South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Civil Rights Law Section

“In-Custody Litigation South Carolina”

Saturday, January 20

SC Supreme Court Commission on CLE Course No. 240015

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2024 SC BAR CONVENTION

Civil Rights Law Section

Saturday, January 20

Introduction

J. Christopher Mills

2024 SC BAR CONVENTION

Civil Rights Law Section

Saturday, January 20

Pretrial Detention: When Prison is Not a Prison

Patrick J. McLaughlin
Stuart M. Andrews, Jr.
Daniel R. Settana, Jr.

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Cassiopia Rhoads, Plaintiff,	)	Civil Action No.: 2020-CP-02-02238
vs.	)	**MATERIALS FOR JANUARY 2024 SOUTH CAROLINA BAR CONVENTION**
Aiken County Sheriff's Office, Defendants.	)	

Materials from the above-captioned case, tried October 9-13, 2023, on behalf of the Plaintiff by:

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–and–

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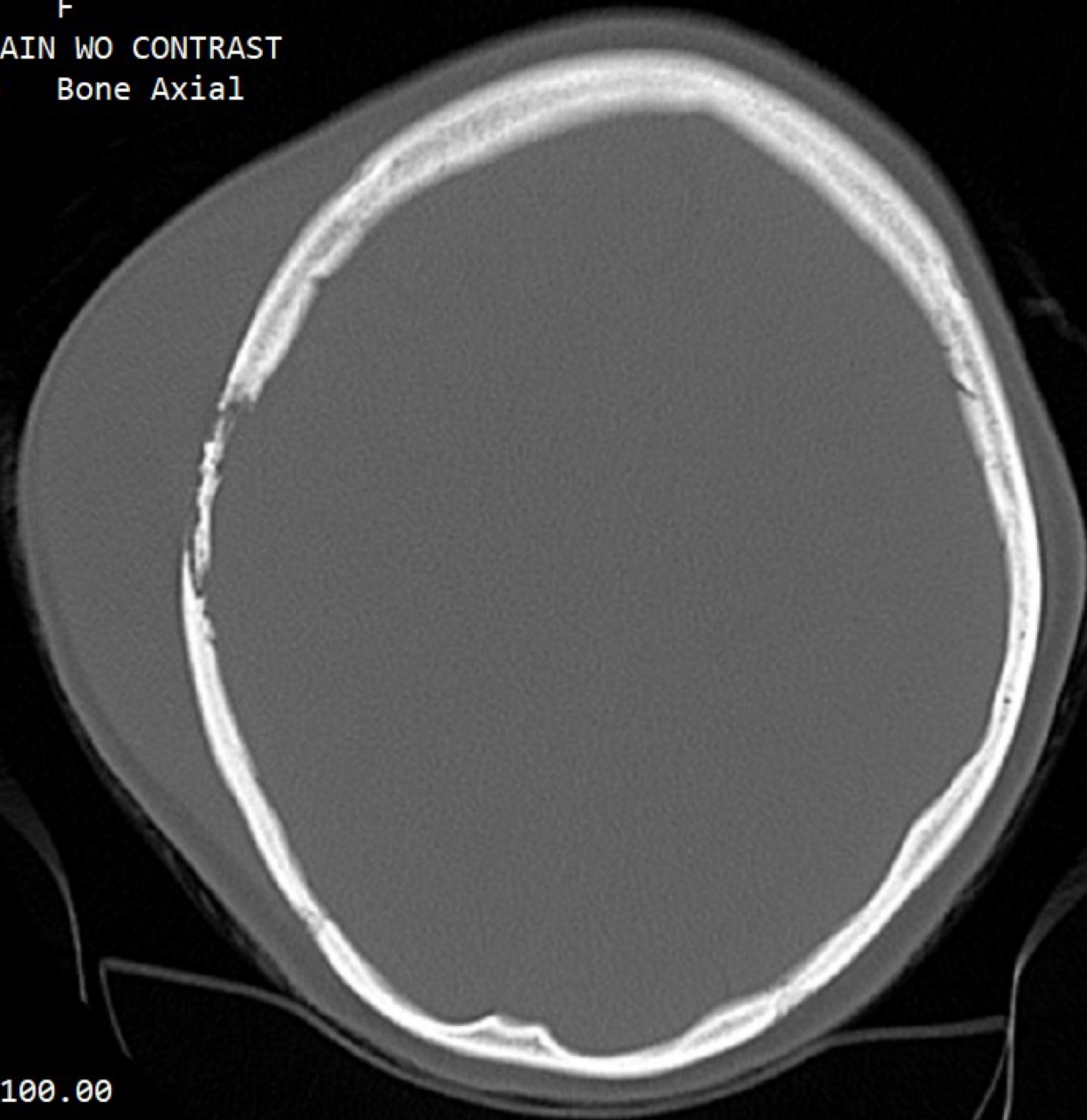
MAY 2019

SUN	MON	TUE	WED	THU	FRI	SAT
			1	2	3 Intake Booking Cassi enters the jail	4
5	6	7 Med Record Knot to Right side of head	8 Incident Report Rhoads is evaluated	9	10 Emergency Call re Rhoads passing out	11 Cassi completes sick call slip about "huge abscess"
12 Issue with Cassi covering up three times	13 placed on the dentist list	14	15	16 Sick Slip "Really bad pain in ear and fever	17	18
19	20 Cassi completes sick call slip about "fluid like sack on side of head	21 Cassi completes sick call slip about swollen side of face	22 Note about knot with "soft center"	23 Dr. Williams sees Casi "Small hematoma"	24 Peaceful Protest "Barricading" incident taken to lockdown	25
26	27	28 CT ordered fall and hit her head "swelling seemed worse	29 Request for Tylenol for pain on R side of head	30 Falls and a possible seizure	31	JUNE 1
June 2 SENT to hospital						

www.oldcalendars.com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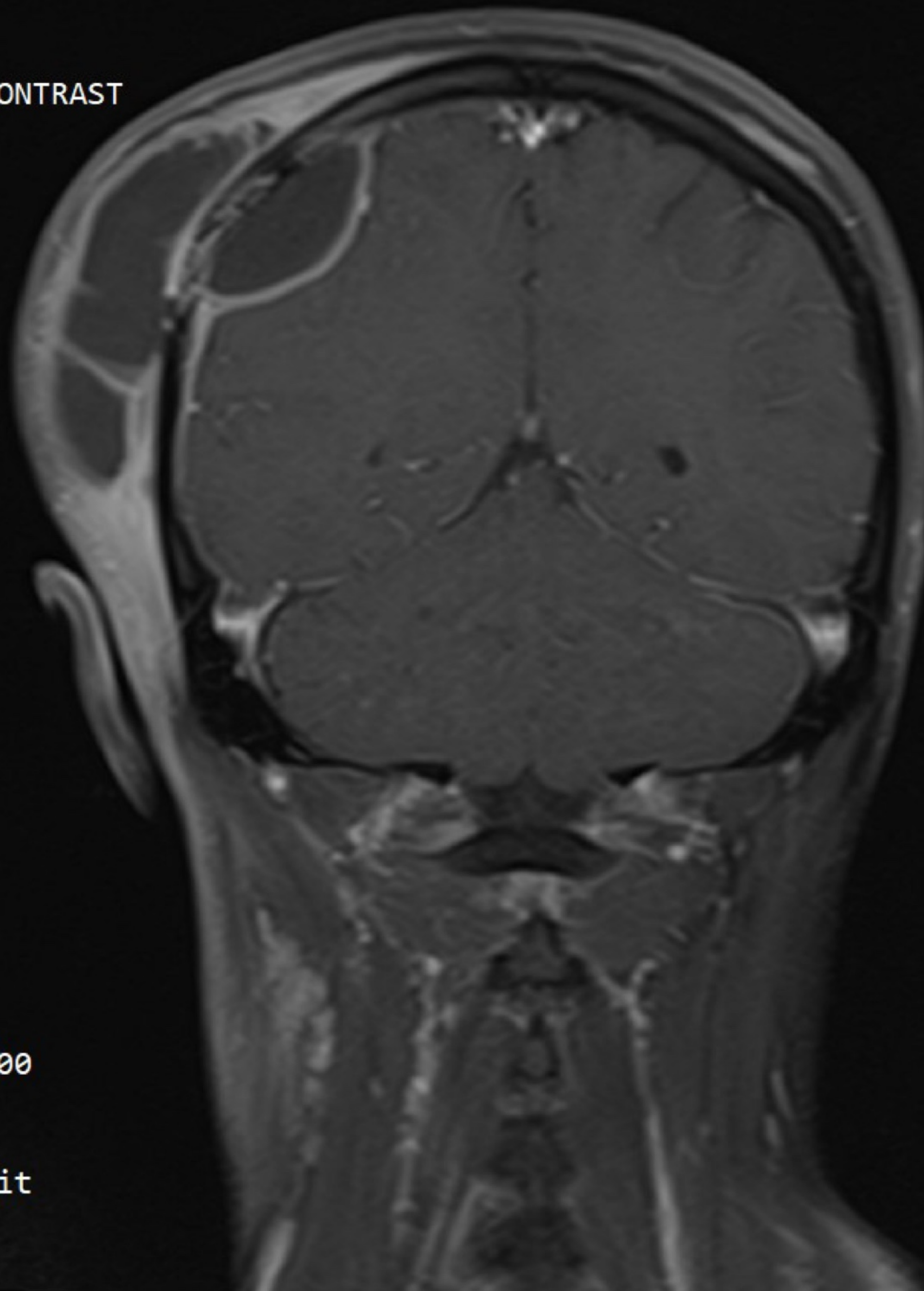
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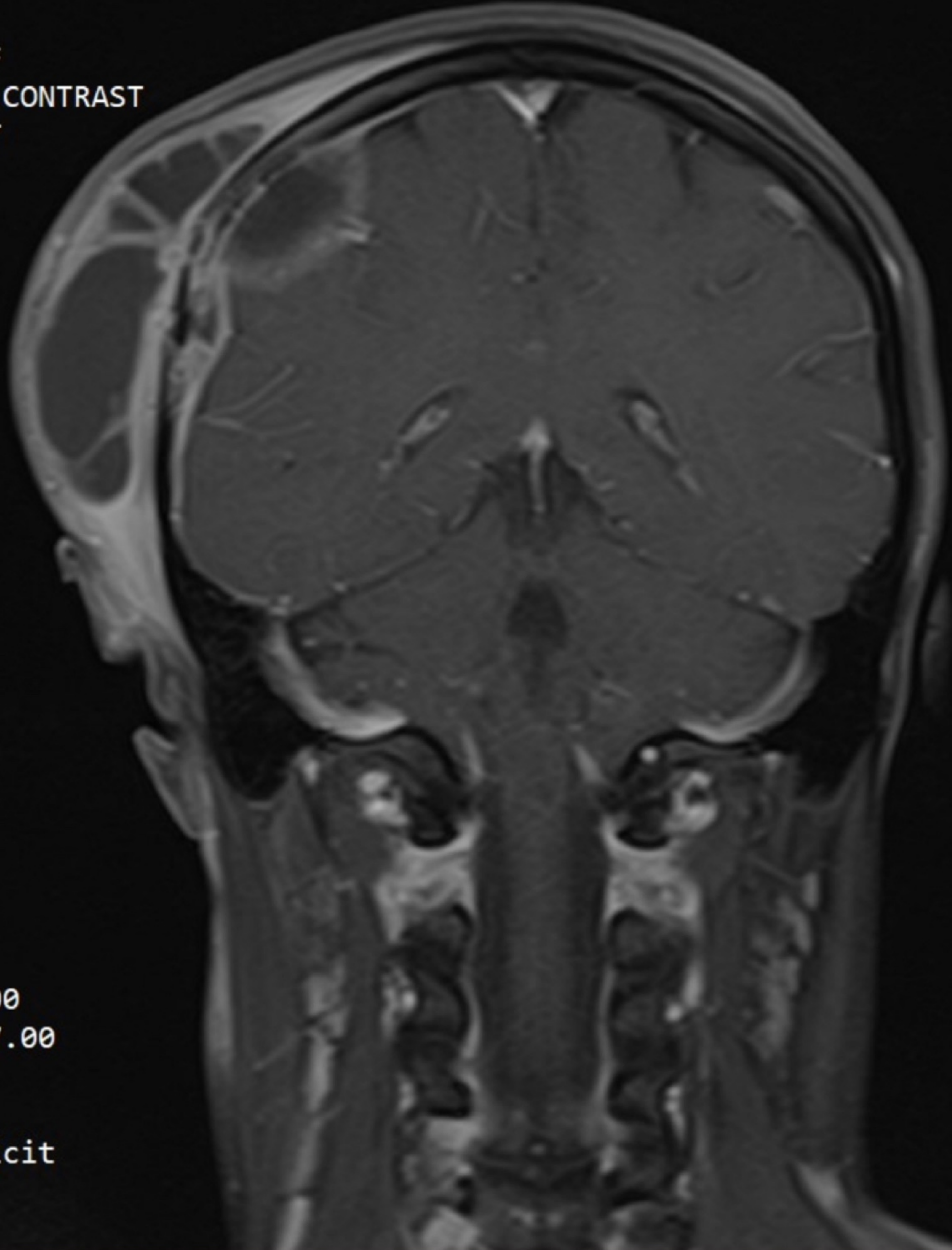
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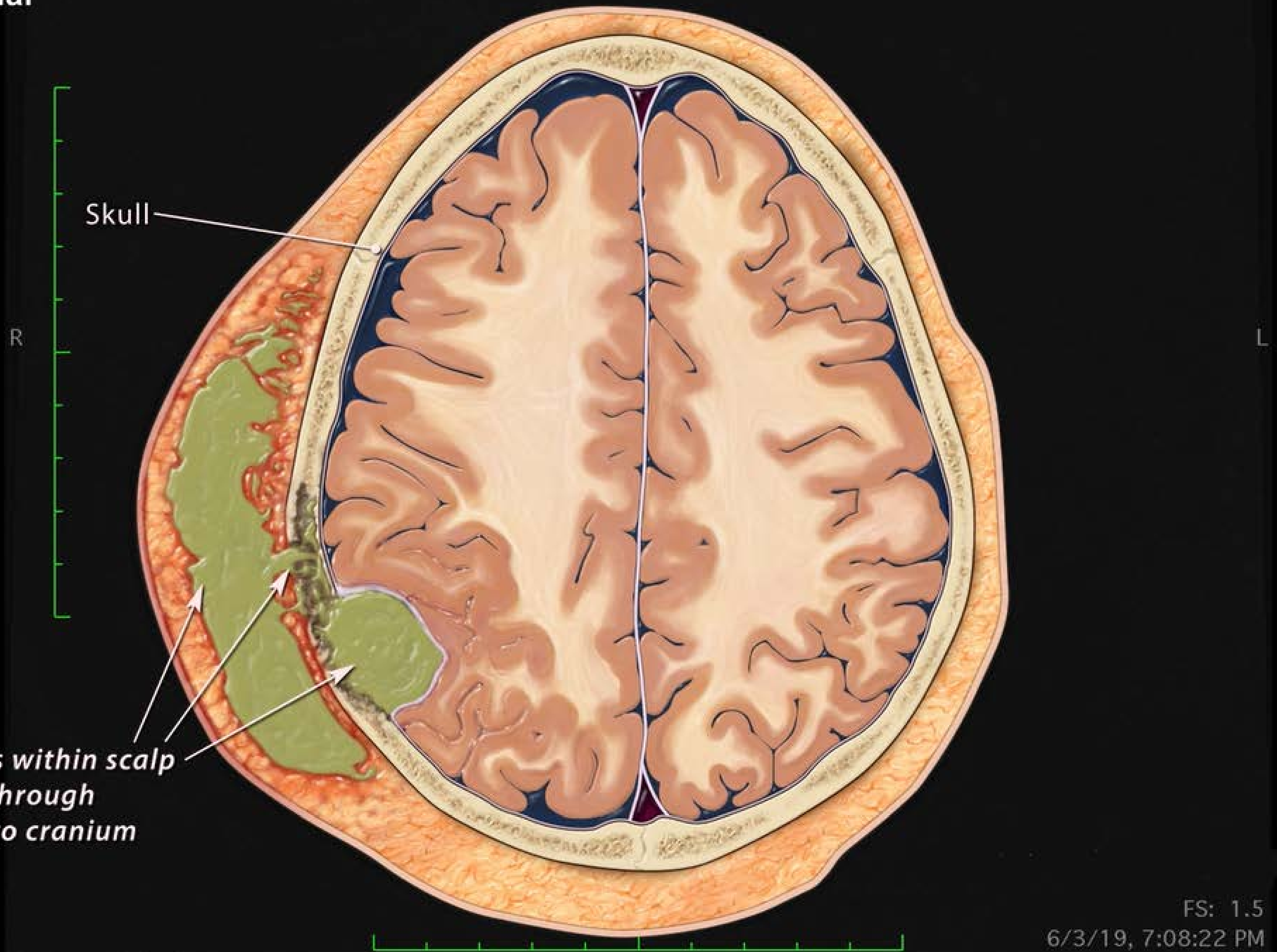
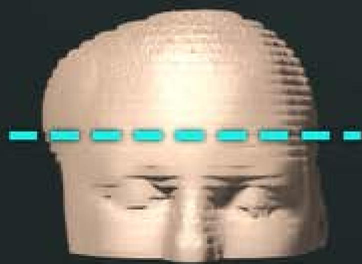
Cross-sectional Axial View





