that this information is necessary for him to have a meaningful opportunity to identify and reject the more inhumane of South Carolina's available methods of execution.

Mr. Sigmon will apprise this Court promptly of the receipt of the autopsy report.

Respectfully submitted, this, the 5th of February, 2025.

/s Joshua Snow Kendrick
Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
P.O. Box 6938
Greenville, SC 29606

Gerald W. King, Jr.
Chief, Capital Habeas Unit
for the Fourth Circuit
Gerald_King@fd.org
129 West Trade Street, Suite 300
Charlotte, NC 28202
(704) 688-6946

Counsel for Brad Keith Sigmon

[2] Mr. Sigmon is aware that SCDC has proffered expert evidence that takes a different view of the risks, but this has merely added to the uncertainty, which only additional facts can put to rest.

Feb 05 2025
S.C. SUPREME COURT

EXHIBIT 1

DECLARATION OF DR. DAVID B. WAISEL, M.D.

I. Expert Qualifications

I, Dr. David B. Waisel, M.D., am currently a practicing anesthesiologist at St. Jude Children's Research Hospital in Memphis, Tennessee. I served as a Professor of Anesthesiology at Yale School of Medicine from September 2020 through December 2023, and an Associate Professor of Anesthesia at Harvard Medical School from July 2006 through August 2020. I have been practicing clinical anesthesiology for approximately thirty (30) years, and I have administered anesthesia to more than 20,000 patients. I am currently licensed to practice in Tennessee.

I was certified as a Diplomate by the American Board of Anesthesiology in 1994. I performed voluntary recertification in 2005 and 2016. I was also certified as a Diplomate by the American Board of Anesthesiology for Pediatric Anesthesiology in 2013 and performed voluntary recertification in 2024. My complete curriculum vitae is included with this report as an Attachment.

II. Referral Question

I have been asked by counsel for Plaintiff Marion Bowman to provide an expert medical opinion as to whether South Carolina provides him with sufficient information to assess the risks and benefits of execution by lethal injection as compared to the state's other available methods of execution.

III. Documents and Resources Considered

I have reviewed the documents provided to me in this matter, as well as other readily available reference materials. The most notable materials include:

- Autopsy report for Richard Moore
- Declaration of Dr. Michaela Almgren
- Press Conference following execution of Freddie Eugene Owens
- Press Conference following execution of Richard Moore

My opinions are based on the information available to me as of the date of this report. Should further information become known to me through additional documentation, reports, or testimony relevant to my opinions in this matter, or should I receive additional requests from Plaintiff's counsel, I may supplement this report as needed.

IV. Conclusions and Opinions

My understanding is that death-sentenced prisoners in South Carolina are offered the option of execution by lethal injection, firing squad, or electrocution. This declaration concerns lethal injection only.

Based upon the information I have now, it is my opinion to a reasonable degree of medical certainty that South Carolina failed to administer five grams of effective pentobarbital during the execution of Richard Moore. As a result, there is a substantial risk that he experienced needless and extensive suffering during his execution.

It is my opinion to a reasonable degree of medical certainty that, given the State's inadequate transparency, there is insufficient information about the lethal injection process for anyone to assess its risks and benefits as compared to execution by firing squad or electrocution.

V. Discussion and Analysis

1. I have been told that executions in South Carolina call for the administration of pentobarbital via intravenous injection. Pentobarbital is a member of a class of drugs called barbiturates. Barbiturates act on the body by depressing various organ systems, including the central nervous system. Pentobarbital is classified as "short-acting," which means that it has an initial onset of action within one arm-brain circulation time, which is usually considered to be less than 1 minute and is often more rapid.

2. Furthermore, IV drugs, including barbiturates, have a remarkably consistent drug-specific onset upon reaching a functioning intravenous circulation. I would expect to see even greater consistency of effect with higher doses. For instance, if a patient received a 350 mg/kg dose, I would expect a somewhat quicker effect in a 50 kg patient and a somewhat slower onset in heavier patients in which the per kg basis is less than 5 mg/kg (e.g. 100 kg). Larger doses, however, make such distinctions non-consequential. The larger doses mean that there should be remarkable consistency in the onset of action.

3. I have been informed that South Carolina prison officials are declining to provide death-sentenced inmates with any specific information about the potency, purity, or stability of the particular dose of pentobarbital to be used in their executions, with the sole exception of providing a general assurance that the drugs have been tested and approved by the forensic lab of the S.C. Law Enforcement Division (SLED). State prison officials are also declining to provide death-sentenced inmates with any of the SLED lab reports or results.

