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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND **Freddie Eugene Owens**; **Brad Keith Sigmon**; **Gary Dubose Terry**; and **Richard Bernard Moore**, Plaintiffs, v. **Bryan P. Stirling**, in his official capacity as Director of the South Carolina Department of Corrections; **South Carolina Department of Corrections**; and **Henry McMaster**, in his official capacity as Governor of South Carolina, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2021CP4002306 **ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF**

These matters came before the Court for a non-jury trial, which began on August 1, 2022, and concluded on August 4, 2022. Plaintiffs did not appear for the trial but were represented by their attorneys, J. Christopher Mills, Esquire; Joshua S. Kendrick, Esquire; Lindsey S. Vann, Esquire; and Hannah Freedman, Esquire. Defendants Stirling and South Carolina Department of Corrections were represented by Daniel C. Plyler, Esquire, and Austin Reed, Esquire. Defendant McMaster was represented by Thomas A. Limehouse, Jr., Esquire, and William Grayson Lambert, Esquire.

Having fully considered all of the arguments, testimony, and evidence presented by the parties, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedure.

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FACTUAL AND PROCEDURAL BACKGROUND

I. The Parties

One of the defendants in this action is the South Carolina Department of Corrections ("SCDC"), the state agency charged with implementing and carrying out the policy of the State of South Carolina with respect to its prison system. *See* S.C. CODE ANN. § 24-1-30 (1976, as amended); *see also* S.C. Const. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates."). The remaining defendants are Bryan P. Stirling, the Director of SCDC ("Director Stirling"), and Henry McMaster, Governor of the State of South Carolina ("the Governor"), both of whom are sued in their official capacities only.

Each of the plaintiffs is an inmate at SCDC, having been convicted of committing at least one murder and sentenced to death. Gary Dubose Terry ("Terry") was convicted of murder in Lexington County and has been on death row since 1997. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000). Freddie Eugene Owens ("Owens") was convicted of murder and sentenced to death in 1999, after he shot and killed a convenience store clerk during the commission of a nighttime robbery. *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001), *abrogated by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Like Owens, Richard Bernard Moore ("Moore") was convicted of a murder that he committed during the commission of a nighttime robbery. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004). He was sentenced to death in October 2001. *Id.* Brad Keith Sigmon ("Sigmon") murdered two people in Greenville County in 2002, and a jury subsequently sentenced him to death. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005).

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Between November 2020 and March 2021, the Supreme Court of South Carolina set execution dates for Moore, Sigmon, and Owens after they exhausted their appellate and post-conviction remedies. At that time, South Carolina law provided that any death-sentenced inmate be executed by electrocution or by lethal injection. *See* 1995 S.C. Acts No. 108, § 1 (codified at S.C. CODE ANN. § 24-3-530(A) (2007)). That statutory scheme required that, fourteen days before the scheduled execution, the inmate must choose his method of execution. *Id.* If the inmate made no election, the default method of execution was lethal injection. *Id.*

Before each of Plaintiffs' scheduled execution dates, SCDC informed the Supreme Court that it could not obtain lethal injection drugs to carry out the executions. The Court responded by issuing stays of execution until "[SCDC] advises the Court it has the ability to perform the execution as required by law." *See, e.g.*, Order, *State v. Moore*, No. 2001-021895 (S.C. Nov. 30, 2020).

II. S.C. CODE ANN. § 24-3-530

For many years, SCDC has been unable to obtain or to compound the drugs necessary to carry out lethal injection. This moratorium was due, in part, to the South Carolina legislature declining to pass certain legislation which would facilitate procurement of the drugs. Failures such as these resulted in a *de facto* stay of executions, as inmate after inmate opted for death by lethal injection. *See* S.C. House, Video of Judiciary Subcommittee on Constitutional Laws, 1:45 (Apr. 21, 2021), https://tinyurl.com/4czcc4yc (testimony from Director Stirling to a House Judiciary subcommittee that SCDC "cannot carry out an execution by lethal injection because [SCDC] could not obtain the drugs").

In order to address this problem, the South Carolina legislature ("the General Assembly") amended the law regarding executions. Act 43 of 2021 ("the Act") – which was approved by the

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General Assembly and ratified by the Governor – amended S.C. CODE ANN. § 24-3-530 to change the default method of execution to electrocution. *See* 2021 S.C. Acts No. 43, § 1 (amending S.C. CODE ANN. § 24-3-530). The Act also added a firing squad as a third option for the method of execution. It provides:

> A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election, under the direction of the Director of the Department of Corrections.

S.C. CODE ANN. § 24-3-530(A) (2021). Therefore, if an inmate does not make an election as to his method of execution, or if lethal injection or the firing squad are unavailable, he must die by electrocution. *Id.*

The Act "applies to persons sentenced to death as provided by law prior to and after [its] effective date," including Plaintiffs. 2021 S.C. Acts No. 43, § 3. In other words, despite Plaintiffs having previously rejected the option death by electrocution, the amended law requires that they die in this manner unless lethal injection or the firing squad is deemed "available" by Director Stirling. With lethal injection remaining unavailable as it has been for many years, Plaintiffs have only two choices: being electrocuted or being shot to death.

III. This Lawsuit

In May 2021, soon after the Act was signed into law, Plaintiffs filed this action. They also filed a Motion for Preliminary Injunction, which was denied by this Court in June 2021. At the same time, Director Stirling advised the Supreme Court that SCDC "has been unable, despite numerous and diligent attempts, to acquire the drugs necessary, in a useable form, to perform lethal injection" and that "SCDC does not currently have the necessary policies and protocols, as required by the statute, for an execution by firing squad." Letter, Stirling to Shearouse (June 8, 2021), filed in *Sigmon*, No. 2002-024388. The Supreme Court again stayed Plaintiffs' executions, stating:

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> According to the Director's response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of the necessary protocols and policies.
>
> Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.

Order, *State v. Sigmon* & *Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021).

This prompted SCDC to quickly develop protocols necessary to implement the firing squad as a method of execution. It did so and notified the Supreme Court of its work on March 18, 2022. The Court then set new execution dates for Moore and Sigmon of April 29, 2022 and May 13, 2022, respectively; and Director Stirling submitted an affidavit to the Court certifying that "the only statutorily approved methods of execution available to the Department are electrocution and firing squad." The Supreme Court stayed those execution notices during the pendency of this action.

After a series of revisions to the original pleadings and the consolidation of related cases into this one, Plaintiffs filed their "Third Amended Complaint for Permanent Injunctive Relief and for a Declaratory Judgment" ("the Complaint") on April 11, 2022. In it, they assert eight "claims for relief" (labeled as Count I through Count VIII) – (1) that the Act is "retroactive legislation," which violates their due process rights; (2) that the Act amounts to unconstitutional *ex post facto* legislation; (3) that the execution statute, as amended, is void for vagueness; (4) that the courts must determine the meaning of the word "available" with respect to methods of execution, not

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Defendants; (5) that the Act violates the Non-Delegation Doctrine of the South Carolina Constitution; (6) that both electrocution and the firing squad are prohibited by the South Carolina Constitution; (7) that Plaintiffs' right to elect their manner of execution is rendered meaningless by the lack of constitutional choices from which to make that election; and (8) that the statutory methods of execution, as applied to Terry, are unconstitutional.