ORIENTATION

Skull

Midline shift
to the left

Large abscess within scalp
penetrating through
skull bone into cranium

Midline

RHOADS CASSIOPHIA
279523
F
CT HEAD OR BRAIN WO CONTRAST
Bone Bone 5.0 Axial Bone

Aiken Regional Medical Center
Aquilion
WILLIAMS ROBERT
10-October-2019 9:46:28

ST: 5.00 SL: 75.00
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Images: 16/29

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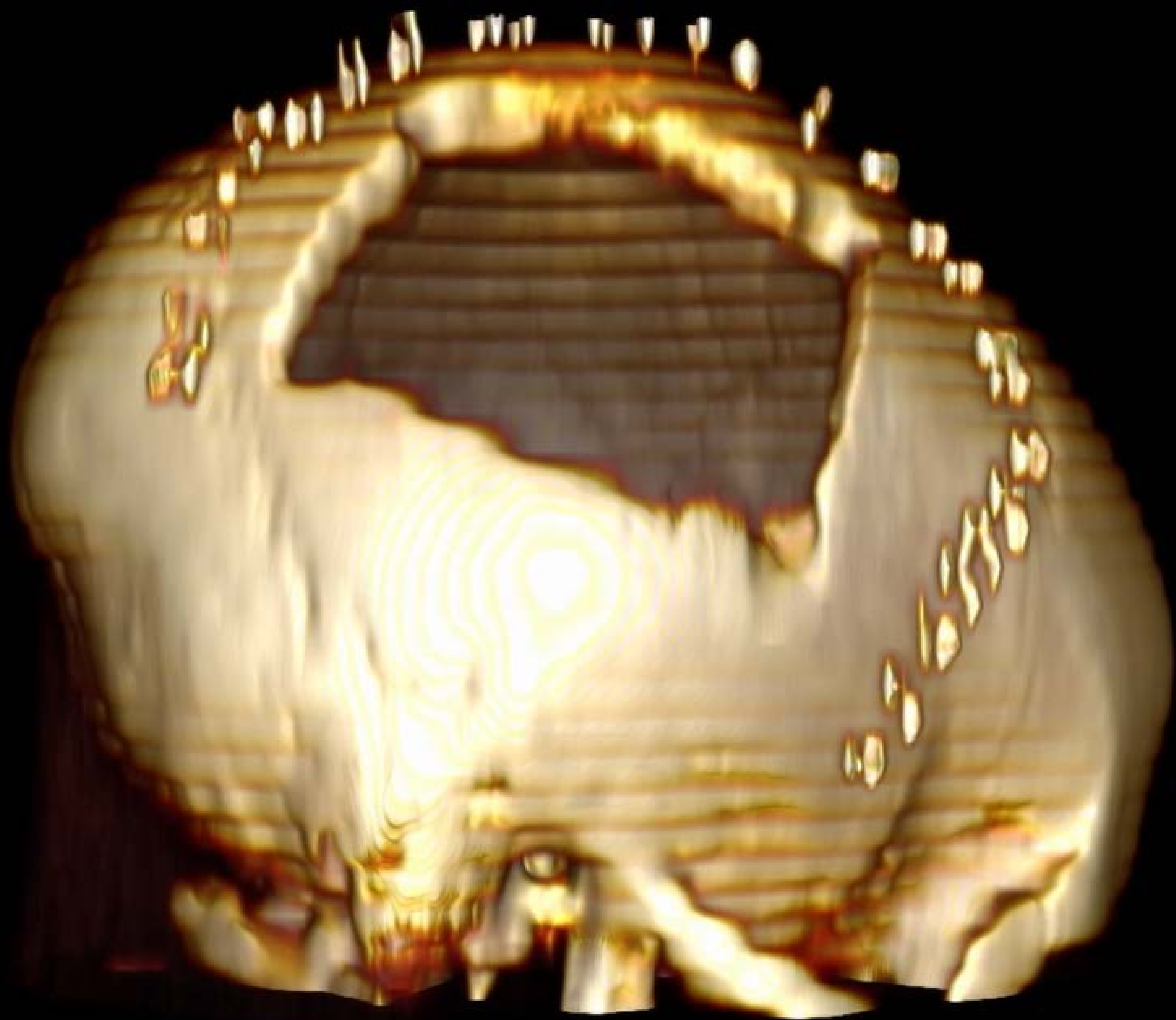

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Cassiopia Rhoads,	)	Civil Action No.: 2020-CP-02-02238
Plaintiff,	)	
vs.	)	**VERDICT FORM**
Aiken County Sheriff's Office,	)	
Defendant.	)	

Check "Yes" or "No" to the following question:

1. **Do you find that any employee of the Aiken County Sheriff's Office was grossly negligent and, through any such acts or omissions, proximately caused injury to Cassiopia Rhoads?**

   ✓ **Yes** (*which means you have found in favor of the Plaintiff*)

   ______ **No** (*which means you have found in favor of the Defendant*)

   If you answered "Yes" for Question 1 and therefore found in favor of the Plaintiff, please answer the additional question below. If you answered "No" for Question 1 and therefore found in favor of the Defendant, you should stop deliberations and have the foreperson sign the form.

If you answered "Yes" to Question 1, also answer the following question:

2. **Please state the total amount of damages (including both economic damages and non-economic damages) sustained by Cassiopia Rhoads:**

$ 950,000

FILED October 13 20 23
[signature]
C.C.C.P. & G.S.
[signature]
Deputy Clerk

PLEASE SIGN AND DATE.

[signature]
Foreperson

October 13, 2023
Date

Please let the bailiffs know when you have finished your deliberations.

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STATE OF SOUTH CAROLINA COUNTY OF AIKEN	IN THE COURT OF COMMON PLEAS C. A. NO: 2020-CP-02-02238
Cassiopia Rhoads, Plaintiff, vs. Southern Health Partners, Inc.; Robert J. Williams, M.D.; Michael E. Hunt., in his official and representative capacity as Aiken County Sheriff; and Aiken County, operating as the Aiken County Detention Center, Defendant(s).	**PLAINTIFF'S RESPONSE IN OPPOSITION TO AIKEN COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

TO: DEFENDANT MICHAEL E. HUNT, IN HIS OFFICIAL AND REPRESENTATIVE CAPACITY AS AIKEN COUNTY SHERIFF, AIKEN COUNTY AND THEIR ATTORNEY, ANDREW F. LINDEMANN

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through her undersigned counsel, responds in opposition to Defendant Michael E. Hunt, in his official and representative capacity as Aiken County Sheriff ("Hunt") and Aiken County, collectively "Aiken County Defendants," second motion for summary judgement filed September 29, 2023. These Defendants previously filed a motion for summary judgment on March 7, 2023. Plaintiff responded to that first motion with a *Response in Opposition to Aiken County Defendants' Motion for Summary Judgment*, which was filed June 12, 2023. In opposition to this second motion for summary judgment, Plaintiff incorporates by reference all arguments and exhibits contained in her June 12th response.

STATEMENT OF THE CASE

This case involves the adequacy (or rather the inadequacy) of medical care provided to the Plaintiff during her detention at the Aiken County Detention Center ("ACDC") that spanned from

May 3, 2019 through June 2, 2019, at which point she was finally transported to Aiken Regional Medical Center's emergency department for appropriate care. Plaintiff was transported to the hospital due to her health having been allowed to deteriorate into a dire medical emergency.

That emergency medical condition, documented throughout hospital records, show Plaintiff had developed a "large boggy lesion over [her right] temple." Medical records document the abscess on the right side of Plaintiff's head had grown to "approximately 9.7 x 2.2cm" in size, had destroyed a large portion of her skull, and was so extensively invading her brain that it was causing a "right-to-left-midline shift" (meaning that Plaintiff's brain had been forcefully pushed to one side by the invasion of the infectious mass into her skull):

Plaintiff was ultimately diagnosed with a subgaleal abscess, an epidural abscess, osteomyelitis (a bone infection), and sepsis. Plaintiff required neurosurgery to remove the infectious mass, and, because the abscess had become so large and invasive due to the Defendants' failure to ensure that Plaintiff received adequate medical treatment, a substantial portion of the Plaintiff's skull required removal:

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

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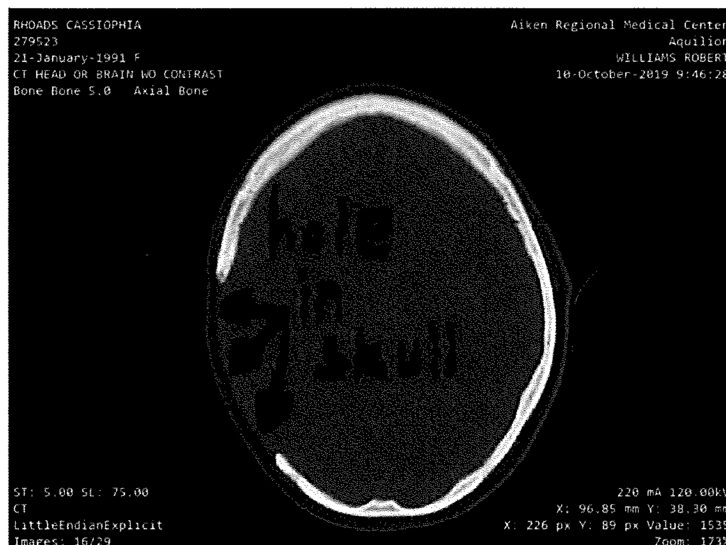

Defendant Hunt's[1] "Inmate Grievance Records" memorialize the Plaintiff repeatedly pleading through the ACDC's "kiosk system" for medical care as her condition worsened, up until the day Plaintiff lost access to the jail's kiosk system when she was placed in B-Max (solitary confinement) on May 24, 2019. Those complaints were:

1) May 11, 2019: "I have a huge abcess on the side of my head that keeps getting bigger and hurts real bad I need my tooth pulled or some antibiotics."

2) May 16, 2019: "I'm having really [b]ad pain in my ear and fever."

3) May 20, 2019: "I have a fluid like sack on side of my head, above my ear, my ear aches and I'm still fighting a [fever] and severe [head] pressure. My eyes water constantly and I have severe nausea n vomiting. I also feel dizzy and can't focus my eyes when I stand up. The whole right side of my face is

1 In the September 29th motion, the Aiken County Defendants argue they reserve the right "to seek the enforcement of the Consent Stipulation of Partial Dismissal with Prejudice ***entered by the parties and dated June 14, 2023***. *Motion*, p.4. While the Plaintiff ***offered*** a stipulation of dismissal as to Defendant Aiken County on June 8, 2023, Plaintiff is unaware of any consent/acceptance by Aiken County Defendants until September 28, 2023, when counsel for the Aiken County Defendants asked Plaintiff's counsel if Plaintiff would still be willing to enter into that stipulation and Plaintiff's counsel relayed Plaintiff would still stipulate as offered in the ***proposed*** *Consent Stipulation of Partial Dismissal with Prejudice*. *See* Exhibit 11 to *Plaintiff's Response in Opposition to Aiken County Defendants' Motion for Summary Judgment* filed June 12, 2023. As such, Plaintiff will refer to Aiken County Defendants as "Defendant Hunt" in this brief, due to the representations from defense counsel that the conditions of the consent stipulation as to Defendant Aiken County is acceptable and the Aiken County Defendants wish to so consent.

swollen and very painful. I have not been able to get out of bed for 4 plus days on the exception of showering. Please help me and send motrin."

4) May 21, 2019: "I have fluid under my skin above my R ear. Been there 4 plus days, whole side of face is swollen and have placed several sick calls and have not been seen yet. I am in severe pain and pressure in my head."

5) May 24, 2019: "I have been taken off all pain meds and still have yet to have seen the [dentist]."

Exhibit 1.

Plaintiff's deteriorating health is also documented through medical records produced by Defendant SHP, evidencing multiple incidents involving falls, loss of consciousness, and hallucinations by the Plaintiff during her May to June 2019 detention at the ACDC.

Testimony from both fellow inmates and ACDC Correctional Officers ("CO") establish that the Plaintiff's deteriorating health was visible and obvious, as was the growth of the massive abscess on the side of her head, which has been described as the size of "a grapefruit." ACDC COs have testified to complaining to both the medical staff at ACDC (who were agents/employees of third-party contract medical provider Defendant SHP) and supervisory correctional staff. Those complaints resulted in medical staff communicating to ACDC correctional staff that the cause of Plaintiff's visible and obvious deteriorating health was the Plaintiff "self-inflicting," (a "diagnosis" that does not appear in anywhere in the jail or medical records and that the complaining ACDC correctional staff knew to be, and relayed to their supervisors, false).

Despite all the above, the Plaintiff's health was allowed to deteriorate, resulting in the injuries discussed above. Plaintiff alleges Defendant Hunt was negligent/grossly negligent/reckless in failing to provide Plaintiff adequate medical care.

Defendant Hunt contracted with Defendant Southern Health Partners to provide the medical care at the ACDC. That contract was entered into through a procurement process in compliance with South Carolina law, involving publicly published requests for proposals (RFPs)

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and the submission of bids in response to the published RFPs. The RFP for the medical services contract at the ACDC specifically imposed minimum qualifications and compliance requirements upon the medical services provider. Discovery demonstrates that Defendant SHP blatantly and obviously refused to meet many of the minimum qualifications and compliance requirements pursuant to that RFP that Defendant Hunt considered "material" to the agreement, yet Defendant Hunt took no action either at the time of Defendant SHP's failures to meet the minimum qualification and compliance requirements, nor after being confronted with Defendants SHP's failures to so comply.