4. I have reviewed the affidavit of Dr. Michaela Almgren, which details the information needed to ensure that the pentobarbital South Carolina uses in execution is effective. I concur with her conclusions, and like Dr. Almgren, it is my opinion that the information she identifies is necessary for a death-sentenced inmate to be able to make a meaningfully informed decision about the relative risks of lethal injection compared to the other available execution methods.

5. The concerning circumstances surrounding the two most recent executions in South Carolina—which indicate that problems occurred—amplify the need for prisoners to be provided with information about the execution drugs going forward.

6. Records detailing the precise actions taken to carry out the executions by lethal injection of Richard Moore (November 1, 2024) and Khalil Allah (Freddie Owens) (September 20, 2024) are unavailable. This limits the ability to evaluate precisely what occurred during

those executions, which makes it difficult to assess the risks posed by this method. However, what we do know about each execution is disturbing.

7. Mr. Moore's autopsy revealed he was administered "2 x 2.5 g pentobarbital [5 grams] at 18:01" and "a second round of 2 x 2.5 g [5 grams] at 18:12." He was pronounced dead 23 minutes after the administration of the initial 5 grams of pentobarbital at 18:24. Given the extraordinarily high dose of pentobarbital administered at the outset of the execution, it is concerning that two separate five-gram doses of pentobarbital were required before Richard Moore was declared dead. A properly administered dose of five grams of effective pentobarbital should eliminate all breathing within a minute or less.

8. I believe to a high degree of medical certainty that it is physiologically and pharmacologically impossible for Mr. Moore to remain alive for ten minutes after a dose of five grams of fully-potent pentobarbital, unless that dose was not delivered completely.

9. Mr. Moore's autopsy also documents that he suffered from pulmonary edema, a complication that, in my experience, occurs in many, if not most, executions involving pentobarbital. Generally, pulmonary edema is when fluid from the bloodstream floods the lungs, making it more difficult to breathe, and causing sensations of shortness of breath similar to the experience of drowning. While pulmonary edema can have many causes, it is my belief with a reasonable degree of medical certainty that Mr. Moore's edema was caused by the obstruction of his upper airway from the sedation effects of pentobarbital, even as he continued breathing, which caused fluid to seep out of the blood vessels inside his lungs. Mr. Moore's autopsy report documents clinical features of this type of edema—called negative pressure pulmonary edema—in that he had pink froth in his airway. Its onset would occur almost immediately following the initial IV administration of pentobarbital, as the tissues in his upper airways collapsed and his vocal cords closed. If sensate, a person whose lungs filled with the fluid of pulmonary edema would suffer feelings of drowning and suffocation. In an execution setting where the administered pentobarbital is either not completely effective or is delivered ineffectively, the pentobarbital would affect the prisoner's airways and lead to pulmonary edema while simultaneously failing to sufficiently anesthetize the prisoner to these torturous sensations. It appears likely that during Mr. Moore's execution, he consciously experienced feelings of drowning and suffocation during the 23 minutes that it took to bring about his death.

10. While no autopsy was performed on Mr. Owens, I listened to a press conference given by the South Carolina Department of Corrections, which reported that his execution began at 6:35 p.m., and that he was declared dead at 6:55 p.m. Given what happened in Mr. Moore's execution, I would want to know whether Mr. Owens's twenty-minute execution also required a second dose of five grams of pentobarbital. Because a properly administered dose of effective pentobarbital should stop breathing within a minute, the fact that Mr. Owens' execution lasted 20 minutes indicates that a problem of some kind occurred.

11. The absence of drug property information is even more concerning for Marion Bowman in light of his body composition, which I am informed is 6'4", 375 lbs. This is a body mass index of 46, which is in the category of "Severely Obese." Peer-reviewed published

outcome data indicate that the prevalence of difficult IV access has been reported at 3.1 – 5.9%, depending on many characteristics including BMI.[1] Bowman's execution process could become especially complicated, and even torturous, in the event that problems caused by an ineffective IV were compounded by an ineffective dose of pentobarbital.

12. On the basis of all the materials I have reviewed, it is my conclusion that the vast lacunae of available information makes it impossible for Mr. Bowman and his counsel to make an informed decision about his preferred execution method.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10, 2025.