The trial of this case began on August 1, 2022. At that time, Plaintiffs abandoned and withdrew Count I of the Complaint and consented to sever Count VIII for determination at another time. While six "claims for relief" remain, it appears that the thrust of Plaintiffs' argument is that S.C. CODE ANN. § 24-3-530 (2021) is unconstitutional because both electrocution and the firing squad violate the South Carolina Constitution's prohibition on cruel, unusual, and corporal punishments. The Court heard testimony and received exhibits as to these allegations, culminating in closing arguments on August 4, 2022.

FINDINGS OF FACT

I. Methods of Execution

The parties largely agree on the mechanics of each method of execution.

A. South Carolina's Firing Squad

The protocol for South Carolina's firing squad calls for the inmate to be strapped into a backless metal chair. Once the inmate is restrained in the chair, an "aiming point" is placed over his heart by a physician, and his head is covered by a hood. A three-member team is armed with rifles containing .308 Winchester 110-grain TAP urban ammunition. The team is positioned approximately fifteen feet from the inmate. When instructed to do so, the members of the team focus the sights of their rifles on the aiming point. They then fire their rifles at the inmate's chest.

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Following the first volley, if the inmate appears unresponsive, a physician is called to check the inmate's vital signs. Vital signs are checked every sixty seconds until none are present, at which time the physician will certify death. However, if vital signs continue to be present after ten minutes, the firing squad team will fire a second volley at the inmate. Altogether, the protocol provides for contingencies for up to three volleys fired at the inmate if he continues to exhibit signs of life.

B. Electrocution

In 1912, South Carolina became the eighth state to adopt the electric chair as a method of execution. *See* 1912 S.C. Acts. 702, No. 402 § 1 ("*Be it enacted* by the General Assembly of the State of South Carolina, That after the approval of this Act by the Governor all persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the State Penitentiary, at Columbia, under the direction of the Superintendent of the Penitentiary instead of by hanging.). Today, SCDC uses the same electric chair that it purchased in 1912, although some of the components have been replaced. It is a wooden chair equipped with leather straps which are used to restrain an inmate's head, legs, arms, and body.

Once the inmate is restrained, one copper electrode is attached to his right leg and another attached to his head using a copper hat. A sponge, soaked in a conductive solution, is placed between the inmate's scalp and the head electrode. An electric current is then applied to the inmate's body as follows: 2000 volts for 4.5 seconds followed by 1000 volts applied for eight seconds (the rounds of high-voltage current), ending with 120 volts of electric current (i.e., low voltage current) applied for two minutes. This process disrupts the inmate's bodily functions such as respiration and circulation, causes electrical burns, and ultimately results in death.

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II. Witness Testimony

Plaintiffs presented the testimony from five witnesses, including two expert witnesses. Defendants offered testimony from three expert witnesses.

A. Defendant Bryan Stirling

Director Stirling testified that he became Interim Director of SCDC in 2013. He was then confirmed by the South Carolina Senate as Director in 2014. Since that time, SCDC has not carried out any executions. Director Stirling stated that he offered testimony before the legislative committees which were tasked with evaluating Act 43 but that he never advocated for or against any particular method of execution.

While the Court found Director Stirling to be a credible witness, he is admittedly not a subject matter expert in executions. Rather, he has a general familiarity with SCDC's protocols for its electric chair and firing squad and relies on experts to advise him on needed updates to the electric chair and the design and processes involved in utilizing the firing squad. Therefore, it is apparent that Director Stirling has very limited firsthand knowledge about many of the legal issues raised in this action.

B. Colie Rushton

Rushton currently serves as the Director of Security and Emergency Operations at SCDC. He has been employed by SCDC in various capacities for forty-nine years and has been in his current position since May 2007. Rushton is familiar with both the electric chair and the newly-implemented firing squad.

According to Rushton, SCDC's current protocols for judicial electrocutions were established before May 2007. Therefore, while he is knowledgeable about the electric chair itself and the voltage and timing applied pursuant to the protocols, he does not know why any specific

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voltage or time period was chosen. Rushton testified that while the electric chair is old, the electrical system was built in the late 1980's. Further, he was present when the electrical system was tested by a professional engineer in June 2021 and again in April 2022. That testing confirmed that the system was in proper working order.

Unlike electrocution, the protocol for SCDC's firing squad was developed by Rushton. He testified that he did internet research about historical uses of firing squads and the FBI's testing of certain ammunition. Rushton spoke to officials in the State of Utah regarding their use of a firing squad, and he was the person who ultimately chose the ammunition to be used in such executions. However, Rushton admitted that the protocol was developed without consulting with any doctors, firearms experts, ballistics experts, or any professional who could determine the proper positioning of the target on the inmate's body.

C. Witness X

Witness X, another SCDC employee, testified *in camera* pursuant to S.C. CODE ANN. § 24-3-580 (2010). Witness X oversees judicial executions and ensures that security is maintained during those executions. The witness has been present at the capital punishment facility when executions were carried out by SCDC but has never personally observed the body of any inmate after judicial electrocution has occurred. In Witness X's role at SCDC, the witness would be advised if any problems arose during a judicial execution. However, Witness X testified that they are unaware of any problems or anomalies having occurred during any of those executions.

D. John Peter Wikswo, Jr., Ph.D.

Dr. Wikswo is a tenured professor of biomedical engineering, molecular physiology and biophysics, and physics at Vanderbilt University. The Court found, based on his education, training, and experience, that he is qualified as an expert in each of those three subjects. Dr.

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Wikswo admitted that although he has been studying the electric chair and electrophysiology since 1992, he has no expertise in consciousness, pain, or forensic pathology. He has never attended medical school and has no training in medicine or forensic pathology, but he has studied how the human body responds to stimuli, including electricity. Therefore, Dr. Wikswo's testimony primarily concerned the mechanics of electrocution and its effect on the body.

Dr. Wikswo also explained that electrocution is meant to cause fibrillation, the process by which the heartrate increases until its electrical circuitry is disrupted and it can no longer pump oxygenated blood through the body, resulting in brain death. The heart, however, is capable of spontaneously regaining function after it enters fibrillation, meaning it can resume pumping oxygenated blood without any medical intervention. This is significant because, as Dr. Wikswo testified, the heart has an "upper threshold of vulnerability" beyond which a current will not induce fibrillation. According to Dr. Wikswo, that upper threshold is approximately 1000 volts. South Carolina's protocols call for the application of an initial current equal to or greater than this upper threshold. Therefore, Dr. Wikswo testified, the first 12.5 seconds of the inmate's electrocution is unlikely to induce fibrillation in most people, meaning that most inmates who are electrocuted in South Carolina's electric chair will not die from loss of oxygen to the brain after the first two shocks.

According to Dr. Wikswo, when judicial electrocutions are performed, the hope is that the electric current is first applied to the inmate's brain, but that this scenario is unlikely to actually occur. He testified that the human skull is not a good conductor of electricity. Thus, when the electric current is applied to the inmate's scalp, it spreads into the facial muscles and thoracic portions of the body, with only a small fraction entering the brain. In other words, the electric current primarily travels around the skull before and down the skin and tissues of the neck and

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torso before reaching the electrode on the inmate's leg. However, Dr. Wikswo admitted that he cannot quantify the percentage of electric current that reaches the brain and that there is no evidence of how much of the brain is rendered nonfunctional during the process.