LEGAL STANDARD

Summary judgment is a drastic remedy which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Once a Rule 56 motion has been made, the evidence and its reasonable inferences must be viewed in the light most favorable to the non-moving party. Id. At 115, 545.

Summary judgment is appropriate when the pleadings, deposition, affidavits, and discovery on file show there is no genuine issue of material fact. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Flemming v. Rose, 350 S.C. 488 at 493-494 (2002).

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Conner v. City of Forest Acres, 348 S.C. 454, 462; 560 S.E.2d 606, 610 (2002) (citing Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 443 S.E.2d 392 (1994) and Rule 56(c), SCRCP). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all inferences which can be reasonably drawn from

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the evidence must be viewed in the light most favorable to the nonmoving party. Id. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Conner at 462, 610 (citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112; 410 S.E.2d 537, 543 (1991)).

In ruling on motions for summary judgment, the Court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Nolte v. Gibbs International, Inc., 335 S.C.72, 515 S.E.2d 101 (S.C. Ct. App. 1999). For the purposes of summary judgment, the moving party has the burden of proving no material fact exists. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54 (1998). Summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is dispute as to the conclusions to be drawn from those facts. Gilliland v. Elmwood Properties, 301 S.C. 295, 299; 391 S.E.2d 577, 579 (1990) (citing Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196; 293 S.E.2d 706, 707 (1982)).

Summary judgment is inappropriate when more than one inference can be drawn from the evidence when it is viewed in the light most favorable to the non-moving party. Fickling v. City of Charleston, 372 S.C. 597; 643 S.E.2d 110 (2007). When the evidence is susceptible to more than one reasonable inference, it should be submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589; 503 S.E.2d 717 (1998). To ensure substantial justice to the parties, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

If any triable factual issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402 (1991).

ARGUMENT

1) Defendant Hunt owed the Plaintiff a legal duty and there is a material question of fact as to whether Defendant Hunt was grossly negligent in breaching that duty.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

"An affirmative legal duty to act may be created by statute, contract relationship, status, property interest, or some other special circumstance." Arthurs ex rel. Estate of Munn v. Aiken Cnty., 346 S.C. 97, 103 (2001).

South Carolina law specifically proscribes Defendant Hunt's legal duty to the Plaintiff via two separate statutes:

> **The sheriff shall have custody of the jail in his county** and, if he appoint a jailer to keep it, the sheriff shall be liable for such jailer and the sheriff or jailer **shall receive and safely keep** in prison **any person delivered or committed to either of them**, according to law.

S.C. Code §24-5-10, emphasis added.

> The governmental entity is not liable for a loss resulting from…responsibility or duty including but not limited to **supervision, protection, control, confinement, or custody of any…inmate…except when the responsibility or duty is exercised in a grossly negligent manner**.

S.C. Code §15-78-60(25), emphasis added.

The legal duty of Defendant Hunt to the Plaintiff is further established by the Constitutions of the United States and South Carolina, both of which prohibit "cruel and unusual punishment." *See* 8th Amendment to United States Constitution and Article I, Section 15 of South Carolina Constitution.[2]

As Defendant Hunt argues in his March 7th motion for summary judgment, "the persons operating the Aiken County Detention Center are employees of the Sheriff and not employees of

2 As a pre-trial detainee, Plaintiff had not been adjudicated guilty of a crime and could not be subjected to any form of "punishment." Staton v. Arcer, 2023 U.S. Dist. LEXIS 147363, *11, fn.3 (D.S.C. 2023) (citing to City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) and Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988)). The Fourth Circuit has found that "a prisoner's right to adequate medical care and freedom from deliberate indifference to medical needs has been clearly established by the Supreme Court and this Circuit since at least 1976 and, thus, was clearly established at the time of the events in question." Tarashuk v. Givens, 53 F.4th 154, 163 (4th Cir. 2022) (quoting Scinto v. Stansberry, 841 F.3d 219, 236 (4th Cir. 2016)).

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

the County," and Defendant Hunt is solely responsible for the care and custody of persons in the ACDC. *March 7th Motion,* p.2-3.

Defendant Hunt attempts to avoid the clear statutory duty he had to the Plaintiff by arguing that "as a matter of law, the Aiken Defendants did not owe a legal duty of care for their non-medically trained detention officers or security staff to second-guess or override the medical decision-making of the clinicians (doctor and nurses) who were providing care and treatment to the Plaintiff for her medical conditions and seek a different or alternative course of care or treatment." *September 29th Motion,* p.2. That statement is contrary to the law according to the United States Supreme Court, which has specifically found that the State cannot contract away "its constitutional duty to provide adequate medical treatment to those in its custody." West v. Atkins, 487 U.S. 42, 56 (1988). The non-delegable nature of this duty is recognized by the State of South Carolina through the two statutes cited above.[3]

In the context of governmental entity liability, the South Carolina Supreme Court has defined gross negligence as "a relative term and means the absence of care that is necessary under the circumstances," specifically finding that "gross negligence is ordinarily a mixed question of law and fact." Jinks v. Richland County, 355 S.C. 341, 345 (2003) (internal citations omitted). Ordinarily, a mixed question of law and fact is for the jury. Rogers v. Atlantic Coast Line R.R. Co., 222 S.C. 66, 72 (1952). When the evidence supports but one reasonable inference, the question becomes a matter of law for the court, but in determining summary judgment, the court must

3 The Fourth Circuit has specifically found a state actor can be liable when a reasonable official would have known their conduct in failing to properly assess and transport a detainee for adequate medical care could give rise to a Fourteenth Amendment violation, even when that detainee has received medical care from a trained medical professional. *See* Tarashuk and Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987).

construe inferences arising from the evidence against the moving party. Clyburn v. Sumter County Sch. Dist. #17, 317 S.C. 50, 53, 451 S.E.2d 885 (1994).

In this case, there is ample evidence giving rise to reasonable inferences that there was an absence of care that was necessary under the circumstances by ACDC's staff.

Both former inmates and correctional staff at ACDC have given sworn testimony that the Plaintiff was receiving such inadequate medical care that she engaged in a "peaceful protest" on May 24, 2019, refusing to return to her room after rec time and instead demanding to be taken to the hospital.

Mary Joyner, who was an inmate at ACDC during the time in question, provided a written statement, that she verified as being truthful and accurate during her deposition, where she explained the May 24, 2019 "peaceful protest" and what led to it:

> I observed Cassi **repeatedly ask for help about the growth on the side of her head**. In the **second half of May, on a near daily basis, Cassi asked and pleaded with ACDC correctional officers to take her to the hospital.** She often cried out in pain and openly complained about the pain she was experiencing. One day, at the end of recreation time, **Cassi engaged in a "peaceful protest" in which she said that she would not go back to her cell and would only go to a hospital. Instead of taking her to a hospital, the guards place Cassi in "lock down."** I recall being very sad that no one would help Cassi and worrying what would happen to her.

Exhibit 2, *Joyner written statement*, emphasis added.

Kimberly "Haven" Kelley, a former correctional officer at the ACDC, similarly described the Plaintiff's dire need of adequate medical care leading to the May 24, 2019 "peaceful protest":

> In May of 2019, the growth on the side of Cassie's head grew into **a tremendous deformity, which caused her head and face to become grossly misshapen**. Eventually, the growth/abscess distorted her face so significantly, that her face **looked as if she had been badly beaten with a bat**. One could not even glance at Cassie without immediately noticing the gigantic abscess.
>
> One day, at the end of recreation time, Cassie engaged in a "peaceful protest" in which she said she would not go back to her cell and would only go to a hospital. However, Cassie was not taken to a hospital but, instead, was placed in B-Max (female isolation)…

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Exhibit 3, *Kelley written statement*, emphasis added.

ACDC records show Defendant Hunt's reaction to that peaceful protest on May 24, 2019, was not to provide any medical care, rather the Plaintiff was punished by being placed in B-Max for "15 D/S." ACDC Cpl. Tonetta Buggs explained "D/S" was "Disciplinary Segregation," a classification Dep. Kelly specifically described as inmates "can't make complaints about their situation." **Exhibit 4,** *Deposition of Cpl. Tonetta Buggs*, p.64, l.13-21 and **Exhibit 3,** *Deposition of Kelley*, p.29, l.17 – p.31, l.2.

The Plaintiff has testified that the reality was, once she was placed in B-Max, she had no kiosk access by which to request medical care:

> Q: When you were in B-Max, **you still had access to the kiosk, right**?
>
> A: **No, sir.**
>
> Q: You – you – what do you mean, you don't have access to the kiosk?
>
> A: Whenever you're in B-Max, **you are not allowed to go out in general population at all, and the kiosk is in general population at the officer's desk. You cannot come out the door of B-Max at all.**
>
> Q: But they can – you still had the right to go do a sick call request, right?
>
> A: We couldn't have a pencil or anything.
>
> Q: So did you try to do a sick call when you were in B-Max?
>
> A: I talked to the nurses every time they came through. I wasn't in a position to be able to do sick call.

Exhibit 5, *Deposition of Cassiopia Rhoads*, p.134, l.4-20, emphasis added.

Plaintiff's testimony is supported by the actual inmate grievance records, as there were half a dozen grievances before she was placed in B-Max and **no** grievances **after** Plaintiff was placed in B-Max on May 24, 2019. **Exhibit 1.**

Dep. Kelley described the failure of Defendant Hunt to provide the Plaintiff with the adequate care necessary under the circumstances:

> **On numerous occasions, I tried to advocate for Cassie and personally asked the medical staff to arrange to have Cassie seen at a hospital.** I even went so far as to personally assist Cassie in submitting a medical request on the kiosk at B-Pod (female housing unit), ensuring that I included as much detail about her physical appearance and detailing her symptoms as she narrated to me how she was feeling. **After having made this request several times, I began voicing my concerns to my supervisory team and even offered to take Cassie to Aiken Regional Medical Center on my day off of work but was told that Cassie didn't need to be seen at a hospital**...
>
> I recall being very sad and outraged that no one would help Cassie and increasingly worried about what would happen to her...
>
> That **blatant and stoic refusal** of both the medical staff contracted by Aiken County Sheriff's Office Detention Division and the jail's supervisory staff to **acknowledge and property treat Cassie** during this period of her incarceration in 2019 ultimately **led to my decision to leave law enforcement all together in January of 2020**.

Exhibit 3, *Kelley written statement*, emphasis added.

After describing how Defendant Hunt completely abdicated to medical any responsibility whatsoever to making sure inmates receive reasonably adequate medical care, Kelley was examined about her thoughts on that subject:

> Q: So, do you disagree with the idea that the licensed nurses and physicians should make the decisions on medical care instead of unlicensed correctional officers?
>
> A: **Under certain circumstances, absolutely, because it falls under deliberate indifference when the medical department won't send someone out and you clearly see that they're in need of medical attention that they're not providing adequately.**

Exhibit 3, *Deposition of Kelley*, p.49, l.10-18, emphasis added.

The above evidence and testimony creates reasonable inferences of material questions of fact as to whether Defendant Hunt provided adequate care that was necessary under the circumstances that should be submitted to a jury.

2) Defendant Hunt is not entitled to immunity under the South Carolina Tort Claims Act for his gross negligence to the Plaintiff.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

South Carolina law specifically recognizes that the "State, an agency, a political subdivision, and a governmental entity **are liable for torts in the same manner and to the same extent as a private individual under like circumstances**, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code §15-78-40, emphasis added.

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke v. S.C. Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999).

Under the "Exceptions to waiver of immunity" section, the S.C. Tort Claims Act states that "the governmental entity is not liable for a loss resulting from" and proceeds to list forty (40) exceptions. S.C. Code 15-78-60. Defendant Hunt argues five of those exceptions entitle him to immunity:

- (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
- (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
- (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide police or fire protection;
- (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;
- (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third parties.

September 29th Motion, p.2, ¶2, citing to S.C. Code §15-78-60(4-6), (17) and (20).

Noticeably absent from Defendant Hunt's motion and argument is the sole exception to the SCTCA's waiver of immunity **controlling all other exceptions in this case**:

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

> (25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any...**inmate**...**except when the responsibility or duty is exercised in a grossly negligent manner**.

S.C. Code §15-78-60(25), *emphasis added.*

The fact that Defendant Hunt leaves subsection 25 out of his motion and argument is damning, as the South Carolina Supreme Court has held numerous times, "when an exception containing the gross negligence standard applies, **that same standard will be read into any other applicable exception**." Steinke v. SCDLLR, 336 S.C. 373 (S.C. 1999); Etheredge v. Richland School Dist. 1, 330 S.C. 447, 463 (Ct. App. 1998) *cert. granted on other grounds*, April 8, 1999 (when an action is brought alleging gross negligence by a governmental entity pursuant to an exception contained in Section 15-78-60, all other applicable exceptions must be read in light of the exception containing the gross negligence standard).

In other words, not only does subsection 25 apply to this case given the facts and allegations, but South Carolina case law requires that all the exceptions Defendant Hunt **did** bother to cite and argue **must** incorporate the gross negligence standard imposed by S.C. Code 15-78-60(25). Etheredge v. Richland School Dist. 1, 330 S.C. 447, 463 (Ct. App. 1998).

In *Etheredge*, the trial court had originally granted summary judgment to the School District on several of the exceptions to the waiver of immunity under S.C. Code §15-78-60. In reversing the trial court, the Etheredge court specifically found:

> Where an action is brought against a governmental entity for injuries or death allegedly caused to a student by the entity's gross negligence in the exercise of its duty of supervision, protection and control of the students in its custody in accordance with subsection (25) of 15-78-60, **all other subsections of 15-78-60 providing exceptions to the waiver of governmental immunity, must be read in light of subsection (25), which provides an exception to immunity where the governmental entity exercises its responsibilities or duties in a grossly negligent manner**.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Etheredge at 463, 246, emphasis added. *See* Jackson v. S.C. Dept. of Corr., 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989).

Etheredge creates an "exception to the exception" via the gross negligence standard for which the allegations of the complaint, along with the discovery to date, creates reasonable inferences of questions of material fact to require submission of the case to a jury.

"Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something which one ought not to do." Etheredge at 454-455.

Since Etheredge states that the gross negligence "exception to the exception" applies, the Plaintiff has a valid claim **even if** the only conduct she can prove is Defendant Hunt's "conscious failure to do something which one ought to do."

As there are questions of material fact as to whether Defendant Hunt was grossly negligent in his "supervision, protection, control, confinement, or custody of" the Plaintiff, Defendant Hunt's conduct in this case is not excepted from the waiver of immunity under the SCTCA due to S.C. Code §15-78-60(25) and Etheredge.

3) There is a material question of fact as to whether the policies and procedures at ACDC were insufficient to rise to gross negligence.

Defendant Hunt argues that the Plaintiff "has failed to present any competent, admissible evidence demonstrating that any written policies in place at the Aiken County Detention Center as applicable to the Plaintiff's confinement were deficient at all or alternatively so to rise to the level of gross negligence. The Plaintiff has also failed to present any competent, admissible evidence demonstrating that the Aiken Defendants owed a duty to adopt medical-based policies as described in Paragraph 96 of the Plaintiff's complaint separate and apart from the policies adopted and implemented by Southern Health Partners, including its "Policy and Procedure Manual for Health

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Services in Jails at Aiken County Detention Center (Bates numbered SHP-Rhoads 00594-00650)." *September 29th Motion*, p.2, ¶3.