/s/ David B. Waisel
David B. Waisel, M.D.

[1] Difficult IV access can be defined as whether obtaining access on the first attempt is unsuccessful or whether access is unable to be obtained. Data typically coalesces around 3-30% of difficult IV access for patients with minimal risk factors and greater than 50% of difficult IV access for patients with significant risk factors. See Heart & Lung 2020;49:273-286; J Clin Med 2020;9:799; J Clin Nurs 2017;26:4267-75; Br J Anaesth 2018;121:358-66; BioMedical Material and Engineering 2013;23;93-108, among others.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State, Respondent,

v.

Marion Bowman, Jr., Appellant.

Appellate Case No. 2002-023546

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2001GS1800348, 2001GS1800349

CERTIFICATE OF SERVICE

I certify that the Affidavit of Bryan P. Stirling was served on counsel of record listed below on January 8, 2025, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447:

Lindsey S. Vann at lindsey@justice360sc.org
S. Boyd Young at byoung@sccid.sc.gov
Teresa L. Norris at Teresa_Norris@fd.org
G. Amber Pittman at G_Amber_Pittman@fd.org; apittman@mcgowanhood.com
Gerald W. King at Gerald_King@fd.org
John G. Baker at John_Baker@fd.org
Donald J. Zelenka at dzelenka@scag.gov
Melody J. Brown at MBrown@scag.gov
Alan McCrory Wilson at agwilson@scag.gov

Respectfully Submitted,

Salley W. Elliott
S.C. Bar No. 1871
South Carolina Department of Corrections
P.O. Box 21787
Columbia, S.C. 29221-1787
(803) 896-4237
Elliott.Salley@doc.sc.gov

SOUTH CAROLINA DEPARTMENT OF CORRECITONS
Post Office Box 21787, Columbia, South Carolina 29221

The Director of the South Carolina Department of Corrections has designated Willie Davis as his duly authorized agent for the purpose of making service of the Affidavit of Bryan P. Stirling, dated January 7, 2025.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF RICHLAND)

On the 8th day of January 2025, I served the Affidavit of Bryan P. Stirling, dated, January 7, 2025, by delivering personally and leaving a copy of the same at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina. Deponent is not a party to this action.

s/ Willie Davis
Willie Davis

SWORN TO AND SUBSCRIBED before
me this 8th day of January 2025

Jacqueline Murrell (L.S.)
Notary Public for South Carolina

My Commission Expires: 4.27.26

JACQUELINE MURRELL
Notary Public
South Carolina
My Comm. Expires April 27, 2026

ACCEPTANCE OF SERVICE

Service of a copy of the within Affidavit of Bryan P. Stirling is accepted at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina, this 8th day of January 2025.

s/ Marion Bowman Jr
Marion Bowman, Jr.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

v.

Marion Bowman, Jr.,

Appellant.

Appellate Case No. 2002-023546

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2001GS1800348, 2001GS1800349

AFFIDAVIT OF BRYAN P. STIRLING

AP #1

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen, of sound mind, and competent to give this testimony.

2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, and February 19, 2014, when I was confirmed by the Senate as the Director. I have served as the Director of the Department since my confirmation.

3. According to S.C. Code Ann. § 24-3-530, there are three statutorily approved methods of execution: electrocution, the firing squad, and lethal injection.

4. Pursuant to S.C. Code Ann. § 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receipt of a notice of execution from this Court.

5. On January 3, 2025, in accordance with S.C. Code Ann. §§ 17-25-370, -380, the Department received an Execution Notice issued by the Clerk of this Court for Marion Bowman, Jr.

6. According to the Execution Notice for Marion Bowman, Jr., the Department is required to "execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service . . . or receipt of this notice," which is January 31, 2025.

7. I hereby certify that all three statutorily approved methods of execution—electrocution, the firing squad, and lethal injection—are available for carrying out Bowman's execution.

8. I am certifying that electrocution is available because the appropriate and responsible Department staff informed me that the electric chair and system were tested on January 6, 2025, and all aspects performed as intended.

9. I am certifying that the firing squad is available because the appropriate and responsible Department staff informed me that the Department has in its possession the necessary firearms and ammunition and that members of the firing squad have completed all required training.