Instead, Dr. Wikswo opined that because the human skull is significantly more resistive than the skin, the muscles, and the connective tissue around the head, when current is applied to the top of the head, the vast majority does not enter the brain. Rather, it flows from the head electrode to the leg electrode. It does not cause immediate loss of consciousness but causes severe pain due to the tetany, or full contraction, of the body's skeletal muscles. Dr. Wikswo testified that tetany caused by a judicial electrocution may be forceful enough to cause broken bones. For this reason, Dr. Wikswo explained, the use of a head-to-hoof or head-to-leg arrangement is not even permitted for animal slaughter.

Dr. Wikswo also testified that when electric current flows through the body, it encounters resistance, which generates heat. In the case of the electric chair, the current generates enough heat to cause burning, charring, and arcing – a phenomenon in which electricity jumps through the air, as with a lightning strike or a spark. Arcing can cause burns to appear to on parts of the body that are not touching electrodes. Dr. Wikswo testified that one of the autopsies he reviewed from South Carolina documented that the fleshy portion of the inmate's nose had been burned off, which Dr. Wikswo explained was likely caused by arcing. He also testified that in the autopsies he reviewed from South Carolina and from other states, he observed damage consistent with severe electrical burns, charring, and arcing. Specifically, he testified that multiple of the South Carolina autopsies documented burns so deep that the underlying fat tissue rendered, causing the skin to slip and fall away from the bone. He did, however, admit that he was unable to determine whether the burns and other damage to the body occurred pre- or post-mortem.

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In summary, Dr. Wikswo opined that there is no scientific evidence that electrocution – particularly in the manner applied by SCDC – causes painless, instantaneous death, and that he is unable to find scientific rationale to support for South Carolina's electrocution protocols. In fact, South Carolina's use of multiple, prolonged shocks is evidence that the first application of current is insufficient to kill the inmate. Further, there are no measurements to prove that the human brain is rendered insensate from the first electrical shock in judicial electrocutions, and that there is a substantial risk that the inmate remains conscious, sensate, and in pain for some period of time. Thus, while it is impossible to determine the exact moment that death occurs during a judicial electrocution, the process is neither instantaneous nor painless.

E. Dr. Jonathan Arden

Dr. Arden is a board-certified forensic pathologist. He has worked as a medical examiner in many jurisdictions and is currently a parttime forensic pathologist for the State of West Virginia and the City of San Diego, California. He is also a private consultant. Based on his education, training, and experience, the Court admitted Dr. Arden as an expert in the field of forensic pathology. Dr. Arden offered testimony about the kinds of injuries an inmate suffers when subjected to death by firing squad or by electrocution.

1. Firing Squad

According to Dr. Arden, the mechanism that causes death by firing squad is destruction of the heart, causing cessation of circulation. He explained that gunshot wounds to the chest would cause extensive damage, including fractures of the ribs and sternum. This, he testified, would cause excruciating pain as long as the person remained sensate, especially when making any movements such as flinching or breathing. Dr. Arden supported his conclusion that the firing squad would hit and fracture bone by reviewing a report of examination and photographs from a

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firing squad execution in Utah. The pathological diagnoses in that execution noted "fragmentation of anterior chest wall," which Dr. Arden recognized as indicating broken bones in the chest cavity.

Dr. Arden testified that an inmate would remain sensate and able to feel pain for approximately fifteen seconds, assuming the heart was rendered completely unable to circulate blood to the brain. If, however, the heart function was not completely disrupted – either because the bullets were not properly aimed at the heart or because the fragmentation caused the bullet fragments to hit surrounding areas – the inmate would remain sensate for longer. Based on his extensive experience as a pathologist, Dr. Arden testified that it is a scientific fact that a person will not immediately lose consciousness upon disruption of the heart because the remaining blood in the brain will provide sufficient oxygen to maintain consciousness for approximately fifteen seconds even if circulation is completely disrupted.

2. Electrocution

Dr. Arden testified that he has reviewed more than eighty autopsy reports from electric chair executions in various states and that all of those autopsies showed severe injuries. Specifically, he described severe electrical and thermal burns on inmates' bodies and "effects on parts of the body, including internal organs, that is the equivalent of cooking." Some of the burns Dr. Arden observed were classified as third-degree burns, and he testified that if a person were conscious during that process, they would feel "horrific pain." Like Dr. Wikswo, Dr. Arden testified that when a person is electrocuted, their skeletal muscles tetanize, causing them to contract painfully. The muscles around the chest and lungs, which regulate breathing, also tetanize, meaning a person who is electrocuted is unlikely to be able to breathe. He also opined that the experience of electrocution and the passage of high voltage current through the body "in and of itself would be painful and excruciating."

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According to Dr. Arden, although it is not possible to distinguish between all pre- and post-mortem injuries, it is possible for some injuries. For example, he stated that some of the injuries he observed in the autopsy reports could only have occurred post-mortem, such as subdural hematomas. However, he testified that the presence of subdural hematomas in South Carolina electric chair autopsies is an indication that the inmates were exposed to extreme heat, as in cooking. Other injuries, Dr. Arden testified, could only have happened pre-mortem. Those injuries include bruising corresponding to the configuration of the restraints, for example, which Dr. Arden observed in many of the autopsies he reviewed, including those from South Carolina. According to Dr. Arden, bruising occurs when blunt force trauma causes blood to rush to the area of injury, a process that can only happen when the heart is beating. The presence of bruising, Dr. Arden explained, is a clear signal that a person killed in the electric chair did not die immediately.

Finally, Dr. Arden testified that of the eighty autopsies he reviewed, ten revealed that the executions were "botched," meaning they did not go according to plan. Dr. Arden testified that some of the botches involved inmates surviving and remaining conscious past the first application of current, as indicated by voluntary movement or breathing. He stated that at least one of the South Carolina autopsies indicated a botched electrocution, as the head electrode appeared to have moved and fallen into the inmate's eyes. Dr. Arden explained that if the inmate were conscious during any of his electrocution, he would have experienced excruciating pain from having an electrical burn in his eyes. In conclusion, Dr. Arden testified that "[t]here is no proof that judicial electrocutions, botched or not, provide instantaneous death."

F. Dr. Ronald Wright

Dr. Wright – deemed by the Court to be an expert in forensic pathology – testified about the electric chair on behalf of Defendants. He largely disagreed with Plaintiffs' witnesses.

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According to Dr. Wright, when a person is electrocuted with very high voltage current, they are rendered instantaneously unconscious and cannot regain consciousness because their brain cells are subject to immediate poration. Poration, Dr. Wright testified, is a phenomenon in which an electrical current punches sub-microscopic holes into tissue, causing irreparable damage. He also stated that even if the brain does not instantly porate, a person will still die very quickly because the human heart tetanizes instantly. For this reason, Dr. Wright opined that "[i]f I had been sentenced to die, that [the electric chair] would be my choice because it doesn't hurt." Dr. Wright could not, however, offer any affirmative proof to support this theory of instant poration and insensibility. To the contrary, Dr. Wright acknowledged that a person whose brain has been subject to instant poration would not be capable of breathing, moving, or screaming; and he was unable to explain electrocutions during which inmates breathed, moved, and screamed after the application of electric current.