Defendant Hunt's argument ignores the testimony of Dep. Kelley, who explained that the standard operating procedure of ACDC was that care being provided (or not provided) by SHP's medical staff simply could not be challenged:

> Q: Don't you think it's the policy of the detention center and the best practice to not send inmates to the hospital if it's not medically necessary?
>
> A: **The jail's policy is strictly to leave that to the decision of medical staff.**
>
> Q: Well, **if somebody was having a medical emergency, the jail staff could call and ambulance, couldn't they**?
>
> A: **No.**
>
> Q: So, you're telling me that if somebody – okay. You weren't a supervisor, were you?
>
> A: No, I was not.
>
> Q: Okay. So, you're going to sit her today and tell me that **none of the supervisors or any of the correctional officers that work at the Aiken County Detention Center have the authority to call an ambulance if an inmate was having a medical emergency?**
>
> A: My understanding was that **the only ones allowed to make that determination was Medical**. So, if there was a medical emergency, we would contact Medical, they would come and make the determination on whether or not to send them out EMS. Now –
>
> Q: Who told you that?
>
> [omitted discussion between counsel]
>
> A: **That was the policy of the Aiken County Detention Center**. We could not make a determination on whether or not someone needed to be sent out EMS unless Medical made that decision, or in the event that Medical was not available or present to be able to make that decision.
>
> Q: **Who told you that**?
>
> A: **That's in the Aiken County Detention Center Policies and Procedures, Standard Operating Procedures.**

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Q: So, you read it in the Aiken County Policy and Procedure Manual?

A: Yes, sir.

Q: All right. **Any other source for your belief of that**?

A: **Lieutenant Riddell, Captain Gallam, Lieutenant Whitaker**.

Q: Captain Gallam?

A: Yeah.

Q: Okay, **they all told you that**?

A: **Yeah. When you're complaining that an inmate needs to be sent out to the hospital and their response is always, "Well, we can't do that unless Medical decides to do that," I mean, that's pretty cut and clear**.

Q: All right. Any other policies that you think of that interfered with the medical care of the inmates in the jail?

A: Other than we can't make any determination or go to Medical directly if we feel like an inmate needs medical care? No.

Exhibit 3, *Deposition of Kelley*, p.46, l.25 – p.49, l.9, emphasis added.

Despite asking Defendant Hunt to identify "each and every rule, regulation, code, policy, by-law or other document of any association, licensing authority, accrediting authority or other private or public body which you, or your attorneys, may use at trial in defense of the allegations contained in the Complaint" (IROG No. 9) and to produce "all codes, laws, standards, policies, or regulations upon which you have relied or intend to rely upon in connection with this case" (RFP No. 23) via written discovery requests, Defendant Hunt failed to identify or produce a single one of his policies in response to those discovery requests.

ACDC Jail Administrator Capt. Nick Gallam specifically testified that SHP and its medical staff was required to provide healthcare services at ACDC in compliance with the *Minimum Standards for Local Detention Facilities in South Carolina* (MSSC), the National Commission on Correctional Health Care (NCCHC) Standards and the American Correctional Standards (ACA). **Exhibit 6**, *September 28, 2023 Deposition of Capt. Nick Gallam*, p.73, l.15-23.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

The MSSC states that "these regulations have been prepared and adopted for the purpose of establishing minimum standards for the operation, administration, and design of detention facilities…The development of these standards has not been an arbitrary or discretionary procedure. Various agencies and organizations involved in local corrections in South Carolina were solicited and asked for comments on these standards. Various national standards developed by professional organizations such as the American Correctional Association, the National Sheriffs' Association, and the American Medical Association, as well as sound management principles were the fundamental guides for the development of these standards." §1002 MSSC.

South Carolina Code §24-9-10 *et seq.* provides the statutory authority for the establishment and enforcement of the MSSC, providing standards be established by the South Carolina Association of Counties and adopted by the South Carolina Department of Corrections, with a "Jail and Prison Inspection Division" being established under the Department of Corrections. S.C. Code §24-9-10 *et seq*.

The MSSC specifically requires that "each facility shall have a written manual of all policies and procedures for the operation of the facility," that each policy and procedure should be reviewed annually and updated as needed, and "documentation of these reviews shall be maintained. These policies and procedures shall be made readily available to all personnel." §1021 MSSC. The MSSC explicitly requires written policies and procedures for:

- 2051 = Responsible Physician
- 2052 = Medical Procedures
- 2053 = Screening
- 2054 = Emergencies
- 2055 = Sick Call
- 2055 = Health Appraisal

During his 30(b)(6) deposition, Capt. Gallam testified:

Q: Earlier you said that the medical, the minimum standards in the state of South Carolina apply to facilities, correct?

A: Yes.

Q: So that means that Aiken County is required under the minimum standards to offer to comply with the provisions of the minimum standards related to the provision of medical services, is that right?

A: Yes, sir. Yes, sir.

Q: And one of the ways in which you do that is you contract with a provider and ask them to do it, right?

A: Yes.

Q: So but isn't there – but the whether the – but the provider itself, **the minimum standards from a matter of law don't apply to the provider, right, they apply to the facility** –

A: Correct.

Exhibit 6, *30(b)(6) Deposition of Capt. Nick Gallam*, p.90, l.11 – p.91, l.3, emphasis added.

Both the NCCHC and ACA Standards have similar requirements for written policies and procedures on these topics.

Despite all of the above, Defendant Hunt's response to a discovery request specifically asking Defendant Hunt to identify his policies and procedures for providing medical care at ACDC was:

> INTERROGATORY NO. 26: Identify by title and/or description, every policy, procedure, process, protocol, guideline, manual and/or form that was created, reviewed and/or approved for use in providing medical care at ACDC and who/when such review and/or approval took place.
>
> **RESPONSE #26: None.**

Defendant Hunt's August 10, 2021 Answers to Interrogatories, IROG#26.[4]

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4 In response to this same discovery request, Defendant Aiken County answered that "any responsive information would need to be obtained from the Aiken County Sheriff." *Defendant Aiken County's May 25, 2021 Answers to Interrogatories*, IROG No. 27.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Contrary the MSSC requirement that all written policies and procedures, including those governing medical services, be readily available to all personnel, numerous ACDC correctional officers have testified to never having seen SHP's "Policy and Procedure Manual for Health Services in Jail" or SHP's "Inmate Medical Services Information and Resources Guide for Correctional Officers." *See* **Exhibit 7.**[5]

Defendant Hunt finally produced policies & procedures on October 4, 2023, after Plaintiff's counsel specifically had to ask Capt. Gallam during his "expert" deposition to identify ACDC policies and procedures "pertinent to the issues in the Rhoads case." However, Capt. Gallam admitted that **there is no written policy instructing COs what they should do if there are concerns about the medical care an inmate was or was not receiving**, but that there is an "unwritten" one. **Exhibit 6**, *September 28th Deposition of Gallam*, p.25, l.12 – p.26, l.21 and p.80, l.12-25. Nor does there appear to be any written policy within the 142 pages of policies and procedures Defendant Hunt just produced supporting Capt. Gallam's testimony that supervisory level correctional staff may override medical.[6] **Exhibit 6,** *September 28th Deposition of Gallam*, p.30, l.9-12.

All of the above is competent evidence of reasonable inferences of questions of material fact that Defendant Hunt's written policies in place at the Aiken County Detention Center as applicable to the Plaintiff's confinement were deficient and grossly negligent.

4) Defendant Hunt's own "expert" and jail administrator has admitted that the provision of medical services at ACDC had to comply with the

5 *Deposition of Cpl. Carla Hill*, p.44, l.22 and p.48, l.7-20; *Deposition of Sgt. Natasha Rivers*, p.71, l.5-7; *Deposition of Dep. Lisa Bauer*, p.48, l.22 – p.49, l.10; *Deposition of Lt. Jessica Whitaker*, p.16, l.4 – p.17, l.5; *Deposition of Dep. Chanate Buchanan*, p.18, l.12 – p.19, l.8; *Deposition of Myra Hamilton-Carree*, p.22, l.2-14; *Deposition of Cpl. Tonetta Buggs*, p.49, l.22 – p.50, l.4; *Deposition of Sgt. Tamara Erikson*, p.41, l.1-6; *30(b)(6) Deposition of Capt. Nick Gallam*, p.46, l.9-15.

6 An "unwritten" policy regarding the provision of medical care violates §1021(b) MSSC.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

MSSC and NCCHC pursuant to the contract, that ACDC had a duty to assure quality control of the healthcare, that Defendant Hunt was aware SHP was failing to adhere to material terms of the contract and did nothing, thus creating material questions of fact as to whether Defendant Hunt grossly negligent in this matter.

Defendant Hunt argues that the Plaintiff "has failed to present any competent, admissible evidence demonstrating that the MSSC establish a legal duty, that South Carolina law required compliance with NCCHC standards," that ACDC had duty to follow standard quality assurance practices, etc. *September 29th Motion*, p.2, ¶¶4-9.

As already discussed above, Capt. Gallam has testified that the provision of medical services at ACDC had to comply with the MSSC and NCCHC. In providing that testimony, Capt. Gallam admitted that the reason for that required compliance was to ensure adequate care was being provided to inmates like the Plaintiff.

> Q: And the reason that those standards are put into that contract, in essence, is to – and effort to provide adequate and appropriate medical care to inmates, correct?
>
> A: To provide an adequate and quality health care program for the inmate population. Yes, sir.

Exhibit 6, *September 28, 2023 Deposition of Capt. Nick Gallam*, p.74, l.8-14.

Capt. Gallam further testified to knowing that SHP denied they had to comply with those standards meant to ensure adequate and quality health care, and that Defendant Hunt took no action despite that knowledge:

> Q: Are you aware that in this litigation Southern Health Partners denied that it had to comply with those standards?
>
> A: Yes, sir. You pointed that out at my first deposition.[7]

---

7 During his 30(b)(6) deposition, Capt. Gallam was examined about SHP's denial to a specific request for admission that SHP had to provide medical services at ACDC in compliance with the MSSC and asked if those denials concerned him, to which he answered "Yes, it does." **Exhibit 6**, *30(b)(6) Deposition of Capt. Nick Gallam*, p.55, l.3-14.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Q: Upon learning that SHP had denied that they had to comply with those standards, was any action taken?

A: No, sir.

Exhibit 6, *September 28, 2023 Deposition of Capt. Nick Gallam*, p.74, l.22 – p.75, l.5.

All the standards (MSSC, NCCHC, and ACA) require a 14-day health appraisal be conducted on an inmate. Capt. Gallam specifically testified that auditing the 14-day health appraisals was the sole way in which they checked that SHP was in compliance with these standards meant to ensure adequate and quality healthcare for inmates:

Q: Did y'all – y'all meaning the detention center administration. Do you review Southern Health Partners in any formal way through the course of a year or through the course of contact?

A: Yes, sir.

Q: The – really, the major thing that we look at is whether or not – or, I guess, one part of that would be, is, we looked at – to see whether or not they're up-to-date on their history and physicals. That's a requirement through minimum standards that requires them to do a history and physical within 14 days. So, we would spot check those, print out, you know, people who had been there for 20 days and go see if, you know – you know, have them show us in the chart where those were at.

[omitted testimony]

Q: Did you ever look to see if a history and physical was done on Ms. Cassie Rhoads during her approximately month long detention?

A: I can't – I didn't necessarily spot check that one, no, sir.

Q: **If there wasn't one done at any point during her May, June detention, that would be inappropriate, wouldn't it**?

A: **Yes, sir, as long as it wasn't within that 14 days**.

Q: Besides looking at the compliance with – so, the 14-day history and physical, that's part of the minimum standards, correct?

A: Yes, sir.

Q: And **was there any other way that y'all evaluated or graded SHP's performance besides spot checking to see if the – SHP's compliance with that 14-days history and physical requirement**?

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

A: **No, sir.**

Exhibit 6, *September 28, 2023 Deposition of Capt. Nick Gallam*, p.78, l.14 – p.80, l.1, emphasis added.

Nurse Brandi Galloway, Defendant SHP's Medical Team Director during the Plaintiff's May-June 2019 detention, testified that there was no 14-day history and physical within the medical file SHP had produced in this case, which went back over a year prior to the May-June 2019 detention. **Exhibit 8**, *Deposition of Brandi Galloway*, p.137, l.3 – p.138, l.4. Defendant SHP also admitted that they do not have a completed "Admission Data / History and Physical Form" for the Plaintiff. *See* Defendant SHP's Reponses to Plaintiff's Sixth Requests for Admission, RFA No. 16.

During his deposition, Plaintiff's expert, Edward O'Bryan, MD, MBA, CPE testified as to the importance a properly conducted 14-day health assessment could have played in preventing the extent of harm to the Plaintiff:

Q: If a – are you familiar with the concept in correctional health care of basically there being two types of – of health care screenings? You have, one, a receiving screening right at the time the person comes into the facility, and then, two, you have a follow-up screening that's supposed to be done within 14 days?

A: Yes.

Q: Okay. **Was a 14-day screening ever done on Cassie?**

A: **No.**

Q: Okay.

A: Yeah. The 14-day is typically called the "History and Physical." But, yeah, it's –

Q: But when Mr. Long asked you some questions about how Cassie had never **disclosed these prior abscesses she had, is that something that may have been disclosed through a proper – for lack of a better way, I'll say medical interview that's involved in a 14-day health screening?**

A: **Yes.**

Exhibit 9, *Deposition of Edward O'Bryan, MD, MBA, CPE*, p.235, l.1 – 21, emphasis added.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

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In short, there is ample competent, admissible evidence on these issues creating material questions of fact, much of which comes from Defendant Hunt's own testimony.

5) There is a material question of fact as to whether Defendant Hunt was grossly negligent in failing to properly train ACDC detention officers.

Defendant Hunt similarly argues that the Plaintiff "has failed to present any competent, admissible evidence demonstrating that the Aiken Defendants failed to properly train the detention officers" at ACDC. *September 29th Motion*, p.2, ¶10.

Capt. Gallam testified that ACDC correctional staff are trained that medical can be overridden at the supervisory level:

> Q: Does any of the training for new correctional officers include any medical – medical matters of any sort?
>
> A: We talk about emergency procedures.
>
> Q: Okay. Are new correctional officers taught to rely on medical?
>
> A: Yes.
>
> Q: Are there situations where they are empowered to override medical?
>
> A: We allow that to happen at the supervisory level.

Exhibit 6, *September 28, 2023 Deposition of Capt. Nick Gallam*, p.30, l.2-12.

Capt. Gallam later testified that both Lt. Erik Riddell and Lt. Jessica Whitaker would have had the power to overstep medical if they believed it prudent to do so. **Exhibit 6**, *September 28, 2023 Deposition of Capt. Nick Gallam*, p.42, l.7-19.

Despite that testimony, when Cpl. Hill took her concerns about the medical care being provided the Plaintiff to Lt. Whitaker, her testimony supports the reasonable inference that Whitaker was not adequately trained that she had the authority override medical:

> Q: Is there anything you can think of about Cassi or this incident **that you think is important**, that I've missed, but you think that we should know about?
>
> A: On the – on the day that I had asked Bauer to look at Cassiopia and think what – she what she thought and let me know, **I'd also talked to Lieutenant**

Whitaker due to my concern about how much swelling there was. And Lieutenant Whitaker stated that she would talk to medical to find out what was going on.