10. I am certifying that lethal injection is available via a single dose of pentobarbital. I have confirmed that the pentobarbital in the Department's possession is of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol. The Department provided pentobarbital to the S.C. Law Enforcement Division (SLED) for testing by its Forensic Services Laboratory. SLED confirmed that its Forensic Services Laboratory is an internationally accredited forensic laboratory and that it used widely accepted testing protocols and methodologies in this matter. SLED reported to me that experienced, qualified, and duly authorized personnel tested and confirmed the concentration of the solution

BPS #2

provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter, and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible Department staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by the Department, other States, and the federal government, the dosage called for by the Department's lethal injection protocol is sufficiently potent such that administration in accordance with the protocol will result in death.

11. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 7th DAY OF January, 2025

Jessica Lovelace (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 4/5/2026

BPS

RECEIVED
Oct 08 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State, Respondent,

v.

Richard Bernard Moore, Appellant.

Appellate Case No. 2001-021895

The Honorable Gary E. Clary
Spartanburg County
Trial Court Case No. 2000GS4200619, 2000GS4200617, 2001GS4202460

AFFIDAVIT OF BRYAN P. STIRLING

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen, of sound mind, and competent to give this testimony.

2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, and February 19, 2014, when I was confirmed by the Senate as the Director. I have served as the Director of the Department since my confirmation.

3. According to S.C. Code Ann. § 24-3-530, there are three statutorily approved methods of execution: electrocution, the firing squad, and lethal injection.

4. Pursuant to S.C. Code Ann. § 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receipt of a notice of execution from this Court.

5. On October 4, 2024, in accordance with S.C. Code Ann. §§ 17-25-370, -380, the Department received an Execution Notice issued by the Clerk of this Court for Richard Bernard Moore.

6. According to the Execution Notice for Richard Bernard Moore, the Department is required to "execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service . . . or receipt of this notice," which is November 1, 2024.

7. I hereby certify that all three statutorily approved methods of execution—electrocution, the firing squad, and lethal injection—are available for carrying out Moore's execution.

8. I am certifying that electrocution is available because the appropriate and responsible Department staff informed me that the electric chair and system were tested on September 3, 2024, and all aspects performed as intended.

9. I am certifying that the firing squad is available because the appropriate and responsible Department staff informed me that the Department has in its possession the necessary firearms and ammunition and that members of the firing squad have completed all required training.

10. I am certifying that lethal injection is available via a single dose of pentobarbital. I have confirmed that the pentobarbital in the Department's possession is of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol. The Department provided pentobarbital to the S.C. Law Enforcement Division (SLED) for testing by its Forensic Services Laboratory. SLED confirmed that its Forensic Services Laboratory is an internationally accredited forensic laboratory and that it used widely accepted testing protocols and methodologies in this matter. SLED reported to me that experienced, qualified, and duly authorized personnel tested and confirmed the concentration of the solution

provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter, and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible Department staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by the Department, other States, and the federal government, the dosage called for by the Department's lethal injection protocol is sufficiently potent such that administration in accordance with the protocol will result in death.

11. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling

Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 8th DAY OF October, 2024

N. Dayna Hall (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 2/9/2034

RECEIVED
Sep 03 2024
S.C. SUPREME COURT

AFFIDAVIT OF DR. MICHAELA ALMGREN

I. Background and Qualifications

1. My name is Michaela Almgren, Pharm.D., M.S. I am over the age of eighteen and competent to testify to the truth of the matters contained herein. The factual statements I make here are true and correct to the best of my knowledge.

2. I am a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcomes Sciences at the University of South Carolina College of Pharmacy. I teach principles of sterile compounding per United States Pharmacopeia ("USP")[1] Chapters 797 and 800, aseptic technique and pharmacy regulations applicable in sterile compounding environment[2] under 503a guidance and section 503b of the Drug Quality and Security Act of 2013, as well as pharmacokinetics, pharmacotherapy, pharmacy law, and biopharmaceutics courses. I specialize in sterile compounding, medication safety and pharmacy laws and regulations that relate to pharmacy compounding practices. I also provide continuing education courses for pharmacists in those topics. I received my Doctor of Pharmacy degree from the University of South Carolina College of Pharmacy in 2010. Additionally, I have a Master's Degree in Pharmaceutical Chemistry from the University of Florida.

