

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Justice 360,)	CIVIL ACTION NO.: <u>3:20-03671-MGL</u>
)	
Plaintiff,)	
)	COMPLAINT FOR VIOLATIONS
v.)	OF 42 U.S.C. § 1983 AND
)	EQUITABLE, INJUNCTIVE, AND
)	DECLARATORY RELIEF
Bryan P. Stirling, Director of the South Carolina)	
Department of Corrections; and Alan Wilson,)	
South Carolina Attorney General,)	
)	
<u>Defendants.</u>)	

Plaintiff, by and through its attorneys, asserts:

INTRODUCTION

The First Amendment protects professional speech. *See Nat’l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371–72 (2018). The U.S. Supreme Court has affirmed that “when the government polices the content of professional speech, it can fail to ‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” *Id.* at 2374 (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)). Attorneys’ professional speech encompasses their ability to consult experts, communicate with judges, and counsel their clients. South Carolina capital defense attorneys are one such type of professional, and these First Amendment protections apply in full as attorneys discharge these professional duties.

Capital defense attorneys engage in professional speech to protect their clients’ constitutional rights, among other functions. For instance, the Eighth Amendment protects inmates from methods of execution that pose a substantial risk of severe pain if the inmate can identify a

feasible alternative that significantly reduces that risk. *Glossip v. Gross*, 576 U.S. 863, 878 (2015). South Carolina Code § 24-3-530 grants death sentenced inmates the choice between two methods of execution: lethal injection or electrocution. The inmate must make this election in writing before the execution date. But “[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State’s law.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019). Accordingly, to protect their clients’ Eighth Amendment rights, capital defense attorneys must conduct a comparative analysis of a variety of possible execution methods, in consultation with expert witnesses and co-counsel, and advise their clients whether to elect lethal injection or electrocution, whether there are any viable, less painful alternatives, and whether to consider an Eighth Amendment challenge to the state’s proposed methods of execution. Counsel cannot exercise these professional speech rights if Defendants are permitted to shroud in secrecy information about already authorized methods of execution. Most importantly, they cannot carry out the most sacred aspect of their lawyer-client relationships: advising their clients how to die.

Plaintiff Justice 360—a non-profit organization that provides legal representation to death sentenced inmates and information to the public about the administration of the death penalty in South Carolina—brings this action pursuant to 42 U.S.C. § 1983 and § 1988 to challenge, as applied to Justice 360, the constitutionality of South Carolina’s death penalty secrecy statute. Specifically, South Carolina Code provides: “A person may not knowingly disclose the identity of a current or former member of an execution team,” S.C. Code § 24-3-580. The statute has been interpreted in a letter by the South Carolina Attorney General to prohibit disclosure of the “identities of individuals and companies involved in the process of an execution via lethal injection,” Ex. B (Letter from Defendant to Plaintiff dated September 29, 2020 citing SCAG

Opinion, 2015 WL 4699337). The letter relies on an extremely broad reading of the secrecy statute that clearly goes beyond what the plain text of the statute provides.

On September 1, 2020, Justice 360 requested information from Defendants by letter asking, among other things, that Defendants provide their lethal injection and electrocution execution protocols, and state how they plan to carry out the executions of Richard Moore, Brad Sigmon and Freddie Owens (at least one or more of which will likely be scheduled for execution this fall, beginning as early as November). Ex. A (Letter from Justice 360 to Defendant dated September 1, 2020). Defendants responded on September 29, 2020, stating that they do not have any drugs to carry out lethal injection at this time, but indicated that even if they do procure drugs in the future, they do not believe Justice 360 is entitled to know that any of the requested information—including access to execution protocols that had previously provided to counsel for other executions—on the basis of the above statutory provisions, neither of which address execution protocols but rather the identity of the execution team. Ex. B. They also provided no information about the electrocution process

The secrecy statute, the Attorney General letter, and the Department of Correction's interpretation of them more than burden Justice 360's constitutionally protected speech right to counsel and advise its clients—they completely eliminate them. *See NIFLA*, 138 U.S. at 2374. Justice 360s' clients rely on Justice 360 for constitutionally significant advice, and Justice 360 cannot fulfill its function as capital defense attorneys if its ability to fully and competently represent its clients is obstructed. The secrecy statute, as applied to Justice 360, likewise censors Justice 360's ability to subject the method of execution to meaningful adversarial testing and assist the court in making an informed decision as to its constitutionality. Justice 360's First Amendment

rights must be enforced so that the attorney-client relationship is protected and Justice 360's clients' constitutional rights are upheld.