Q: And I meant to ask you about that because I think what Bauer told Mr. Hinson yesterday was when she came back and confirmed to you that she like she could see swelling, that you – you – Bauer says you asked her, "Well, will you say something to Whitaker, too?" Is that correct? **Did you ask her to report to Whitaker, too, that she saw it, and – and it didn't' appear to be self-inflicted to her, either**?

A: Yes, sir.

Q: Did Whitaker – **did you report to Whitaker that Nurse Donna was telling you it was self-inflicted**?

A: **Yes, sir.**

Q: Did – did **Whitaker express to you an opinion about that at all**?

A: She said, "Are you sure that you're keeping a close watch on her?" I stated I was. I talked to all the inmates that was in the cell with her at the time. Everybody said the same thing. **"Ms. Hill, she's not doing this. She's barely eating because her head hurst so bad.**"

[omitted testimony]

Q: And leading up to that day, whenever it was, **was there a growing concern leading up to that day, with you, about what was happening with Cassi**?

A: **There was, and any time I talked to medical, they would always say, "She has to submit a sick call on the kiosk.**"

Exhibit 10, *Deposition of Hill*, p.54, l.7 – 56, l.9, emphasis added.

Dep. Kelley testified similarly:

Q: Did you ever raise any of these issues up the chain of command?

A: **I did.**

Q: What kind of issues did you raise up the chain of command?

A: **Complaints that I felt like they weren't doing what they should have been doing to assist an inmate. Obviously, with Cassi Rhoads**, I brought that issue up to **Lieutenant Riddell**, I brought that issue up **to Lieutenant Whitaker**, and their response was, "**We cannot overstep Medical. If Medical doesn't want to send her out, we can't force them to do so**."

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

Exhibit 3, *Deposition of Kelley*, p.89, l.24 – p.90, l.7, emphasis added.

These examples from discovery are "competent, admissible evidence demonstrating that the Aiken Defendants failed to properly train the detention officers" at ACDC and enough to create reasonable inferences of material questions of fact that Defendant Hunt was grossly negligent in training ACDC correctional staff.

6) Plaintiff's claims are not barred by S.C. Code §15-78-70(d).

Finally, Defendant Hunt argues he cannot be sued because Plaintiff settled with the SHP Defendants, basing his argument on S.C. Code §15-78-70(d), which states in relevant part:

> **SECTTION 15-78-70.** Liability for act of government employee; requirement that agency or political subdivision be named party defendant; effect of judgment or settlement.
>
> (d) A settlement or judgment in an action **or a settlement of a claim under this chapter** constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code §15-78-70(d), emphasis added.

Plaintiff has not settled a single claim brought under Chapter 78 of Title 15, as she haS not settled any claim under the SCTCA against any governmental entity or employee.

This very argument Defendants attempt was rejected by the South Carolina Supreme Court in Wade v. Berkley County, 348 S.C. 224 (2002). In Wade, the South Carolina Supreme Court allowed a plaintiff to proceed with suing the County **after** settling a claim against the county employee "in his individual capacity," noting that seemed to circumvent the policy of the Act:

> ...which is to protect employees from person liability for torts committed while acting within the scope of employment....Nevertheless, our construction of the statute is limited by its legislative history.

Wade at 230-231.

If S.C. Code §15-78-70(d) did not prohibit suit against a county in a situation involving prior settlement **with a governmental employee**, it is simply not credible to argue it prohibits the Plaintiff's claims against Defendant Hunt after settlement with a private corporation.

ELECTRONICALLY FILED - 2023 Oct 05 12:46 PM - AIKEN - COMMON PLEAS - CASE#2020CP0202238

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CONCLUSION

Based on the above, and such other argument and evidence that may be presented to the Court at any hearing, the Plaintiff respectfully requests the Defendants' motion for summary judgment be DENIED and this case allowed to be tried on its merits with all questions of fact submitted to a jury for their consideration.

Respectfully Submitted,

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Florence, SC
October 5, 2023

2024 SC BAR CONVENTION

Civil Rights Law Section

Saturday, January 20

Juveniles in Custody: It's Not Kids Play

Daniel C. Boles
David A. DeMasters

No Materials Available

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2024 SC BAR CONVENTION

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Saturday, January 20

Litigation in the Big House: Safety Under the 8th Amendment

Lindsey S. Vann
Elloree Ganes

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

FREDDIE EUGENE OWENS,

BRAD KEITH SIGMON,

GARY DUBOSE TERRY,

and

RICHARD BERNARD MOORE

Plaintiffs,

v.

BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

and

HENRY D. MCMASTER, in his official capacity as the Governor of South Carolina,

Defendants.

Civil Action No. 2021-CP-40-02306

THIRD AMENDED COMPLAINT FOR PERMANENT INJUNCTIVE RELIEF AND FOR A DECLARATORY JUDGMENT

Plaintiffs Freddie E. Owens (i.e., Khalil Divine Black Sun Allah)[1], Brad Keith Sigmon, Gary Dubose Terry, and Richard Bernard Moore by their undersigned counsel, bring this action against Defendants and allege as follows:

[1] In 2015, by order of the Dorchester County Family Court, Mr. Owens's legal name was changed to Khalil Divine Black Sun Allah. However, because all of his prior proceedings before the South Carolina state courts and federal courts have been filed under the name Freddie Owens, this complaint primarily uses the name Owens for purposes of clarity.

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I.
PARTIES AND NATURE OF ACTION

1. This is a civil action for declaratory and injunctive relief brought by Plaintiffs Owens, Sigmon, Terry, and Moore for violations and threatened violations of their rights pursuant to (i) the Due Process Clauses of Article I, Section 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution; (ii) the prohibitions on ex post facto punishment in Article I, Section 4 of the South Carolina Constitution and Article I, Section 9, Clause 3 of the United States Constitution; (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution; (iv) Article I, Section 15 of the South Carolina Constitution prohibiting cruel, corporal, and unusual punishments; and (v) the statutory right of inmates to elect the manner of their execution under South Carolina Code section 24-3-530 (2021).

2. Plaintiffs Owens, Sigmon, Terry, and Moore are citizens of South Carolina under sentences of death in the custody of Defendants and under the control and supervision of Defendant South Carolina Department of Corrections (SCDC), a state agency. Plaintiffs are incarcerated at the Edisto Unit of Broad River Secure Facility (BRSF) in Columbia, South Carolina.

3. Plaintiffs were sentenced to death prior to the 2021 amendments to South Carolina Code section 24-3-530 ("execution statute") that are the subject of this complaint.

4. Plaintiff Brad Sigmon was sentenced to death in Greenville County in 2002 for a crime that occurred in 2001. Plaintiff Freddie Owens was sentenced to death in Greenville County in 2006 for a 1997 crime. Plaintiff Gary Terry was sentenced to death in Lexington County in 1997 for a 1994 crime. Plaintiff Moore was sentenced to death in Spartanburg County in 2001 for a crime that occurred in 1999.

5. At the time of Plaintiffs' crimes and sentencing hearings, South Carolina law provided that their death sentences would be carried out by lethal injection, unless Plaintiffs

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

selected electrocution or lethal injection was held unconstitutional. *See* S.C. Code Ann. § 24-3-530 (1995). Lethal injection has not been held unconstitutional. *E.g.*, *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020).

6. Defendants are the individuals charged by state law with carrying out Plaintiffs' death sentences.

7. Defendant SCDC is the state agency in South Carolina charged with overseeing the custody and care of people incarcerated in South Carolina.

8. Defendant Bryan P. Stirling is the Director of SCDC and is a citizen and resident of South Carolina. He is charged under Sections 24-3-510, 24-3-530 and 24-3-550 of the South Carolina Code with overseeing and carrying out executions in South Carolina. He is the final executive authority responsible for carrying out sentences of death against South Carolina prisoners. Stirling is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

9. Defendant Henry McMaster is the Governor of South Carolina and is a citizen and resident of South Carolina. He has the power to approve legislation and duty to ensure laws are faithfully executed. S.C. Const. art. IV, §§ 15, 21. McMaster is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

10. Defendants are acting, and each of them at all times relevant hereto were acting, in their respective official capacities with respect to all acts described herein, and were in each instance acting under the color and authority of the laws of South Carolina.

11. On May 14, 2021, South Carolina amended the statutory provision that governs executions in an effort to execute death-sentenced prisoners by electrocution or, depending on the

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

circumstances, firing squad, if Defendant Stirling avers that lethal injection is "unavailable." S.C. Code Ann. § 24-3-530 (2021).

12. As alleged in greater detail below, the amended execution statute violates Plaintiffs' constitutional rights. Plaintiffs therefore seek a permanent injunction preventing Defendants from enforcing the 2021 amendments; an order declaring the amended execution law improperly retroactive, ex post facto, unconstitutionally vague, and an improper delegation of legislative power; an order declaring that the 2021 amendments violate the South Carolina and/or United States Constitutions; an order declaring electrocution and firing squad violate the South Carolina Constitution's prohibition on cruel, corporal, and unusual punishments; an order declaring the amended execution statute requires inmates be provided a choice between at least two constitutional methods of execution; and any other equitable relief as the Court deems just and proper.

II.

FACTS

Amendments to the Execution Law

13. From 1995 until 2021, lethal injection was the primary means of execution in South Carolina.

14. On May 14, 2021, Governor Henry McMaster signed into law Senate Bill 200, amending the execution statute to make electrocution the default method and adding the firing squad as a third authorized method of execution. As amended, the statute now provides:

> (A) 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, <u>by firing squad or</u> lethal injection, <u>if it is available at the time of election</u>, under the direction of the Director of the Department of Corrections. The election for death by electrocution, <u>firing squad</u>, or lethal injection must be made in writing fourteen days before <u>each</u> execution date or it is

waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.

(B) Upon receipt of the notice of execution, the Director of the Department of Corrections shall determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods provided in subsection (A) are available.

(C) A person convicted of a capital crime and sentenced to death by electrocution prior to the effective date of this section must be administered death by electrocution unless the person elects death by firing squad or lethal injection, if it is available, in writing fourteen days before the execution date.

(D) If execution by lethal injection under this section is determined and certified pursuant to subsection (B) to be unavailable by the Director of the Department of Corrections or is held to be unconstitutional by an appellate court of competent jurisdiction, then the manner of inflicting a death sentence must be by electrocution, unless the convicted person elects death by firing squad.

(E) The Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods.

(F) The Department of Corrections shall establish protocols and procedures for carrying out executions pursuant to this section.

2021 S.C. Acts No. 43, R-56, S. 200, *codified at* S.C. Code Ann. § 24-3-530 (2021) (emphasis added to indicate newly enacted language).

15. S.C. Code Ann. § 24-3-530 does not define the word "available," nor does it provide any guidance regarding what efforts (if any) the defendants must undertake to make one of the execution methods available.

16. On May 19, 2021, after the amendments were signed into law, counsel for SCDC sent a letter to the South Carolina Supreme Court informing the Court that "due to the recent

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

amendment to S.C. Code Ann. Section 24-3-530, the Department . . . is now able to carryout [sic] executions by electrocution." A copy of this letter is attached to this Complaint as Exhibit A. The Clerk of the South Carolina Supreme Court issued execution notices for Plaintiffs Sigmon and Owens, setting their execution dates for June 18 and June 25, 2021, respectively. Execution Notice, *State v. Sigmon*, No. 2002-024388 (May 27, 2021); Execution Notice, *State v. Owens*, No. 2006-038802 (June 1, 2021). Defendant Stirling then informed the South Carolina Supreme Court and Plaintiffs Sigmon and Owens that the only available method of execution at that time was electrocution. *See* June 3, 2021 letter from Stirling (Exhibit B); Sigmon Notice of Election (Exhibit C); Owens Notice of Election (Exhibit D).

Defendants Certify that Neither Lethal Injection nor Firing Squad Is "Available"

17. On June 4, 2021, the Clerk of the South Carolina Supreme Court sent a letter to Defendant Stirling requesting he "provide an explanation as to why two methods of execution under the statute, lethal injection and firing squad, are currently unavailable." A copy of the letter is attached to this Complaint as Exhibit E.

18. Defendant Stirling responded by letter on June 8, 2021, that SCDC "has been unable, despite numerous and diligent attempts, to acquire the drugs necessary, in a useable form, to perform lethal injection." Stirling averred that efforts to purchase compounded lethal injection drugs "have also been unsuccessful." A copy of Stirling's response is attached to this Complaint as Exhibit F.

19. As the only evidence of their "diligent attempts" to acquire lethal injection drugs, Stirling attached to his response a letter from Hikma Pharmaceuticals (the Hikma Letter) addressed to him, Defendant McMaster, and South Carolina Attorney General Alan Wilson, "remind[ing]

[them] of [Hikma's] objection" to use of any of their products for lethal injection. A copy of the Hikma Letter is attached to this Complaint as Exhibit G.

20. On information and belief, Defendants have not taken steps necessary to purchase lethal injection drugs, either from pharmaceutical companies or from compounding pharmacies.

a. The only evidence Defendants have proffered of their purportedly diligent efforts to purchase lethal injection drugs is the Hikma Letter.

b. On information and belief, the Hikma Letter was sent to Defendants because of Hikma's concern that SCDC might misuse Hikma pharmaceutical products to carry out lethal injections in violation of Hikma's public policy against use of its products in executions—not in response to Defendants' efforts to purchase lethal injection drugs.

c. On information and belief, Hikma has a practice of sending letters similar to the Hikma Letter to departments of corrections across the country when it suspects that a state may use Hikma drugs to carry out executions. *E.g.*, David Ferrara, *Company Demands Return of Drug Planned for Zane Floyd Execution*, June 25, 2021, https://perma.cc/F9HK-U25Z.

21. Defendants likewise did not take steps to make firing squad "available" under the statute. In his June 8 letter to the Supreme Court, Defendant Stirling indicated that "SCDC does not currently have the necessary policies and protocols, as required by the statute, for an execution by firing squad" and that when the protocols are finalized, SCDC will turn to implementation. Ex. F. The timetable for implementation of the firing squad would depend, according to Defendant Stirling, on the finalized policies and procedures. Ex. F.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

22. On June 16, 2021, after reviewing Stirling's response and the Hikma letter, the Supreme Court vacated the execution notices for both Sigmon and Owens. The orders in both cases stated:

> 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). The orders are attached to this Complaint as Exhibit H.

23. On January 10, 2022, after the Supreme Court of the United States denied Plaintiff Terry's petition for writ of certiorari, jurisdiction over his case was remitted to the Supreme Court of South Carolina. Although Terry is now similarly situated to Sigmon and Owens in that he lacks additional avenues for ordinary appellate or collateral relief, the Clerk has not issued an execution warrant in his case. *See* Motion to Stay the Setting of an Execution Date Pursuant to *State v. Sigmon*, No. 2002-024388 (June 16, 2021) and *State v. Owens*, No. 2006-038802 (June 16, 2021), No. 1997-006197 (Jan. 10, 2022). On information and belief, Defendants will eventually inform the Supreme Court that more than one method execution is "available" and will seek an execution date in Terry's case.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

24. On March 18, 2022, Defendants notified the Supreme Court of South Carolina that they have finished developing their firing squad protocol. Firing Squad Notification Letter dated March 18, 2022, attached as Exhibit L.