3. In conjunction with my academic appointment, I currently maintain a practice site at a 503b[3] outsourcing pharmacy where I perform duties of an outsourcing pharmacist, clinical

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[1] USP sets standards for the identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements in the United States. The USP publishes the United States Pharmacopeia-National Formulary (USP-NF), which contains a compendium of quality standards and specifications for a wide range of pharmaceuticals and related products. USP Chapters 797 and 800 are part of the USP-NF compendium.

[2] Aseptic technique in drug compounding refers to specific practices to avoid physical and microbial contamination when preparing sterile medications that are to be used for parenteral applications, such as IV infusion, injection, etc.

[3] 503b Outsourcing Pharmacy is a compounding pharmacy that produces large batches of sterile products and distributes them directly to health systems pharmacies to address drug shortages, as specified in Section 503B of the FD&C Act.

advisor and pharmacy student preceptor. Previously, I worked in pharmacy operations at a large local teaching hospital as a pharmacist. I have over fifteen years of experience in sterile compounding and aseptic technique. Prior to joining the faculty at the University of South Carolina I worked for several years in pharmaceutical manufacturing where I was involved in drug formulation, quality assurance, quality control and analytical method development and validation. My professional qualifications are Doctor of Pharmacy and Master of Science in Pharmacy with focus on Pharmaceutical Chemistry. A copy of my CV is attached as Exhibit A.

4. I have been asked by attorneys who represent Khalil Allah (or Freddie Owens) whether the August 28, 2024, affidavit provided by the director of the South Carolina Department of Corrections contains adequate information to assess the quality and reliability of the lethal injection drugs the department has obtained for use in his execution, which is scheduled for September 20, 2024. In my expert scientific and pharmaceutical opinion, it does not.

5. The director's affidavit does not provide the date when the drugs were tested. The affidavit also does not include the drugs' "Beyond Use Date," or BUD. BUD refers to the date after which a compounded preparation should not be used, as it may no longer be effective or safe. You need to know these facts to know that the drugs will still be effective on September 20, when the department intends to use them. This is particularly important because the affidavit makes no reference to a Certificate of Analysis from the manufacturer, which suggests to me that the drugs were compounded, not manufactured. Manufactured drugs have a Certificate of Analysis that includes the drug's expiration date. This differs from the BUD, as the expiration date is determined by the manufacturer. The expiration date for commercially manufactured drugs is generally much longer than the BUD for a compounded drug. Commercially manufactured drugs undergo rigorous stability testing under controlled conditions to establish their expiration dates, which can extend

for years. In contrast, compounded drugs are typically made in smaller batches and do not go through the same level of testing, so their stability over time is less certain. Even if a compounded drug passes all USP-required quality tests today, it is still important to know its BUD to ensure that the testing accurately reflects the drug's properties on September 20, provided that the BUD extends beyond that date.

6. The affidavit describes reports the director received from SLED personnel concerning the testing of the drugs. The statement "...acknowledged the substance's concentration in terms of its purity and stability" lacks clarity. The affidavit does not specify the test methods used, the testing procedures followed, or the actual results obtained from those tests. This information is vital to assessing the quality and reliability of the drugs. You would need to know that the SLED laboratory followed all established steps for pharmaceutical drug quality analysis as specified in the USP compendium, which usually differ from typical forensic practice. Documentation of test method validation, calibration curves, details of quality control procedures and methodology used should all be available for review as these are all standard records produced during this type of laboratory analysis. The easiest way to address this concern would be to share the actual analytical reports from the testing of the drugs.

7. The affidavit does not address where the drugs will be stored and how the storage conditions will be monitored between now and September 20th. The nearly three weeks leading up to September 20 provides ample opportunity for quality issues to arise with these drugs if they are not stored correctly, as medications—especially compounded drugs—are sensitive to moisture, light, and temperature. Generally, drugs degrade more rapidly when stored outside their recommended temperature and humidity range. However, simple measures can be implemented to assure that the drug quality is preserved. According to USP Chapter 659 titled "Packaging

Temperature and Storage Requirements", room temperature is generally defined as a range of 20°C to 25°C (68°F to 77°F). This range allows for a variability of 2°C (4°F) above or below the specified range, meaning that the temperature could be between 15°C and 30°C (59°F and 86°F) and still be considered acceptable for room temperature storage. The acceptable humidity level for a pharmacy typically falls within the range of 30% to 60% relative humidity. Pentobarbital sodium injection drug vials should be stored in the conditions described above, as defined by the USP. According to USP Chapter 1079 titled "Risks and Mitigation Strategies for the Storage and Transportation of Finished Drug Products", storage temperature of medications should be checked daily. Without daily monitoring, temperature excursions may occur, leading to reduced potency and effectiveness of the drug. Once daily temperature measurements should be recorded to document that medications are stored under optimal conditions, safeguarding their quality and effectiveness while complying with regulatory requirements.