BACKGROUND

1. Although Defendants refuse to provide any information about how they intend to carry out an execution—at least one of which could be scheduled next month—there are several known possibilities, each carrying its own risk of substantial pain and suffering.

Lethal Injection Issues

2. Defendants have indicated that they do not currently possess any drugs to carry out a lethal injection. But Justice 360 reasonably believes Defendants may either manufacture the drugs using a compounding pharmacy, or purchase or acquire the drugs from an unregulated source. There are a variety of drugs that have been or could be used to carry out an execution by lethal injection, and each has specific risks and associated problems—risks that can be exacerbated when assessed in the context of a particular inmate's health and medical history. By withholding information from inmates and their counsel, Defendants ensure that Justice 360 is unable to object to or challenge a particular drug's use as applied to a particular inmate. Such objections or challenges would necessitate an understanding of the drugs' efficacy, testing, storage and procurement in an individualized and informed manner.

3. This is not a new issue for the State of South Carolina. For example, before the D.C. Circuit Court enjoined the Food and Drug Administration ("FDA") from allowing the importation of the apparently misbranded or unapproved execution drug sodium thiopental, *see Cook v. Food & Drug Admin.*, 733 F.3d 1, 4 (D.C. Cir. 2013), South Carolina imported untested sodium thiopental from Dream Pharma, a questionable operation that operated out of the back of the Elgone Driving Academy in London. Procuring drugs from unregulated foreign suppliers

creates a high risk of drug contamination, which in turn creates a high risk of excessively painful execution in violation of the Eighth Amendment. Under Defendants' interpretation of South Carolina law, Defendants are free to resume procuring drugs from dubious, non-FDA approved sources, potentially in violation of state or federal regulation, without informing the inmate whom Defendants intend to execute or his counsel, and without any judicial oversight.

4. Another possibility is that Defendants intend to use chemicals obtained from compounding pharmacies, which are exempt from regulation under the 2013 Drug Quality and Security Act ("DQSA") and subject only to extremely lenient state oversight. This lack of regulation increases the risk of contamination, poor production, and inefficacy of drugs.

5. The DQSA, Public Law 113-54, defines two types of pharmaceutical compounding: traditional and non-traditional. Non-traditional compounders must register with the FDA and acknowledge the jurisdiction and authority of the FDA to inspect their facilities. Traditional compounders, however, do not. If a drug is compounded by a traditional compounder, the FDA does not verify the safety or effectiveness of its preparation, nor the quality of its manufacture. Lethal injection formulations are largely procured from traditional, non-FDA regulated compounding pharmacies. These compounded products remain outside the FDA regulatory system that otherwise ensures the quality of manufactured pharmaceutical drugs.

6. The United States Pharmacopeia ("USP") Convention sets industry standards for compounding pharmaceutical preparations. USP 797 sets forth industry standards for producing compounded sterile preparations. Although many states have adopted USP 797, South Carolina has not.

7. The above factors related to drug production, as well as issues related to drug storage, can result in an inefficient or ineffective drug and are thus also pertinent to a

comprehensive drug analysis. If a chemical formulation has been degraded by the passage of time, its ability to meet its intended use will be considerably weakened, which will impact the effectiveness of the compounded formulation at work within a lethal injection. Without oversight, the drugs could be stored indefinitely and degrade to the point where they lose potency, resulting in a prolonged, agonizing death constituting a violation of the Eighth Amendment. Lack of regulation or oversight also increases the risk that a drug will be contaminated, and the sterility of a drug is also pertinent in evaluating the possibility of extreme pain.

8. Defendants' reliance on the South Carolina secrecy statute to conceal even the most basic information about the method of execution prevents Justice 360 and the expert witnesses it may retain from conducting a drug analysis, rendering the execution less reliable. To facilitate confidence in the information about the source and quality of the drugs, and in particular to inform an assessment of the drugs, Justice 360 and its experts must be able to analyze the potency, stability, osmolarity, pH, sterility, and quality of the lethal injection drugs.