25. On April 6, 2022, the Supreme Court of South Carolina denied Moore's Petition for Writ of Habeas Corpus and denied Moore's request for a stay of execution based on the petition. On April 7, 2022, Supreme Court of South Carolina issued an execution notice in Moore's case setting his execution for Friday April 29, 2022. On April 8, 2022, Defendant Stirling certified that "the only statutorily approved methods of execution available to the Department are electrocution and firing squad." Moore Certification Affidavit dated April 8, 2022, attached as Exhibit M.

Overview of South Carolina's Statutory Methods of Execution

26. With the 2021 amendments, South Carolina became the only jurisdiction in the United States where electrocution is the primary method of execution. Only eight states authorize the use of the electric chair as even an alternative method. With the 2021 amendments, South Carolina became only the fourth jurisdiction in the United States where firing squad is a statutorily authorized method of execution. As the chart on the following page illustrates, among those American jurisdictions that authorize the death penalty, South Carolina's statute is an anomaly in every regard:

Method	Count of jurisdictions—primary method	Count of jurisdictions—alternate method	Jurisdictions
Lethal injection	28	1	*Primary method*: Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee,

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

			Texas, Utah, Wyoming, U.S. military, U.S. government Alternate method: **South Carolina**
Electrocution	1	7	Primary method: **South Carolina** Alternate method: Alabama, Arkansas, Florida, Kentucky, Mississippi, Oklahoma, Tennessee
Firing squad	0	4	*Alternate method:* Mississippi, Oklahoma, Utah, **South Carolina**

27. Since 1976, executions in the United States have been carried out by the following methods:

Method	# of executions	Percent of total
Lethal injection	1,362	88.33%
Electrocution	163	10.58%
Gas chamber	11	0.71%
Hanging	3	0.19%
Firing squad	3	0.19%
Total	*1,542*	

28. In 2013, Defendants began publicly asserting that they could not obtain drugs to carry out lethal injection executions. Since then, however, thirteen states and the federal government have carried out 222 executions by lethal injection. Additionally, since January 2020, six states and the federal government have carried out 27 executions by lethal injection. Most recently, Donald Anthony Grant was executed by lethal injection in Oklahoma on January 27, 2022. Matthew Reeves was executed by lethal injection in Alabama on the same day. Thirteen additional executions by lethal injection are currently scheduled in 2022 by various states. *See* https://deathpenaltyinfo.org/executions/upcoming-executions#year2022 (last visited Feb. 4, 2022).

Details of execution by electrocution

29. South Carolina is now the only jurisdiction in the world where a person could be executed by electrocution even if he did not select that method. Internationally, far fewer

executions have been carried out by electrocution in the past decade than have been carried out by hanging or beheading with a sword.

30. On information and belief, any executions by electrocution in South Carolina will be accomplished in the same electric chair that the State first purchased in 1912, using the same essential process the State has used over the last 100-plus years.

31. The last execution in South Carolina's electric chair took place in 2008, and the inmate selected that method. South Carolina last forced a prisoner to die by electrocution in 1991.

32. Death in the electric chair is torturous. Electrocution produces various physiological reactions: burning and charring of the skin; thermal heating, i.e., cooking of the body and internal organs; direct excitation of sensory, motor, secretory, and autonomic nerves; direct excitation of brain nerves, causing sensations of sound, light, dread, and fear; simultaneous contractions in the flexor and extensor muscles (e.g., the hamstring muscle on the back of the thigh and the quadriceps muscle on the front of the thigh at the same time); contraction of the muscles necessary for breathing, preventing the person from inhaling or exhaling and causing the person to suffocate. All of these reactions cause extreme pain. John P. Wikswo, Jr. Aff. ¶ 12 (attached to this Complaint as Exhibit I); Jonathan L. Arden Aff. ¶¶ 9–11, 14 (attached to this Complaint as Exhibit J).

33. A person executed by electrocution will remain conscious and sensate during an electrocution until he loses consciousness. Electrocution causes loss of consciousness by terminating brain functioning, which occurs through either: "(1) a direct electrical stimulation of the neurons in the brain; or (2) insufficient blood circulation to the brain due to cardiac asystole, shock entrainment, fibrillation, or asphyxia due to either cardiac or respiratory arrest." John P. Wikswo, Jr. Aff. at ¶ 12(b)(i). Both processes take time. Accordingly, a person subjected to the

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

electric chair will remain conscious and sensate. *Id.* at ¶¶ 12, 14. Because a person subjected to death in the electric chair can remain alive, conscious, and sensate during the electrocution, there is a significant likelihood of excruciating pain during the event.

34. Death in the electric chair also produces needless and wanton psychological suffering. During the electrocution process, the condemned person's perception of time may become distorted, causing them to experience the electrical trauma as lasting dramatically longer than it appears to a bystander and causing him to perceive each of the sixty cycles of electrical current that will pass through his body every second. When an electrical current directly excites brain nerves, it can trigger sensations of sound, light, dread, and fear. And because Defendants tightly strap condemned people into the electric chair and cover their faces with a leather hood, they are unable to signal when they are experiencing pain or suffering. John P. Wikswo, Jr. Aff. ¶ 12.

35. On information and belief, the procedures Defendants use to carry out executions by electrocution are not precise. The amount of electrical current delivered to an object varies directly with the voltage applied and inversely with the resistance of the object to which the current is applied. Human bodies have varying resistance levels, depending on their size, composition, and the amount of sweat present on the surface of their skin. As a result, the amount of electrical current necessary to stop a condemned person's vital organs from functioning depends on that person's particular characteristics, and the length of a time any given individual will remain alive, conscious, and sensate during an electrocution is unpredictable and variable. *Id.* at ¶ 12(d).

36. There is evidence that at least thirty percent of those prisoners Defendants have executed in the electric chair since 1912 experienced excruciating pain and suffering. *Id.* at ¶ 13. Specifically, in at least thirty percent of electrocutions in South Carolina's history, one or more of

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

the following occurred: the prisoner's body was subjected to smoke or fire; the electric chair or apparatus emitted sparks; more than one shock was necessary to stop the prisoner's heart; and the prisoner experienced violent involuntary muscle contractions.

37. Of the seven prisoners Defendants have executed in the electric chair since 1985, there is evidence that at least five suffered excruciating pain.[2]

38. These estimates are almost certainly a significant undercount of the true totals because reliable witness accounts do not exist for most of the executions by electrocution, and a person executed in the electric chair cannot signal when he is experiencing pain or suffering.

39. Evidence from other states confirms that death in the electric chair is torturous. Two states have declared it unconstitutional. The Supreme Court of Nebraska held that "electrocution will unquestionably inflict intolerable pain unnecessary to cause death in enough executions so as to present a substantial risk that any prisoner will suffer unnecessary and wanton pain in a judicial execution by electrocution." *State v. Mata*, 745 N.W.2d 229, 278 (2008). The Supreme Court of Georgia likewise concluded that electrocution, with "its certainty of cooked brains and blistered bodies," is unconstitutional under its state constitution. *Dawson v. State*, 554 S.E.2d 137, 143–44 (Ga. 2001). *See also Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennan, J., dissenting from the denial of certiorari) (describing various problems with the electric chair, including the likelihood that a prisoner will catch fire or otherwise be mutilated by electrocution).

[2] The five men whose executions went awry were: Pee Wee Gaskins (required three shocks before his heart stopped and witnesses observed him convulsing and his muscles violently contracting), Larry Eugene Bell (required three shocks before his heart stopped), Joseph Carl Shaw (witnesses observed smoke rising from Shaw's pants and saw him violently convulse approximately a dozen times), James Neil Tucker (required three shocks for his heart to stop and witnesses noted that he experienced violent, involuntary muscle contractions), and Ronald Woomer (required three shocks for his heart to stop).

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

40. Willie Francis, perhaps the only person to live long enough after an attempted electrocution to give a first-hand account, described the feeling of being electrocuted as "a hundred and a thousand needles and pins were pricking in me all over and my left leg felt like somebody was cutting it with a razor blade." Deborah Denno, *When Willie Francis Died: The "Disturbing" Story Behind One of the Eighth Amendment's Most Enduring Standards of Risk*, *in* DEATH PENALTY STORIES 43–44 (John H. Blume & Jordan M. Steiker eds., 2009). At one point, Francis could no longer tell whether he was alive or dead. He realized he was alive when the executioners administered another surge of electricity, subjecting him to "the needles and pins" once more.

41. In 1983, it took Alabama fourteen minutes and three attempts to execute John Evans in the electric chair. After prison officials applied the first burst of 1900 volts, smoke and sparks poured from under the hood covering Evans's face and the room filled with the smell of burning flesh and clothing; prison doctors then determined that Evans was still alive. *Glass*, 471 U.S. at 1091–92 (Brennan, J., dissenting from denial of certiorari). Prison officials applied a second burst of electricity for another thirty seconds, and more smoke filled the room, along with the increasingly sickening smell of burning flesh, but again doctors determined that Evans was not dead. It was only after prison officials had applied a third jolt of electricity that prison doctors declared him dead. *Id*.

42. In 1990, it took Virginia executioners more than five minutes to electrocute Wilbert Lee Evans. During the execution, Evans bled so profusely that his shirt became soaked in blood. Deenan L. Brown, *Execution Probe Sought*, WASH. POST, Oct. 21, 1990, at B1.

43. That same year, Florida officials attempted to electrocute Jesse Tafero for seven minutes. Ellen McGarrahan, TWO TRUTHS AND A LIE: A MURDER, PRIVATE INVESTIGATOR, AND HER SEARCH FOR JUSTICE xvii (2021). After applying three separate cycles of electricity at 2,000

volts, Tafero appeared to still be alive. Mike Clary, *Flames Erupt in Electric Chair's Death Jolt*, L.A. TIMES, Mar. 26, 1997, at A1. As spectators watched, "the headset bolted onto his bare scalp caught fire. Flames blazed from his head, arching bright orange with tails of dark smoke. A gigantic buzzing sound filled the chamber." McGarrahan, TWO TRUTHS at xvii. Throughout the execution, Tafero's chest heaved, his head nodded, and even after he was engulfed in flames, he continued to sigh. *Id.*

44. Although Virginia prison officials rewired their electric chair in the wake of Wilbert Lee Evans's torturous death, it nevertheless took two attempts for them to kill Derick Peterson in 1991. Karen Haywood, *Convicted Killer Executed in Virginia, But Only on Second Try*, AP NEWS, August 23, 1991, https://apnews.com/article/77b06f17fdeb31c1c23347adc150a3a5.

45. In 1998, Florida attempted to execute Pedro Medina in the electric chair. Like Tafero, Medina caught on fire. Medina lurched backwards and balled his hands as blue and orange flames up to a foot long shot from the right side of his head. One witness recalled that the execution was "brutal, terrible. It was a burning alive, literally." Ron Wood, *Flames Erupt from Man's Face Mask During Death Sentence Electrocution*, AP NEWS, March 25, 1997, https://apnews.com/article/ae9d4a0e21a72803fe299daac7850440. The smell of burnt flesh lingered as the witnesses left. *Id*.

46. Upon information and belief, there are numerous other examples of botched electrocutions in recent American history.

47. If Defendants are permitted to carry out Plaintiffs' executions in the electric chair, there is a near certainty that they will suffer torturous, terrifying deaths.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

Details of execution by firing squad

48. The firing squad has been, and continues to be, rarely used as a method of execution in America. It never gained much traction in any relevant time-period, and it has, until the 2021 amendments, never been a legally authorized method of execution in South Carolina.

49. Internationally, the firing squad is used only in China, North Korea, and other countries in Asia and the Middle East. In recent years, it has fallen out of favor even in those countries and has, for the most part, been replaced by lethal injection. South Carolina is therefore one of the few jurisdictions in the world where a person can be killed by firing squad.

50. Prior to 1789, there were only thirty firing squad executions recorded in the United States. Many were in Louisiana and California, both territories of foreign governments (France and Spain). Although the military long preferred the firing squad as a method of execution, there have been only 144 shooting executions of civilians in the nation's history (out of approximately 16,000 total documented executions). M. Watt Espy & John O. Smykla, *Executions in the United States. 1608-2002* ("The Espy File"), https://perma.cc/CUT5-RP25; DEATH PENALTY INFORMATION CENTER, *Execution Database*, https://perma.cc/6R4K-RZM6 (last visited Feb. 3, 2022). That means that less than one percent of all executions in the United States have been carried out by having citizens shoot and kill other citizens.

51. In the pre-modern and modern eras of capital punishment in this country, the firing squad has virtually disappeared. It has only been used 34 times since 1900, making up less than half of one percent of all American executions in the past 120 years.

52. All but one of those firing squad executions took place in Utah. The sole exception, Andrija Mirkovitch, was shot to death in Nevada in 1920. Christopher Q. Cutler, *Nothing Less*

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

than the Dignity of Man: Evolving Standards, Botched Executions and the Utah's Controversial Use of the Firing Squad, 50 CLEV. ST. L. REV. 335, 400 (2003).

53. Since the reinstatement of the death penalty in 1976, there have been only three firing squad executions in the United States, all of which took place in Utah.[3] Only three other states—Oklahoma, Mississippi, and Utah—currently authorize the use of the firing squad.[4]

54. Consequently, the Supreme Court of the United States has not addressed whether execution by firing squad is a constitutional method of punishment since 1878—nearly 100 years before the Eighth Amendment was incorporated and applied to the states in *Robinson v. California*, 370 US 662 (1962). *See Wilkerson v. Utah*, 99 U.S. 130 (1878). The Supreme Court, reviewing the execution order of a territorial court in Utah, ultimately determined that execution by firing squad was not cruel and unusual punishment, relying primarily on the military's use of the firing squad and its own opinion that firing squad involves less pain and is more dignified than hanging. *Id.* at 133.

55. Execution by firing squad is typically conducted by "multiple people simultaneously firing rifles at a target approximately overlying the heart of the prisoner," inflicting "multiple, concurrent rifle wounds to the heart and surrounding structures" and causing "severe disruption and destruction of bodily tissues." Jonathan L. Arden Aff. ¶ 20. The "[m]ultiple rifle wounds to the chest will cause extensive damage to the skin and chest wall soft tissues" and "multiple fractures of the ribs and sternum," which would be "excruciatingly painful per se, and even more so upon any movement, such as flinching, or trying to breathe." *Id.* at ¶ 24. The autopsy

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[3] Most firing squad executions overall throughout our nation's history have taken place in Utah. This is in large part due to the Mormon doctrine of "blood atonement," i.e., that a murderer must literally shed his blood to obtain divine forgiveness.

[4] From 1982 to 2009, Idaho had a firing squad alternative to lethal injection if lethal injection was "impractical," but it was never used.

photographs from the last firing squad execution in the United States—that of Ronnie Lee Gardner in 2010 at Utah State Prison, filed with this complaint as appendices to Exhibit J—reveal that the bullets that struck Gardner created an enormous hole in his chest, soaked his clothing with blood, and destroyed his corpse.