8. If the department's drugs degraded, or if their testing was improperly conducted or incomplete, they would pose serious risks to Mr. Allah. As I detailed in my earlier affidavit to this Court, if the drug has an improper pH, it could cause extensive damage to the blood vessels and surrounding tissue. If the drug falls out of solution, the resulting solids, or precipitates, would cause intense pain upon injection. If the potency of the drug is insufficient, the injection could result in a prisoner regaining consciousness, perhaps with organ or brain damage from the oxygen deficits suffered during the attempt at execution.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 31st day of August, 2024.

Dr. Michaela M. Almgren

Acknowledgment Notary Certificate (Only for use in AR, AZ, CO, CT, DC, DE, GA, ID, IA, IL, KS, KY, MA, MD, ME, MN, MO, MT, NH, NJ, NM, NY, NV, NC, OH, OK, OR, PA, RI, SC, TX, UT, VA, WA)

Document Name: Affidavit of Dr. Michaela Almgren

STATE OF South Carolina
COUNTY OF Lexington
(County where notarization occurred)

This record was acknowledged before me on 31 day of August, 2024, by ______________________ (name(s) of signer(s)), who personally appeared before me and (is personally known to me or whose identity was proved on the basis of satisfactory evidence) to be the person whose name is subscribed to in this document.

KENNETH R. BERG
Notary Public - State of South Carolina
My Commission Expires June 26, 2028

[signature]
(Signature of notary public)

Kenneth R. Berg, Notary Public
(Name of notary public)

My commission expires: 26 June 2028

Official Seal

Personally known _______ OR
Produced identification ✓ Type of identification produced: SCDL

00-74-0509NSBW 12-2020

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

Appellate Case No. 1999-011364

The Honorable Alexander S. Macaulay
Greenville County
Trial Court Case No. 1998GS235218, 1998GS235220, 1998GS235222

AFFIDAVIT OF BRYAN P. STIRLING

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen, of sound mind, and competent to give this testimony.

2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, and February 19, 2014, when I was confirmed by the Senate as the Director. I have served as the Director of the Department since my confirmation.

3. According to S.C. Code Ann. § 24-3-530, there are three statutorily approved methods of execution: electrocution, the firing squad, and lethal injection.

4. Pursuant to S.C. Code Ann. § 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receipt of a notice of execution from this Court.

5. On August 23, 2024, in accordance with S.C. Code Ann. §§ 17-25-370–380, the Department received an Execution Notice issued by the Clerk of this Court for Freddie Eugene Owens.

6. According to the Execution Notice for Freddie Eugene Owens, the Department is required "to execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service . . . or receipt of this notice," which is September 20, 2024.

7. I hereby certify that all three statutorily approved methods of execution—electrocution, the firing squad, and lethal injection—are available for carrying out Owens's execution.

8. I am certifying that electrocution is available because the appropriate and responsible Department staff informed me that the electric chair and system were tested on June 25, 2024, and all aspects performed as intended.

9. I am certifying that the firing squad is available because the appropriate and responsible Department staff informed me that the Department has in its possession the necessary firearms and ammunition and that members of the firing squad have completed all required training.

10. I am certifying that lethal injection is available via a single dose of pentobarbital. I have confirmed that the pentobarbital in the Department's possession is of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol. The Department provided pentobarbital to the S.C. Law Enforcement Division ("SLED") for testing by its Forensic Services Laboratory. SLED confirmed that its Forensic Services Laboratory is an internationally accredited forensic laboratory and that it used widely accepted testing protocols and methodologies in this matter. SLED reported to me that experienced, qualified, and duly authorized personnel tested two vials and confirmed the concentration of the solution provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter,

and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible Department staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by other States and the federal government, the dosage called for by the Department's lethal injection protocol is sufficiently potent such that administration in accordance with the protocol will result in death.

11. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling
Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 28 DAY OF August, 2024

Jessica Lovelace (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 04/05/2026