Dr. Wright also opined that the second application of electric current in South Carolina's protocol is not necessary, given his view that the first application of high-voltage current causes instantaneous loss of consciousness. As to the third application of current, he testified that low-voltage current – which he described as current of less than 600 volts – is "very dangerous" and that electrocution with low-voltage current is particularly painful. He acknowledged that if a person survived and remained sensate after the first two applications of current in South Carolina's electric chair, they would experience considerable pain and suffering. Consistent with this, Dr. Wright also acknowledged that electro-convulsive therapy (ECT), a medical treatment for some severe psychiatric illnesses, always involves the administration of anesthesia to induce sedation, followed by a strong muscle relaxant to prevent damage to the musculoskeletal system that can occur when a person's skeletal muscles tetanize. ECT never involves a heat-to-leg electrode

system, but instead always requires cross-brain electrical current. These measures, Dr. Wright acknowledged, are designed to reduce pain and suffering. Dr. Wright could not explain how a head-to-leg electrode system – as is used by SCDC – is consistent with the goal of reducing pain and suffering.

Additionally, Dr. Wright acknowledged during his testimony that in reaching his opinions, he relied on a meta-analysis of more than fifty other peer-reviewed articles. *See* Hannah McCann, Giampaolo Pisano, & Leandro Beltrachini, *Variation in Reported Human Head Tissue Electrical Conductivity Values*, 32 BRAIN TOPOGRAPHY 825 (2019). Dr. Wright specifically described this article as "very good." However, when confronted with the fact that the article explicitly details a consensus view among experts that the human skull is significantly more resistant than the scalp, muscles, fat, blood, and the brain, Dr. Wright discounted it and attributed those findings to the studies having used low voltages. He did not explain why a low voltage would impact the resistance measures.

G. Dr. Jorge Alvarez

Dr. Alvarez is a cardiologist in San Antonio, Texas, is the medical director of the South Texas Hearth Valve Center, and is the co-medical director of the Methodist Hospital Chest Pain Center. The Court qualified Dr. Alvarez as an expert in cardiology and heard testimony from him regarding the use of a firing squad to cause death.

Dr. Alvarez agreed with other witnesses that when a firing squad is utilized, death is accomplished by disruption of the heart and surrounding vessels, which would stop blood circulation. He also agreed that the heart is located behind a series of bones, including the ribs and the sternum, with the sternum covering between one-third to one-half of the heart.

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Regarding consciousness, Dr. Alvarez testified that the ammunition would cause relatively immediate stoppage of blood flow and a rapid decline in consciousness. Based on his experience as a cardiologist, he testified that the loss of consciousness would be relatively quick: less than ten seconds. On cross examination, Dr. Alvarez agreed that the precise location of where the bullet hits could impact how quickly a person would be exsanguinated, possibly increasing the amount of time a person could remain conscious. Finally, while he disagrees with Dr. Arden about precisely how long it takes for unconsciousness of the inmate to occur, they agree that loss of consciousness is not immediate; that accuracy in the administration of the firing squad is a necessary component of a rapid death; and that broken bones and chest cavitation cause pain.

H. Dr. D'Michelle DuPre

The final testifying witness was Dr. DuPre, a private consultant and forensic pathologist who has previously been employed as a medical examiner in multiple states. This Court qualified Dr. DuPre as an expert in forensic pathology. She offered testimony concerning the use of the firing squad.

Unsurprisingly, Dr. DuPre agreed with Drs. Arden and Alvarez about the mechanism of death and location of the heart behind bone. She also agreed with Rushton's assessment that the ammunition he selected would cause increased cavitation due to its frangibility. According to Dr. DuPre, each bullet fragment would itself create a temporary cavity in the inmate's body, causing more damage.

Dr. DuPre disagreed with other experts about how long an inmate remains conscious after being shot. Unlike the other experts, Dr. DuPre opined that death by firing squad would be very rapid with unconsciousness occurring "almost immediately." She asserted that it would be so quick that the inmate would not experience pain at all. She based this opinion, in part, on the idea

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that the blood loss caused by the gunshot wounds would cause nearly instantaneous unconsciousness. However, Dr. DuPre offered no affirmative evidence to support her opinion that the firing squad causes immediate loss of consciousness.

In addition, Dr. DuPre acknowledged that her opinion about the firing squad was premised on an assumption that it would be carried out properly, with well-trained marksmen who would not miss their targets. She admitted, however, that she did not have any information about the marksmanship training received by the firing squad team and that she was not involved in the design of the protocol. Moreover, Dr. DuPre testified that shooting and killing another person is difficult and that a person with inadequate training or insufficient psychological preparation would be more likely to flinch or hesitate at the last moment, increasing the chances of a botched execution. Thus, it is clear that Dr. DuPre's testimony about the firing squad is based on a series of unsupported assumptions.[1]

CONCLUSIONS OF LAW

The Uniform Declaratory Judgments Act is an appropriate method to challenge the constitutionality of a statute. See S.C. CODE ANN. § 15–53–20 (1976). It provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." *Id.* "Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder." S.C. CODE ANN. § 15-53-20 (1976); *see also* Rule 57, SCRCP.

"In an action for declaratory relief, the burden of proof rests with the party seeking the declaration…" *SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 82, 781 S.E.2d

[1] Here, the Court makes no attempt to discredit Dr. DuPre's testimony. Rather, the Court recognizes that they are premised on assumptions, which are just that – assumptions.

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115, 121 (Ct. App. 2015) (citations omitted). Generally, "that party must meet its burden by a greater weight or preponderance of the evidence." *Id.* (citing *Vt. Mut. Ins. Co. v. Singleton,* 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994); *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.,* 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App.2006)). However, when the action alleges the unconstitutionality of a statute, the same must be proven beyond a reasonable doubt. *See, e.g., Joytime Distribts. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) ("A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.").

The criminal justice "system affords greater protection to the accused [in capital cases] since the imposition of death by public authority is so 'profoundly different' from any other sanction." *State v. Butler*, 277 S.C. 452, 456, 290 S.E.2d 1, 3 (1982), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991) (quoting *State v. Shaw*, 273 S.C. 194, 206-07, 255 S.E.2d 799, 805 (1979), *overruled on other grounds by Torrence*, 305 S.C. 45, 406 S.E.2d 315; *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). However, it remains true that "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (citations omitted). "This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution." *Johnson v. Collins Ent. Co*., 349 S.C. 613, 626, 564 S.E.2d 653, 660 (2002) (citing *Main v. Thomason,* 342 S.C. 79, 535 S.E.2d 918

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(2000); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994); *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)).

I. Count VI: Both Electrocution and the Firing Squad are Unconstitutional

Plaintiffs allege that electrocution and the firing squad are unconstitutional methods of execution. Specifically, Plaintiffs contend that both methods of execution are cruel, unusual, and corporal, in violation of Article I, Section 15 of the South Carolina Constitution. The Court agrees.

The Constitution of the State of South Carolina provides, in relevant part,

> All persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.