56. "The mechanism of death by firing squad is disruption of the heart, resulting in cessation of circulation of blood to the vital organs." Jonathan L. Arden Aff. ¶ 21. But even this "[a]brupt cessation of circulation…does not cause immediate unconsciousness." *Id.* at ¶¶ 22–24. According to Dr. Jonathan Arden, an experienced forensic pathologist, even if all bullets hit the intended target and effectively destroy the heart, there is enough blood left in the brain for the individual to survive for 10 to 15 seconds and be conscious and able to feel pain. *Id*. During that period, the prisoner would suffer "excruciating pain" from the massive trauma to his bones and tissue caused by the executioners' bullets.

57. Accordingly, execution by firing squad is significantly more painful than execution by lethal injection. As one of the State's experts in ongoing litigation in Nevada has opined, because the firing squad brings about death "without the use of any medication that would render the individual unconscious, sedate, or in a state of anesthesia, the timeframe between when the individual is shot until death would result in incomparable pain when compared to" death by lethal injection. Complaint, Exhibit K—Declaration of Jeffrey D. Petersohn, M.D., at ¶ 48, *Floyd v. Daniels*, No. 3:21-cv-00176-RFB-CLB (No. 108-6) (D. Nev. June 24, 2021). According to Dr. Petersohn, although the firing squad can result in a quick death if the bullets hit the intended target, "there are many medical case reports detailing bullets passing through the skull without causing loss of consciousness." *Id*. at ¶ 49.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

58. Executions by firing squad have also been botched. For example, on the day of his execution, Wallace Wilkerson reportedly flinched at the "fire" command. The sharpshooters missed, hitting only his arm and torso but not his heart. It took almost half an hour for Wilkerson to bleed to death in front of a group of horrified spectators. All the while, Wilkerson lay on the ground, screaming, "My God! My God! They've missed it!" Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 355, 346–47 (2002–2003).

59. Utah botched another execution by firing squad in 1951. The entire squad missed Eliseo Mares' heart, hitting him instead in the hip and abdomen. Like Wilkerson, Mares slowly bled to death. *Id*.

60. The last firing squad execution in the United States was that of Ronnie Lee Gardner in 2010 at Utah State Prison. Per the Utah protocol, five anonymous executioners fired at Gardner's chest from approximately 20 feet, aiming at a target pinned over his heart by a physician. One of the rifles contained a blank, however, for the alleged purpose of relieving any single member of the firing squad from experiencing any personal guilt for participating in a homicide.

61. The firing squad also involves more active human participation in the act of killing citizens than lethal injection, or even electrocution. While there is some human involvement in all methods of execution—*i.e.*, the flipping of a switch or the plunging of a syringe—execution by firing squad involves several people volunteering to take aim at another human being's heart, and on command, shoot that person to death. This is a more brutal method of taking life than execution by lethal injection.

62. On information and belief, the protocol that SCDC is developing for carrying out executions by firing squad is based on the Utah protocol and does not adequately protect Plaintiffs' constitutional rights.

Details of execution by lethal injection

63. Lethal injection is by far the most prevalent method of execution in the United States. American jurisdictions have settled on lethal injection as the most humane method of execution after a 100-plus year history of searching for humane methods of execution. Until South Carolina's recent amendment, every death penalty jurisdiction in the country used lethal injection as its primary method of execution.

64. Of the nation's 1,542 executions since 1976, nearly 90 percent (1,362) of them have been carried out by lethal injection. DEATH PENALTY INFORMATION CENTER, *Execution Database*. In the same period, only 163 executions have been by electrocution, with more than 140 of these occurring in the 70s, 80s, and 90s, and, as noted supra, only three executions by firing squad. *Id*.

65. When carried out properly, lethal injection can largely eliminate the risk of pain that comes with other methods of execution. *See Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). 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)

66. Indeed, lethal injection is a "proven alternative method" with a "track record of successful use." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1130 (2019).

67. As of now, the most reliable and humane way to conduct a lethal injection is by a single dose of pentobarbital.

68. Pentobarbital has "been adopted by five of the small number of States that currently implement the death penalty." *Lee*, 140 S. Ct. at 2591. It has been used in "over 100 executions,

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

without incident," and it has been "repeatedly invoked by prisoners as a less painful and risky alternative to the lethal injection protocols of other jurisdictions." *Id*.

69. Capital punishment by a single dose of pentobarbital has been approved twice by the Supreme Court of the United States. *Id*.; *Bucklew*, 139 S. Ct. 1112. It has also repeatedly been upheld by United States Courts of Appeals. *E.g.*, *Whitaker v. Collier*, 862 F. 3d 490 (5th Cir. 2017); *Zink v. Lombardi*, 783 F. 3d 1089 (8th Cir. 2015); *Gissendaner v. Commissioner*, 779 F. 3d 1275 (11th Cir. 2015).

70. Fourteen states (including South Carolina) have used pentobarbital to carry out executions: Alabama, Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. DEATH PENALTY INFORMATION CENTER, *Overview of Lethal Injection Protocols*, https://perma.cc/H5KE-Q3AL (last visited Feb. 3, 2022).

71. Since January 2020, five American jurisdictions carried out more than 20 executions using a single dose of pentobarbital. *Id.* Five additional states have plans to use a single dose of pentobarbital: Kentucky, Louisiana, Montana, North Carolina, and Tennessee. *Id.*

72. Also in the last year, Arizona has secured a new batch of pentobarbital. Jacques Billeaud, *Arizona finds death penalty drug after hiatus in executions*, AP NEWS, Mar. 5, 2021, https://apnews.com/article/arizona-phoenix-executions-6f0ce846e174119635509e0c16b9ac1d.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

IV.
CLAIMS FOR RELIEF[5]

Count I: Due Process Violation—Retroactive Legislation

73. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

74. The execution statute, as amended, cannot apply to Plaintiffs because their crimes occurred and sentences were imposed prior to the enactment date, their statutory rights to elect lethal injection had vested, and the statute itself is neither procedural nor remedial.

75. As the South Carolina Supreme Court has recognized, Plaintiffs have a "statutory right . . . to elect the manner of [their] execution." Ex. H. Because the pre-amendment statute contained the same language as the post-amendment statute regarding the right to elect, Plaintiffs had a statutory right to choose between lethal injection and electrocution and that right vested when they were sentenced. *See* S.C. Code Ann. § 24-3-530 (1996).

76. Defendants cannot revoke a vested statutory right without violating due process. A statutory right vests when it creates "legitimate expectations" or establishes legal consequences that invite reliance. *See Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 32, 736 S.E.2d 651, 660 (Beatty, J., concurring in part and dissenting in part) (quoting Barbara J. Van Arsdale *et al.*, 16B Am. Jur. Constitutional Law § 735 (2d ed. 2009)); *see also Martin v. Hadix*, 527 U.S. 343, 358 (1999) (the question of retroactivity "should be informed and guided by 'familiar considerations

[5] This complaint contains claims previously raised in two separate actions: (1) *Owens v. Stirling* (*Owens I*), No. 2021-CP-40-2306, filed on May 17, 2021, challenging various procedural aspects of S.C. Code Ann. § 24-3-530 (2021); and, (2) *Owens v. Stirling* (*Owens II*), No. 2021-CP-40-04851, filed on September 27, 2021, raising substantive challenges to the proposed methods of punishment. These have been merged into one complaint (along with an additional claim raised by Plaintiff Terry [Count VIII]) by agreement of the parties in an effort to streamline resolution of the issues.

of fair notice, reasonable reliance, and settled expectations'" (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994))).

77. When Plaintiffs were sentenced to death, the law gave them the option to choose lethal injection and reject electrocution. Since the Legislature authorized lethal injection in 1995, no person has been executed by electrocution against their will in South Carolina.

78. Accordingly, since the time of their crimes and sentencing, Plaintiffs have had a legitimate, reasonable, and settled expectation that they could select lethal injection as their method of execution. The judges and juries who imposed their death sentences similarly expected the sentence imposed would only be carried out by lethal injection or electrocution.

79. As discussed *infra*, the precise operation of the new law is vague and uncertain, but there is no dispute that it retroactively strips Plaintiffs of their statutory right to be executed by lethal injection, unless they choose otherwise. Indeed, stripping Plaintiffs of that right, and clearing the obstacle it created to Defendants' executing them by less humane methods, was the express purpose of the new law and its proponents. Applying the 2021 amendments to Plaintiffs would bring to bear the precise concern that motivates the presumption against retroactive statutes: The Legislature here has used its "unmatched powers" to "sweep away settled expectations suddenly and without individualized consideration" in response "to political pressures" and in order to get "retribution against [an] unpopular group[s]." *See Landgraf*, 511 U.S. at 266, 270.

Count II: Ex Post Facto Violation

80. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

81. The United States and South Carolina Constitutions forbid ex post facto legislation. U.S. Const. art. I § 10 ("No State shall . . . pass any . . . ex post facto law"); S.C. Const. art. I § 4 ("No . . . ex post facto law . . . shall be passed").

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

82. The principle that a law has no effect "before it was actually passed" originates in longstanding and "fundamental notions of justice." *Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring) (quoting 1 J. Kent, Commentaries on American Law *455).

83. The Ex Post Facto Clauses of the State and Federal Constitutions forbid the Legislature 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 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).

84. 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 a prisoner'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).

85. This standard and the United States Supreme Court opinions applying it "set[] 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 837, 840 (2001). South Carolina, therefore, "is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*,

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

455 U.S. 283, 293 (1982). The Supreme Court of South Carolina has read the state Ex Post Facto clause to sweep more broadly than the federal Ex Post Facto clause. *See Jernigan*, 340 S.C. at 263–65, 531 S.E.2d at 510–12.

86. The Supreme Court of South Carolina has also recognized that certain methods of execution are more onerous than others, and this qualitative distinction has implications for determining whether a law changing the method of execution is ex post facto. For example, in the course of rejecting an ex post facto challenge, the South Carolina Supreme Court explained that a shift from hanging to electrocution was not ex post facto because the Court was "satisfied that electrocution is a more humane method of execution than hanging." *Malloy*, 95 S.C. at 441, 78 S.E. at 99.

87. It follows that a retroactive law that changes the method of punishment to one that is less humane is more onerous than the prior law and therefore is impermissibly ex post facto.

88. The 2021 amendments to the execution statute are retroactive. 2021 S.C. Acts No. 43, R-56, S. 200, § 3. The only question, then, 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).

89. The change from lethal injection as the default method of execution unless Plaintiffs choose otherwise to a default method of execution by electrocution (or firing squad if chosen) alters Plaintiffs' situation to their disadvantage. Lethal injection is the least severe of all three punishments, and the 2021 amendments effectively revoke that lesser 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).

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

90. When Plaintiffs committed their crimes and received their death sentences, the default method of execution was lethal injection, which is according to the United States Supreme Court "the most humane [execution method] available." *Baze v. Rees*, 553 U.S. 35, 62 (2008). 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"); *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).

91. In contrast to a properly administered execution by lethal injections, electrocution and firing squad are barbaric, carry a heightened risk of painful death, and desecrate the body of the deceased in a way that can only be considered less humane.

92. Even under "ideal" conditions (when the electrocution is not botched), it is nevertheless a barbaric method of execution. *See* ¶¶ 30–34, *supra*; John P. Wikswo, Jr. Aff. ¶ 11–12, 14–15 (April 27, 2021), attached as Exhibit I. An electrocuted person will likely experience a slow, painful death by suffocation as his internal organs are slowly cooked. *State v. Mata*, 745 N.W.2d 229, 269–78 (2008); *Dawson v. State*, 554 S.E.2d 137, 142, 143 (2001). Their organs will boil, their heads catch fire, their eyes pop out, and their bodies blister, giving off the nauseating odor of burning flesh. *Glass v. Louisiana*, 471 U.S. 1080, 1087–88 (1985) (Brennan, J., dissenting from denial of certiorari); *see also Dawson*, 554 S.E.2d at 144; Jonathan L. Arden Aff. ¶¶ 9–10 (May 14, 2021), attached as Exhibit J.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

a. Electrocution is considered so torturous and outmoded that the last two state courts to consider it have found that killing a death sentenced inmate in the electric chair violates their state constitutions. *Mata*, 745 N.W.2d at 278 (finding that electrocution violated the Nebraska Constitution's prohibition against cruel and unusual punishment, which mirrors the Eighth Amendment); *Dawson*, 554 S.E.2d at 144 (finding that electrocution violated the Georgia Constitution's prohibition against cruel and unusual punishment).

b. There is a consensus among medical and physiology experts that death by judicial electrocution is torturous. *See* Ex. I, Wikswo Aff. ¶ 15; Ex. J, Arden Aff. ¶ 17.

c. South Carolina lawmakers have affirmatively acknowledged that electrocution is more onerous than lethal injection. *See Legislative Watch: Death Penalty*, Times & Democrat, Mar. 2, 1955, at 2B (Representative Harry Hallman, explaining the switch from electrocution to lethal injection was necessitated by the reality that "lethal injection is more humane than dying in the electric chair").

93. Death by firing squad is more brutal and inhumane than death by lethal injection.

a. Firing squad, like electrocution, carries a serious risk of error and therefore excruciating pain. *See* James R. Acker & Ryan Champagne, *The Execution of Wallace Wilkerson: Precedent and Portent*, 42 Crim. Justice Rev. 349, 354 (2017) (describing the botched firing squad execution of Wallace Wilkerson).

b. Even when an execution by firing squad goes according to plan, the condemned person's heart is "ripped to pieces by bullets" and the person is left to bleed to

death. *E.g.*, Ed Pilkington, *Utah firing squad executes death row inmate*, The Guardian, June 18, 2010, https://www.theguardian.com/world/2010/jun/18/firing-squad-executes-death-row-inmate. The prisoner's body is left with baseball-sized holes and internal tissues splattered on the outside of the corpse. *See* Ex. J, Arden Aff., Appendix 3 (photographs of Ronnie Gardner after his execution by firing squad); *Should Firing Squads Replace Lethal Injections?*, VICE News (Mar. 21, 2017), https://www.youtube.com/watch?v=BOKYCqee2YY.

94. Electrocution and firing squad are less humane punishments than lethal injection. Stripping Plaintiffs of their right to be executed by lethal injection and forcing their execution by either electrocution or firing squad "increases the punishment"—from death by a more humane means to death by torturous means—and "alters [their] situation[s] . . . to [their] disadvantage." *Malloy*, 95 S.C. at 441, 78 S.E. at 997 (quotations and emphasis omitted).

95. Enforcing the 2021 statute and electrocuting or shooting Plaintiffs would contravene the explicit purpose of the Ex Post Facto Clause: "to secure substantial personal rights against arbitrary and oppressive legislative action." *Malloy*, 237 U.S. at 183.

Count III: Due Process Violation—Void for Vagueness

96. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

97. 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).

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

98. "[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).

99. Specifically, a statute is unconstitutionally vague "if it 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).

100. The amended statute is unconstitutionally vague because it "lack[s] any guidelines or standards regarding" the definition of the key statutory term: available. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2019). Additionally, the statute is silent as to the sequence of events it requires. As a result of this inherent vagueness, parties whose actions and choices are governed by the statute—Plaintiffs and Defendants Stirling and SCDC—must guess as to its meaning and therefore as to its application.