S.C. Const. art. I, § 15. Notably, this language offers greater protections than those found in the Constitution of the United States. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). This is because the federal constitution "sets the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643-44, 541 S.E.2d 836, 840 (2001).

The Court rejects Defendants' argument that the South Carolina Constitution should be analyzed in the same manner as the United States Constitution. South Carolina's courts have historically reached the same conclusion. *See, e.g., id.* at 644, 541 S.E.2d at 841 (finding that the South Carolina Constitution's prohibition on "invasions of privacy" provides greater protections that the Fourth Amendment to the United States Constitution); *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) (holding that the state constitutional right to privacy prohibited the state from forcibly medicating a death row inmate in preparation of his execution); *State v. Brown*, 284 S.C.

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407, 326 S.E.2d 410 (1985) (finding that despite being permitted under the federal constitution, castration is a form of mutilation, which is prohibited by Article I, Section 15 of the South Carolina Constitution).

Unlike the federal constitution, South Carolina's constitution uses disjunctives to distinguish the categories of prohibited punishment. Therefore, the Court must account for all three prohibitions – cruel, unusual, and corporal – in determining whether a specific method of execution (i.e., the inmates' punishment) is unconstitutional. This is consistent with our state's tradition of "providing [our] citizens with a second layer of constitutional rights," beyond what is guaranteed by the federal constitution. *See State v. Austin*, 306 S.C. 9, 16 & n.6, 409 S.E.2d 811, 815 & n.6 (Ct. App. 1991).

A. The Firing Squad

1. The Firing Squad is Unusual

A review of executions nationally and in South Carolina demonstrates that the firing squad is unusual. The Supreme Court of the United Sates recognized nearly a century and a half ago that the punishment was used mainly as a military punishment for soldiers, not civilians. *See, e.g., Wilkerson v. Utah*, 99 U.S. 130, 135 (1878), ("Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot."). Later, in ruling the nation's death penalty was unconstitutional in the 1970s, United States Supreme Court Justice Brennan noted that executions by "shooting [had] virtually ceased" following the adoption of supposedly more humane methods of execution including electrocution and lethal gas. *Furman v. Georgia*, 408 U.S. 238, 296-97 (1972) (plurality opinion) (Brennan, J. concurring). Dr. DuPre corroborated this conclusion, testifying that her research confirmed that less than 1% of executions

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have been carried out by firing squad, with only thirty-four since 1900, all but one of which were in Utah.

In fact, no one disputes that the State of South Carolina has never before employed a firing squad as a method of execution or non-military punishment and has never carried out such an execution. This is so even though firing squads have existed for many years, meaning that it is not a newly created or recently discovered means of execution. Rather, it is a reversion to a historic method of execution that has never before been used by our State and is not used in the overwhelming majority of other states. Thus, execution by firing squad is unusual punishment both nationally and in South Carolina.

2. The Firing Squad is Cruel

The use of a firing squad to accomplish death is cruel. "Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890). Here, it is clear that the firing squad causes death by damaging the inmate's chest, including the heart and surrounding bone and tissue. This is extremely painful unless the inmate is unconscious which, according to Drs. Arden and Alvarez, is unlikely. Rather, the inmate is likely to be conscious for a minimum of ten seconds after impact. Moreover, the length of the inmates' consciousness – and, therefore, his ability to sense pain – could even be extended if the ammunition does not fully incapacitate the heart. During this time, he will feel excruciating pain resulting from the gunshot wounds and broken bones. This pain will be exacerbated by any movement he makes, such as flinching or breathing.

This constitutes torture, a possibly lingering death, and pain beyond that necessary for the mere extinguishment of death, making the punishment cruel.[2]

[2] Not only do South Carolina courts acknowledge that such conscious pain and suffering exist prior to death, but our system of justice routinely compensates a person's heirs for that discomfort. *See, e.g., Welch v. Epstein*, 342 S.C. 279,

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3. The Firing Squad is Corporal

The firing squad constitutes corporal punishment. "Corporal" is defined as "pertaining or relating to the body." Merriam-Webster Dictionary (2022), https://www.merriam-webster.com/dictionary/corporal. For purposes of interpreting the South Carolina Constitution, "corporal" also refers to mutilation of the human body. *See*, *Brown, supra.* Thus, a method of punishment which mutilates the human body, such as the firing squad, is violative of the South Carolina Constitution.

The firing squad clearly causes destruction to the human body. Rushton testified that in developing South Carolina's protocols, he chose frangible ammunition because it would break apart upon impact and inflict maximal damage to the inmate's body. Rushton opted for specific ammunition which he understood would cause cavitation (a hole in the inmate's chest) up to six inches in diameter, at a depth of 45 inches into the body. He expects that the ammunition will first hit the bone in front of the inmate's heart causing it to fragment, as opposed to if it hit only soft tissue and possibly not fragmenting immediately. An inmate is to be struck by three such rounds of ammunition, compounding the damage to his body.

The expected damage is confirmed by the Court's review of the autopsy photos of the last person executed by firing squad in Utah, which was introduced as an exhibit at trial. Those photos depict multiple entrance wounds in the inmate's chest and large volumes of blood poured out over his body and clothing. The inmate's body has been, by any objective measure, mutilated. SCDC certainly anticipates similar carnage, as it created a firing squad chamber that includes a slanted trough below the firing squad chair to collect the inmate's blood and covered the walls of the

536 S.E.2d 408 (Ct. App. 2000); *Smalls v. S.C. Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); *Edwards v. SCAPA Waycross, Inc.*, 2022 WL 3050834 (Aug. 3, 2022).

chamber with a black fabric to obscure any bodily fluid or tissues that emanate from the inmate's body.

B. Electrocution is Cruel, Unusual and Corporal

Only three states have ever addressed the constitutionality of death in the electric chair: the Supreme Court of Florida in 1999, the Supreme Court of Georgia in 2001, and the Supreme Court of Nebraska in 2008. *See Provenzano v. Moore*, 744 So.2d 413 (Fla. 1999) (per curiam); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001); *State v. Mata*, 745 N.W.2d 229 (Neb. 2008). The Georgia and Nebraska courts held that the electric chair violates those states' constitutions, while the Florida court held the opposite in *Provenzano*. However, after *Provenzano* was decided, the Supreme Court of the United States granted certiorari review. In response, the Florida legislature amended the state's method of execution statute to make lethal injection the default method and the Supreme Court dismissed the petition "[i]n light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection.'" *See Bryan v. Moore*, 528 U.S. 1133 (2000) (describing "recent amendments to Section 922.10 of the Florida Statutes"). Thus, the decision of the Florida Supreme Court was effectively abrogated when the Florida legislature amended that state's methods of execution statute to remove the possibility of an involuntary execution by electrocution.