101. The statute requires Defendant Stirling or his successor to certify to the availability or unavailability of the three methods of execution, but it offers no guidance as to the meaning of the word "available" or as to the timing of the certification. Defendants have interpreted the word "available" to mean that SCDC is capable of using a particular method on the day of a scheduled execution, but the South Carolina Supreme Court rejected this interpretation by staying Plaintiff Sigmon's and Owens's executions when defendants asserted that only electrocution was available. The fact that the statute is silent both as to the meaning of "available" and as to the timing of the Director's certification to the Supreme Court forces Plaintiffs to guess as to the statute's meaning and how it governs their right to elect.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

102. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

103. Even if the statute is not impermissibly vague on its face, the courts—not Director Stirling, not SCDC, and not Governor McMaster—are charged with saying what the word "available" means. *See Abbeville Cnty. School Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163–64 (2014) ("It is emphatically the province and duty of the judicial department to say what the law is. This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws." (cleaned up)).

104. Although the statute is silent regarding the meaning of "available," the Supreme Court's only pronouncement on the statute—the orders staying Plaintiffs Sigmon's and Owens's executions—offers some insight and makes clear that whatever "available" means, it cannot have the meaning that Defendants have given it thus far. *See* Ex. H.

105. Specifically, under the orders, Defendants have at least some affirmative obligation to make the statutory methods "available" and to use good faith efforts to offer Plaintiffs all three methods pursuant to his "statutory right . . . to elect the manner of [their] execution." Ex. H. Moreover, "available" has a temporal meaning broader than the one Defendants have thus far given it; under the orders, Defendants are required to "maintain[] the availability of electrocution" and to make firing squad "currently available" before they may attempt to carry out any executions. Ex. H.

106. Whatever their obligations to make methods of execution available under the statute, Defendants have failed to meet those obligations. *See supra* ¶¶ 17–22.

<u>Count V</u>: Violation of South Carolina Constitution, art. I, § 8—Non-Delegation Doctrine Violation

107. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

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

109. 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. Thus, a statutory delegation is constitutional only "if the officer, board, or commission to whom the authority is alleged to have been delegated is given no power to add to or take away from the law as enacted, if nothing is left to discretion *as to what shall constitute the form and substance of the statute*." *State ex rel. Richards v. Moorer*, 152 S.C. 455, 150 S.E. 269, 273 (1929) (emphasis added); *see also Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) ("[A] statutory delegation is constitutional as long as [the Legislature] 'lays down by legislative act an intelligible principle to which the person or body authorized to exercise

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

the delegated authority is directed to conform.'" (cleaned up) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989))).

110. The 2021 amendments violate the non-delegation principle because they vest Defendant Stirling or his successor with unbridled discretion to determine whether a method is "available," and therefore by which method a condemned person will die. *See Hobbs v. Jones*, 412 S.W.3d 844, 855–56 (Ark. 2012) (invalidating Arkansas's method of execution statute as an impermissible delegation of legislative power where the statute in question "passed to the executive branch, in this case the [Arkansas Department of Corrections], the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution."). Because the word "available" is vague on its face, and because the statute offers no "intelligible principle" to which Director Stirling or his successor "is directed to conform," the amended law grants unqualified power to the Director of the Department of Corrections to decide how it will carry out executions. *See Gundy*, 139 S. Ct. at 2123 (quoting *Mistretta*, 488 U.S. at 372). Put differently, the statute is unconstitutional because it leaves to the discretion of an executive branch officer the "discretion as to what shall constitute the form and substance of the statute." *Moorer*, 152 S.C. at 455, 150 S.E.2d at 273.

111. This grant of authority is also inconsistent with the purpose of the 2021 amendments, which is to prescribe methods of execution, to give condemned people a right to elect how they will be executed, and to define the process by which a condemned person makes an election between the various authorized methods. *See* Ex. H.

a. Consistent with this purpose, the statute requires Defendant SCDC to "establish protocols and procedures for carrying out executions pursuant to this section." S.C. Code Ann. § 24-3-530(F) (2021).

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

b. However, because the statute is so vague as to preclude any collective understanding of its meaning, it gives Director Stirling or his successor the power to decide which methods are "available," based on criteria that are not subject to judicial review or any administrative oversight.

c. "The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if [the Legislature] gave the same power [to determine availability] . . . to members of its staff." *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting).

112. The practical consequences of the legislative delegation here are substantial. Under the statute as written, the Director'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").

113. For example, if Plaintiffs elect death by lethal injection and the Director certifies that lethal injection is unavailable, the statute provides no mechanism by which Plaintiffs 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 Legislature 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").

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

114. Defendant Stirling might determine that a specific method is not "available" for any reason, or for no reason. If Defendant SCDC is unable to obtain the necessary equipment for the selected method in time to meet the date on the execution warrant—e.g., humane lethal injection drugs or appropriate weapons for the firing squad—he could deem it unavailable with no scrutiny or review of what steps he had taken, or foresworn, along the way. A method not being "available" or being "unavailable" could be based on any number of undefined, undisclosed reasons, such as SCDC employees' unwillingness to partake in the execution; temporary conditions, such as the COVID-19 pandemic, rendering the method unsafe, expensive, or impractical for SCDC staff; the method's use exceeding Defendant SCDC's annual budget for carrying out executions; or simply that SCDC does not desire to present the condemned inmate with that option anymore. If Defendant Stirling made such a determination, Plaintiffs would be powerless under the statute to challenge it.

115. Because the amended statute grants unbridled discretion to Defendant Stirling to determine what the law is, and because it "sets up no standard to guide the Department and contains no limitations" on what constitutes "available" under the statute, it violates the non-delegation doctrine. *Harbin*, 226 S.C. at 595, 86 S.E.2d at 471.

Count VI: Electrocution and the Firing Squad are Prohibited by the South Carolina Constitution

116. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

117. 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). Thus, South Carolina "is entirely free to read its own [state] constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the

Supreme] Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982).

118. Article I, Section 15 of the South Carolina Constitution provides, in relevant part: "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. *Cf.* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

119. Where the language in the South Carolina Constitution differs from language in the federal constitution, the state court's interpretive task is to determine whether the state constitution "provide[s] greater protection than the federal Constitution." *Forrester*, 343 S.C. at 644, 541 S.E.2d at 840.

120. Although the Supreme Court of South Carolina has never addressed a challenge to a method of execution under the state constitution, Article I, Section 15 of the South Carolina Constitution sweeps more broadly than the Eighth Amendment as a matter of text, legislative history, and precedent from other jurisdictions. *Cf. State v. Wilson*, 306 S.C. 498, 512, 413 S.E.2d 19, 27 (1992) (noting, in dictum, that for the purposes of proportionality review, the state and federal constitutions offer equal protection because "United States Supreme Court effectively treats the 'and,' as an 'or' in their Eighth Amendment analysis").

121. Article I, Section 15 prohibits three distinct categories of punishment using the disjunctive form "or" (rather than the conjunctive "and" in the federal Constitution): cruel punishment, corporal punishment, and unusual punishment. This drafting form is unique among the constitutions in all American jurisdictions and counsels in favor of a methods-of-execution test

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

that accounts for all three prohibited forms of punishment and that does not require a plaintiff to plead an alternative method of execution.

122. As detailed above, electrocution and the firing squad are "cruel" because they both "involve torture or a lingering death" beyond "the mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447 (1890).

123. Electrocution and firing squad are unusual because they are authorized for use in a vanishingly small number of jurisdictions and are rarely used as methods of execution.

a. Only seven states authorize execution by electrocution.[6] Of those seven, electrocution is a back-up in six, meaning it is used only if the prisoner selects it, if other methods are held to be unconstitutional, or if other methods are legally unavailable.[7] South Carolina is the only jurisdiction in the world where a person can be executed by electrocution without selecting that method. The state is in a self-created category of one, reflecting a far stronger national consensus that the punishment is inappropriate than the consensuses that controlled in *Atkins*, *Roper*, *Graham*, and *Miller*.

b. Only four states authorize the use of the firing squad.[8] None use it as a default method of execution.

[6] The seven states are: Alabama, Ala. Code § 15-18-82.1(a); Florida, Fla. Stat. § 922.105(1); Kentucky, Ky. Rev. Stat. § 431.220(b); Mississippi, Miss. Code Ann. § 99-19-51(3); Oklahoma, Okla. Stat. tit. 22, § 1014(C); South Carolina, S.C. Code Ann. § 24-3-530(A); and Tennessee, Tenn. Code § 40–23–114(b).

[7] *See* Ala. Code § 15-18-82.1(a); Fla. Stat. § 922.105(1); Ky. Rev. Stat. § 431.220(b); Miss. Code Ann. § 99-19-51(3); Okla. Stat. tit. 22, § 1014(C); Tenn. Code § 40–23–114(b).

[8] The four states are Mississippi, Oklahoma, South Carolina, and Utah.

c. Electrocution and firing squad are rarely used in practice, and their use declined rapidly after American jurisdictions embraced lethal injection as a more humane method. Since 2010, only two percent of executions in the United States have been by electrocution, compared to 63 percent through the 1980s. Since 1976, there have only been three executions by firing squad in the United States—all in Utah. Firing squad is as uncommon a method of execution as hanging.

124. Electrocution and firing squad are corporal because they mutilate the bodies of those they kill.

a. Electrocution mutilates the body by charring the flesh, cooking and destroying the internal organs, and leaving the shaven corpse marred with burns and bruises—regardless "whether or not the electrocution protocols are correctly followed and the electrocution equipment functions properly." *See Dawson*, 554 S.E.2d at 143 (describing state autopsy reports, which detailed how "the bodies are burned and blistered with frequent skin slippage from the process"); *Mata*, 745 N.W.2d at 278 (holding that electrocution's "proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man"). *See also* Appendices to Exhibit J.

b. Firing squad mutilates the body by exploding the chest with high-powered rifles, leaving holes in the corpse, exposing internal tissue, destroying internal organs, and soaking the prisoner's clothing, the sand bags that surround it, and the ground with blood. *See* Appendices to Exhibit J.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

125. The disjunctive framing of Article I, Section 15 means that punishments are forbidden if they are cruel, corporal, *or* unusual. Plaintiffs pleads that electrocution and the firing squad are cruel, corporal, *and* unusual. But this Court need only agree with Plaintiffs on one to find the challenged method unconstitutional.

Count VII: Requiring a Choice in Which a Prisoner Must "Select" Between One Constitutional and One Unconstitutional Method of Execution Violates the Prisoner's Statutory Right to Elect the Manner of His Execution

126. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

127. The Supreme Court of South Carolina has concluded that, under the current statute, death-sentenced inmates have a right "to elect the manner of their execution." Order, *Sigmon*, No. 2002-024388; Order, *Owens*, No. 2006-038802. According to the Supreme Court, SCDC violates this right under circumstances "in which only a single method of execution is available." *Id.*

128. To satisfy the statute, Defendants must present a death-sentenced inmate with at least two methods of execution on which he can exercise his statutory right of election. In order for that right to be meaningful, both of the methods presented to him must be constitutional. If either of the two options presented to an inmate is unconstitutional, the statutory right of election is rendered meaningless in violation of the statute.

Count VIII: Electrocution and Firing Squad, as Applied to Plaintiff Terry, Violate the South Carolina Constitution

129. Plaintiffs reallege and incorporate herein by reference all preceding paragraphs of this complaint as if set forth in full below.

130. Plaintiff Terry has a unique set of medical conditions that put him at an increased risk for a torturous execution. He has been diagnosed with essential hemorrhagic thrombocytopenia, a rare genetic disorder related to blood cancers; post-herpetic neuralgia, a

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

painful nerve disorder that may develop following a shingles infection; and polyneuropathy of unknown origins. These medical conditions require Terry to take various powerful medications that, inter alia, alter his mental status, change his perception of pain, and increase his risk of unusual and painful bleeding complications. Terry also suffered a serious fracture to his left ankle, which required placement of large screws and metal plates in his left leg, and an equally serious fracture to his right hip, which necessitated a full hip replacement.

131. Under the federal constitution, as-applied method-of-execution claims are judged under the same standard as all other method claims. *Bucklew*, 139 S. Ct. at 1126.

132. South Carolina courts are entirely free to determine a different as-applied test for method of execution claims. *Aladdin's Castle, Inc.*, 455 U.S. at 293. 84. The disjunctive framing of Article I, Section 15 means that punishments are forbidden if they are cruel, corporal, or unusual.

133. As a result of Plaintiff Terry's medical conditions and the medications he is prescribed to manage them, Mr. Terry is at a heightened risk for an unusually painful execution. Specifically, treatment for essential hemorrhagic thrombocytopenia includes the use of hydroxyurea, a powerful medication that increases the risk of unusual bleeding. Mr. Terry is also prescribed various medications to manage his post-herpetic neuralgia and mental health conditions. Those medications, combined with his underlying conditions, affect Mr. Terry's nerves and pain receptors and increase the likelihood of complications and severe pain from an execution by firing squad.

134. On information and belief, SCDC's firing squad protocol will pose a substantial risk of unnecessary pain and suffering for Plaintiff Terry because it fails to adequately account for the risk of a misfire that could cause Terry to slowly and painfully bleed to death. Additionally, on

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

information and belief, the protocol does not adequately account for the possibility of other complications that could arise because of Mr. Terry's unique pharmacological circumstances.

135. Because of Plaintiff Terry's injuries to his hips and ankle, he has a significant amount of metal in his lower extremities. Because metal is a strong conductor of electricity, any attempt to execute Mr. Terry by electrocution would create a dramatically increased risk of fire, sparking, burning of the flesh around the metal implants, and electrical diversion away from Mr. Terry's essential organs and into the metal in his lower extremities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Declare that execution by electrocution is unconstitutional under the South Carolina constitution.
2. Declare that execution by firing squad is unconstitutional under the South Carolina constitution.
3. Declare that execution by electrocution is unconstitutional under the South Carolina constitution as applied to Plaintiff Terry.
4. Declare that execution by firing squad is unconstitutional under the South Carolina constitution as applied to Plaintiff Terry.
5. Grant a permanent injunction prohibiting Defendants from carrying out, or attempting to carry out, any executions by electrocution or the firing squad unless a death-sentenced inmate affirmatively selects that as the method of execution.
6. Grant a permanent injunction prohibiting Defendants from carrying out, or attempting to carry out, any executions by electrocution or the firing squad

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

unless Plaintiffs have a meaningful choice between two constitutional methods of execution.

7. Grant declaratory relief, as requested in this Complaint, to invalidate the statute as applied to Plaintiffs to the extent it forces an individual to be executed by either electrocution or firing squad.

8. Grant declaratory relief, as requested in this Complaint, to invalidate the statute as applied to Plaintiffs as impermissible retroactive legislation, to the extent that it changes the default method of execution from lethal injection to electrocution.

9. Grant declaratory relief, as requested in this Complaint, to invalidate the statute as applied to Plaintiffs because it is ex post facto legislation.

10. Grant declaratory relief, as requested in this Complaint, to invalidate the portions of the statute that are impermissibly vague, or in the alternative, to define the term "available" so as to give parties covered by the amended statute guidance as to the statute's meaning.

11. Grant declaratory relief, as requested in this Complaint, to invalidate the statute to the extent that it effectuates an unconstitutional delegation of legislative power.

12. Grant any further relief as the Court deems just and proper.

ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

Respectfully submitted

Dated: April 11, 2022

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ELECTRONICALLY FILED - 2022 Apr 11 4:06 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FOR THE FIFTH JUDICIAL CIRCUIT
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.	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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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).

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

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:

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

> 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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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."

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

(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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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,

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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).

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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).

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

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[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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

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[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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

(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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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.

ELECTRONICALLY FILED - 2022 Sep 06 4:37 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002306

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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