In *Dawson*, the Supreme Court of Georgia held that the electric chair violates the Georgia Constitution for three independent reasons. First, the court noted that "the evidence establishes that it is not possible to determine whether unnecessary pain is inflicted in the execution of the death sentence." 554 S.E.2d 142-43. In essence, the court held that the inmate had not satisfied his burden of proof on the question of "unnecessary conscious pain suffered by the condemned inmate." *Id.* at 143. Second, however, the court held that the electric chair violates the Georgia

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Constitution because it "unnecessarily mutilate[s] or disfigure[s] the condemned inmate's body," regardless of "whether or not the electrocution protocols are correctly followed and the electrocution equipment functions properly." *Id.* The court noted that the electric chair leaves inmates' bodies "burned and blistered with frequent skin slippage from the process" and "the brains of condemned inmates are destroyed in a process that cooks them." *Id.* Third, the court held that the electric chair is cruel and unusual "in light of viable alternatives which minimize or eliminate the pain and/or mutilation." *Id.* Thus, the court concluded, "death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition on cruel and unusual punishment" in the Georgia Constitution. *Id.* at 144.

Mata, decided less than a decade later, reached largely the same conclusions, but did so on the basis of a more developed record with the benefit of additional scientific and medical testimony. Unlike *Dawson*, the *Mata* court explicitly held that "death and loss of consciousness is not instantaneous for many condemned inmates" and that the condemned inmate had met his burden of proving that "electrocution inflicts intense pain and agonizing suffering." 745 N.W.2d at 277-78. The electric chair, *Mata* held, has a "proven history of burning and charring bodies" that is "inconsistent with both the concepts of evolving standards of decency and the dignity of man." *Id.* at 278. "Examined under modern scientific knowledge, 'electrocution has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of state prisons.'" *Id.* (quoting *Jones v. State*, 701 So.2d 76, 87 (Fla. 19997). The Court finds *Mata* to be a relevant and persuasive opinion, given that two of the experts who testified in that case Drs. Wright and Wikswo – also testified in this case and offered essentially the same opinions. *See Mata*, 745 N.W.2d at 273-75 (describing Dr. Wikswo's and Dr. Wright's competing theories of how the electric chair accomplishes death).

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According to the testimony adduced at trial, there is no evidence to support the idea that electrocution produces an instantaneous or painless death. If the inmate is not rendered immediately insensate in the electric chair, they will experience intolerable pain and suffering from electrical burns, thermal heating, oxygen deprivation, muscle tetany, and the experience of high-voltage electrocution.

South Carolina's electric chair also causes severe damage to an inmate's body, some of which occurs pre-mortem. Because the human skull is significantly more resistant than other parts of the head and upper body, not all of the electrical current applied in the first two rounds of current will enter an inmate's brain. This increases the likelihood that a person will survive the initial shocks in the electric chair, even if the lower voltage third round of current does eventually kill them by fibrillating their heart, cooking their organs, or preventing them from breathing.

There is evidence that inmates executed by electrocution continue to move, breathe, and even scream after the shock is administered. The inmate may also regain heart function and spontaneously resume breathing during the process. These are indications that a substantial percentage of individuals survive and remain sensate long enough to experience excruciating pain and suffering. In fact, the head-to-leg electrode protocol is not designed to reduce pain and suffering. According to expert testimony, there is no scientific or medical justification for the way South Carolina carries out judicial electrocutions. The South Carolina electric chair causes grave damage to the body, but it is unlikely to immediately cause grievous harm to the two organs most important to maintaining consciousness: the brain and the heart. This creates a risk that an inmate will remain conscious and sensate while he is burned, bruised, and suffocated. The human body is largely unpredictable and it is not possible to know with certainty, in advance, how any given person will respond to an electrocution in the electric chair on any given day. As a result of the

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inherently unpredictable nature of electrocution and the occurrence of human error, an intolerably high percentage of judicial electrocutions do not go according to plan and cause extreme pain and suffering.

Based on the foregoing findings of fact, the Court holds that the electric chair violates the South Carolina Constitution because it is cruel, it is unusual, and it is corporal. Since 1976, the state has killed just seven men in the electric chair. In multiple of those executions, there is objective evidence, documented in the autopsy reports as bruising, that the condemned likely experienced severe pain and suffering. The punishment is, at a minimum, no longer viewed as a reliable method of administering a painless death, and the underlying assumptions upon which the electric chair is based, dating back to the 1800s, have since been disproven.

As other courts have observed, although "it is not possible to determine conclusively whether unnecessary pain is inflicted [in a judicial electrocution]," the affirmative evidence that does exist strongly indicates that in an intolerably large number of cases, judicial electrocution amounts to torture. *Dawson*, 554 S.E.2d at 142-43; *see also Mata*, 745 N.W.2d at 278. Moreover, the law does not require certainty; even under the most demanding methods-of-execution analysis, "[t]he standard is whether the punishment creates a substantial risk that a prisoner will suffer unnecessary and wanton pain in an execution," and the electric chair carries that risk. *Id.*

Even if an inmate survived only fifteen or thirty seconds, he would suffer the experience of being burned alive – a punishment that has "long been recognized as 'manifestly cruel and unusual.'" *Dawson*, 554 S.E.2d at 143 (quoting *In re Kemmler*, 136 U.S. 436, 446 (1890)). Or, in the words of the Supreme Court of Nebraska, the argument that fifteen to thirty seconds "is a permissible length of time to inflict gruesome pain . . . is akin to arguing that burning a prisoner at the stake would be acceptable if we could be assured that smoke inhalation would render him

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unconscious within 15 to 30 seconds." *Mata*, 745 N.W.2d at 278. These risks are even more intolerable in light of the fact that South Carolina authorizes execution by lethal injection, a method that is known to be more humane and less painful when it is properly administered. Simply put, "[e]lectrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Other states have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty." *Id.* After more than a century of use, it is time to retire the South Carolina electric chair as a violation of the Article I, section 15 of the South Carolina Constitution.

II. Count II: The Statute Violates the Ex Post Facto Clauses of the United States and South Carolina Constitutions

Plaintiffs allege the amended execution statute operates in violation of the Ex Post Facto Clause because the prior statute provided an inmate would be executed by lethal injection unless he affirmatively chose electrocution, but the new statute sets the default method as electrocution unless firing squad and/or lethal injection are certified as available and the inmate choses it. Because SCDC has indicated it cannot obtain the drugs to carry out lethal injection, Plaintiffs assert they now face the greater punishment of death by electrocution or firing squad versus lethal injection in violation of the Ex Post Facto Clause. The Court agrees.

Both the Constitutions of the United States and of South Carolina forbid ex post facto legislation. *See* U.S. Const. art. I, § 10 ("No State shall … pass any … ex post facto law"); *see also* S.C. Const. art. I, § 4 ("No … ex post facto law … shall be passed"). These provisions prohibit legislatures from enacting any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798). Put differently, a law is ex post facto when it "produces a sufficient risk of increasing the measure of

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punishment attached to the covered crimes," *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995), or "alters the situation of the party to his disadvantage," *State v. Malloy*, 95 S.C. 441, 441, 78 S.E. 995, 997 (1913). *See also Jernigan v. State*, 340 S.C. 256, 264–65, 531 S.E.2d 507, 511–12 (2000). Thus, although "a change in law that merely affects a mode of procedure but does not alter substantial personal rights is not ex post facto," a law that "poses a sufficient risk of increasing the measure of punishment" affects an inmate's substantial personal rights and is not merely procedural. *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 403, 413, 745 S.E.2d 110, 114, 120 (2013).

Lethal injection is the least severe of the three statutorily authorized punishments, and the amended statute effectively revokes that lesser punishment. When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the Supreme Court of the United States is "believed to be the most humane [execution method] available." *Baze*, 553 U.S. at 62. When carried out properly, it can largely eliminate the risk of pain that comes with other methods of execution. *Id*. at 49 (noting that the first drug of the three-drug protocol "eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections"); *see also Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (observing that a single-drug protocol is "widely conceded to be able to render a person fully insensate and does not carry the risks of pain that some have associated with other lethal injection protocols" (internal quotations omitted)). As a result, there is a "consensus among the States and the Federal Government that lethal injection is the most humane method of execution." *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

The Supreme Court's decision in *Malloy v. South Carolina (Malloy II)*, 237 U.S. 180 (1915), finding a change in the execution method from hanging to electrocution did not create an

ex post facto violation, does not undermine this Court's findings. *Malloy*, decided over a century ago, relied on the then- "well grounded belief that electrocution is less painful and more humane than hanging." *Id.* at 180; *see also Kemmler*, 136 U.S. at 443-44 (approving electrocution as a method of execution based on the assumption that "application of electricity to the vital parts of the human body . . . must result in instantaneous, and consequently in painless, death"). As Drs. Wikswo and Arden testified, based on review of electrocution procedures and outcomes over the one hundred years since *Malloy II* and *Kemmler*, the assumption that electrocution causes an instantaneous and painless death is a fallacy unsupported by scientific evidence or simulations. Accordingly, the statute's effect of changing the default method of execution from lethal injection to electrocution constitutes an ex post facto violation.

Defendants assert a change in execution methods cannot violate the Ex Post Facto Clause because it does not change the punishment itself (i.e., death) but is merely a change in the method of carrying out that punishment. They also assert that even if it could, there is no ex post facto violation unless the new punishments also violate the Eighth Amendment. Neither assertion comports with the proper standards for reviewing a statute for ex post facto purposes.

Defendants rely on a concluding sentencing in *Malloy II* stating "[t]he statute under consideration did not change the penalty – death – for murder" for the proposition that a change in the method of execution cannot create an ex post facto violation. *Malloy II*, 237 U.S. at 180. This reliance ignores the next sentence of the opinion: "The punishment was not increased [by adoption of electrocution], and some of the odious features incident to the old method [hanging] were abated." *Id.* This demonstrates the ex post facto standard requires comparison between the methods of execution to determine if the punishment is increased. Even if the United States Supreme Court did not require such a comparative review, our state's Supreme Court clearly does.

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In reviewing the same change from hanging to electrocution, the Supreme Court of South Carolina conducted a comparative analysis of the two methods, describing "the manner in which an execution by hanging is conducted," including the adjustments made to ensure "when [the inmate] drops from the scaffold his neck will be broken, thus destroying the structural formation of the body" and instances "where the head is completely severed from the body" and "numerous instances where the neck is not broken, and the convict died of strangulation" and reviewing the *Kemmler* decision to find that the Supreme Court of the United States "clearly . . . regarded electrocution as a more humane method of punishment than that by hanging." *State v. Malloy (Malloy I)*, 95 S.C. 441, 441, 78 S.E. 995, 998 (1913). Accordingly, comparative review of the methods of execution is appropriate under the state and federal ex post facto clauses and demonstrates that the amended statute subjects Plaintiffs to a greater punishment.

Finally, Defendants' assertion that there can be no ex post facto violation unless the newly adopted method of execution is itself a violation of the Eighth Amendment to the United States Constitution is incorrect. State and federal courts have reviewed changes in punishment where both the old and new punishments are clearly constitutional under the Eighth Amendment and found the change nevertheless violates the Ex Post Facto Clause by increasing the punishment. *See Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding unconstitutional a retroactive law that removed lesser punishments and made the maximum punishment mandatory); *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000) (holding the change from annual to biannual parole review could not be applied retroactively without violating South Carolina's prohibition on ex post facto punishment). Thus, regardless of whether electrocution and firing squad violate the Eighth Amendment (a question not before this Court), subjecting Plaintiffs to them instead of lethal injection constitutes an ex post facto violation.

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Because the amendments to the execution statute are retroactive, S.C. CODE ANN. § 24-3-530(3) (2021), the only question is whether the law "increases the punishment" or whether "its consequences alter[] the situation of a party, to his disadvantage." *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted). As discussed in great detail above, electrocution and firing squad both cause excruciating pain and damage to the body of the condemned inmate. In comparison to lethal injection, these methods of execution "inflict a greater punishment" than lethal injection. *See Calder*, 3 U.S. at 390.

III. Counts III, IV, and V: The Use of the Term "Available" Voids the Statute

Plaintiffs raise three arguments that center on the use of the term "available" in the amended execution methods statute – that it is impermissibly vague; that it must be defined by the courts, not by Defendants; and that its use violates the Non-Delegation Doctrine of the South Carolina Constitution.

A. Count III: Due Process Violation

First, Plaintiffs assert that the amended execution statute is unconstitutionally vague because it does not define the term "available." According to Plaintiffs, this renders the term subject to multiple definitions depending on the context and, as such, the statute violates procedural due process. The Court agrees.[3]

Procedural due process, which requires fair notice and proper standards for adjudication, prohibits the state from enforcing a statute that is impermissibly vague. *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). "[T]he constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies." *In re Amir X.S.*, 371 S.C. 380, 391–92, 639 S.E.2d, 144, 150 (2006). Specifically, a statute is unconstitutionally vague "if it

[3] Plaintiffs also argue that the statute's failure to address the sequence of events (such as certification and election) renders it invalid. Because the Court finds vagueness as to the meaning of "available," it need not address these issues.

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forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

The amended execution methods statute is unconstitutionally vague because a person of average intelligence must guess as to its meaning. The words "available" and "unavailable" do not have meanings independent of their statutory context. Defendants have asserted that "available" plainly means "present or ready for immediate use," but the word could also mean "accessible, obtainable," or "capable of being gotten; obtainable." MERRIAM-WEBSTER DICTIONARY (2022), https://www.merriam-webster.com/dictionary/available; *see also* AMERICAN HERITAGE DICTIONARY (2022), https://ahdictionary.com/word/search.html?q=available. The various definitions of "available" demonstrate that the meaning of the word depends on the context in which it originates. Therefore, this is not a case in which "the statute's language is plain, unambiguous, and conveys a clear, definite meaning," leaving no room for judicial interpretation.[4] *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010).

Defendants would have this Court interpret the meaning of "available" in the context of the Legislature amending the statute to allow executions resume despite SCDC's assertion that it cannot obtain drugs necessary to carry out executions by lethal injection. However, "context," as

[4] The Supreme Court's Orders staying Plaintiffs' execution dates in June 2021 are persuasive in rejecting the idea that "available" has a plain meaning of "present and ready for immediate use." As described above, following enactment of the amended execution methods statute, Director Stirling, interpreting the statute, certified that neither lethal injection nor firing squad were "available" and SCDC planned to carry out executions by electrocution. However, after he provided an explanation for why, in his view, the firing squad was "unavailable," the Supreme Court vacated the execution notices it had previously issued and stayed all executions because "firing squad [was] currently unavailable due to [SCDC's failure to implement it]." Order, *State v. Sigmon* & *Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). The Supreme Court's rejection of Director Stirling's interpretation—at least in that instance—indicates that the meaning of "available" is vague and leaves "a person of common intelligence" to guess as to the meaning of the term in the statute.

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a matter of statutory interpretation, is not a broad reference to legislative debate or public opinion. Instead, "context" requires the interpreting court to consider not only "the particular clause being construed, but the undefined word and its meaning with the purpose of the whole statute and the policy of the law." *S.C. Energy Users Comm.*, 388 S.C. at 492, 697 S.E.2d at 590.

First, the Court notes this is not a case in which the General Assembly "announced a purpose of the Act." *Contra id.* at 202-03 & n.2, 733 S.E.2d at 906 (noting that the General Assembly expressed its intent in the title of the newly enacted legislation); *S.C. Energy Users Comm.*, 388 S.C. at 494-95, 697 S.E.2d at 592 (relying, in part, on the General Assembly's own explanation of the challenged law's purpose). Therefore, the Court looks at the purpose based on the whole statute. Inclusion of the term "if available" to make the election of execution method conditional provides some support for the idea that the intent of the General Assembly was to restart executions despite SCDC asserting it could not obtain lethal injection drugs. However, the choice to retain an election between execution methods (including lethal injection) and adding firing squad as an authorized method of execution indicates that the General Assembly intended to do more than merely restart executions by a method other than lethal injection. What these dual purposes fail to do is provide the Court, Director Stirling, or Plaintiffs with a definition for the term "available" because the General Assembly failed to provide a definition or standards for determining availability and the statute's purpose leaves the term open to multiple definitions. The statute is, therefore, unconstitutionally vague.

B. Count IV: Statutory Violation Based on the Meaning of "Available"

Plaintiffs also contend that "[w]hatever their obligations to make methods of execution available under the statute, Defendants have failed to meet those obligations." This claim is necessarily dependent on the definition of the term "available" and what obligations that definition

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imposes on Defendants. Because this Court has found the statute unconstitutionally vague as to the term "available," this claim cannot and need not be decided at this time.

C. Count V: Violation of the Non-Delegation Doctrine

As a correlate to their claim that the amended execution methods statute is unconstitutionally vague, Plaintiffs allege that by failing to provide standards for the determination of availability, the General Assembly vested unbridled discretion in Director Stirling to decide the methods of execution in violation of the non-delegation doctrine of the South Carolina Constitution. *See* S.C. Const. art. I, § 8. The Court agrees.

Article I, Section 8 of the South Carolina Constitution provides that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other." Specifically, although the General Assembly "may authorize an administrative agency or board 'to fill in the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose," it may not vest "unbridled, uncontrolled, or arbitrary power" in another branch of government. *Bauer v. S.C. State Housing Auth.*, 271 S.C. 219, 232-33, 246 S.E.2d 869, 876 (1978) (quoting *S.C. State Highway Dep't v. Harbin*, 226 S.C. 585, 593, 86 S.E.2d 466, 470 (1955)).

Although "there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated," the basic guiding principle is that a delegation must not create an area of judicially unreviewable executive action, in light of the statutory purpose. *Id.* at 233, 86 S.E.2d at 876-77. Accordingly, "a statutory delegation is constitutional as long as [the General Assembly] 'lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989)); *see also West Virginia v. Envt'l Protection Agency*, 142 S.Ct. 2587, 2617

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(2022) ("[T]he framers believed that a republic – a thing of the people – would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.' . . . [B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power would be derived from the people,' but also 'that those entrusted with it should be kept in dependence on the people.'" (quoting The Federalist No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton) & *id.*, No. 37, at 227 (J. Madison)).

Without defining "available" or delineating standards for making the determination, Director Stirling's determination of whether any given method is available is judicially unreviewable. *See Bauer*, 271 S.C. at 233, 246 S.E.2d at 876 (explaining that a delegation is unconstitutional where "the courts, when presented with a challenge of the agency's actions, would, there being no limitations on the agency's authority, be unable to judicially review its actions"). For example, if Director Stirling certifies that lethal injection is unavailable, the statute provides no mechanism or standards by which the condemned person can challenge that assessment. Because the statute is silent as to the meaning of "available," "there is an absence of standards for guidance of the [Director's] action," making it "impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed." *Mistretta*, 488 U.S. at 379; *see also Harbin*, 226 S.C. at 595, 86 S.E.2d at 470–71 (holding that the General Assembly effectuated an unconstitutional delegation of power when it gave the State Highway Department the authority "to suspend or revoke a license for any cause which it deems satisfactory"). Under the statute as written, Director Stirling might determine that a specific method is not "available" for any reason or for no reason at all.

Defendants' assertion that the director of SCDC can be presumed to act in good faith does not remedy the non-delegation issue. "The presumption that an officer will not act arbitrarily but

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will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion." *Harbin*, 226 S.C. at 596, 86 S.E.2d at 471. In this case, Director Stirling testified credibly and in good faith. The constitutional problem, however, is that because the statute leaves it to his sole discretion to decide what "available" means, he can always certify in "good faith" that a given method is or is not "available," based on his own definition. The intentions of Director Stirling are not in question; the reviewability of his decisions, as an unelected official of the executive, is the issue. The statute's lack of standards and failure to define the term "available" renders it an unconstitutional delegation of authority.

IV. Count VII: Violation of the Methods-of-Execution Statute

Finally, the Court notes that even if its legal analysis of the statutory amendments is incorrect, and the statute passes constitutional muster with respect to vagueness and delegation, the statute is still rendered invalid by this Court's findings on the firing squad and electrocution. Because both methods are unconstitutional, the statute's creation of an inmate's right "to elect the manner of their execution" is violated by the fact that an inmate does not have a choice between two constitutional methods of execution. *See* Order, *Sigmon*, No. 2002-024388; *see also* Order, *Owens*, No. 2006-038802. Accordingly, even Plaintiffs are not entitled to relief on Counts III, IV, and V, Plaintiffs are entitled to a declaration that the statute is invalid.

CONCLUSION

In 2021, South Carolina turned back the clock and became the only state in the country in which a person may be forced into the electric chair if he refuses to elect how he will die. In doing so, the General Assembly ignored advances in scientific research and evolving standards of humanity and decency.

Based on the foregoing, the Court finds that Plaintiffs are entitled to declaratory judgment that (1) carrying out executions by electrocution and by firing squad violates the Constitution of

the State of South Carolina Constitution and its prohibition on cruel, corporal, or unusual punishments; and (2) S.C. CODE ANN. § 24-3-530, as amended in 2021, is unconstitutional and is, therefore, invalid. Plaintiffs are also entitled to a permanent injunction as requested.

IT IS, THEREFORE, ORDERED that Plaintiffs' request for a declaratory judgment is GRANTED.

IT IS FURTHER ORDERED that Defendants are permanently enjoined from forcing Plaintiffs to be executed by electrocution or by firing squad.

AND IT IS SO ORDERED.

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Richland Common Pleas

Case Caption:	Freddie Eugene Owens , plaintiff, et al vs Bryan P Stirling , defendant, et al
Case Number:	2021CP4002306
Type:	Order/Other

So Ordered

Jocelyn Newman