9. Knowledge of the type, source and preparation of a compounded drug provides information about the conditions under which the drug was created, the reputation and skills of the compounding pharmacists, and any history of past regulatory concerns. Expert witnesses require this information to comprehensively assess a drug's fitness and its potential to cause excessive pain. For example, in Arizona, after the state enacted a secrecy statute shielding information about lethal injection drugs from disclosure in 2014, an inmate injected with a solution of midazolam and hydromorphone struggled "like a fish on shore gulping for air" for nearly an hour and forty minutes before dying. The late Senator John McCain stated that the execution amounted to torture.

10. A lack of transparency poses a particular risk for inmates who have various medical conditions, because without knowledge of what the lethal injection chemicals are, it is entirely

unknown whether the medications an inmate has been taking or an inmate's particular condition will cause an adverse reaction, render the chemicals ineffective, or excessively prolong the execution process. A particular protocol may pose a substantial risk of severe pain when evaluated in the context of a particular inmate's health and medical history, but attorneys and expert witnesses are unable to determine this level of risk without knowledge of the lethal injection drugs or any information pertaining to their quality and effectiveness.

11. Clayton Lockett was one of many inmates that suffered a torturous death after the state of Oklahoma refused to release the details of his execution plan in 2014. The executioner (a phlebotomist) attempted to find a suitable vein for over an hour, finally placing the line in Mr. Lockett's groin. After receiving the first of three lethal injection drugs, a supervising physician pronounced him unconscious, and therefore ready to receive the other two drugs that would actually kill him. Those two drugs were known to cause excruciating pain if the recipient was conscious. Mr. Lockett was conscious. Three minutes after the latter two drugs were injected, "he began breathing heavily, writhing on the gurney, clenching his teeth and straining to lift his head off the pillow." Officials then lowered the blinds to prohibit witnesses from seeing what was going on and ordered witnesses to leave the room. The state halted the execution, yet Mr. Lockett died of a heart attack while still in the execution chamber.

12. This was not Oklahoma's first botched execution: When it killed Robyn Parks in 1992, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag until death came, some eleven minutes after the drugs were first administered. *The Tulsa World* reporter Wayne Greene wrote that the execution looked "painful," "scary and ugly." That same year, in Texas, Justin Lee May had an unusually violent reaction to the lethal drugs. According to one reporter who witnessed the

execution, May “gasp[ed], coughed and reared against his heavy leather restraints, coughing once again before his body froze.” Associated Press reporter Michael Graczyk wrote, “Compared to other recent executions in Texas, May’s reaction to the drugs was more violent. He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing, his eyes and mouth remained open.”

13. Just four years ago in Alabama, Ronald Bert Smith, Jr. heaved, gasped and coughed while struggling for breath for 13 minutes after the lethal drugs were administered, and his death was pronounced 34 minutes after the execution began. He also “clenched his fists and raised his head during the early part of the procedure.” Alabama used midazolam in its procedure. And two years prior, in Ohio, Dennis McGuire gasped for air for some 25 minutes while the drugs used in the execution, hydromorphone and midazolam, slowly took effect. Witnesses reported that after the drugs were injected, McGuire was struggling with his stomach heaving and fist clenched, making “horrible” snorting and choking sounds. In a lawsuit filed after the execution, Mr. McGuire’s family alleged that he experienced “repeated cycles of snorting, gurgling and arching his back, appearing to writhe in pain . . . It looked and sounded as though he was suffocating.”

14. In South Carolina, in 1997, death-row inmate Michael Eugene Elkins suffered from various medical conditions. His body had become swollen from liver and spleen problems, and it took nearly an hour to find a suitable vein for the insertion of the catheter. Executioners failed numerous times to find a suitable vein, and Elkins asked the executioners, “Should I lean my head down a little bit?” to assist them in their attempts and probing, before his executioner located a suitable vein in the back of his neck. The execution began at 12:01am, and, almost an hour later, after a prolonged execution, Elkins was pronounced dead at 12:58 am. Ronnie Howard, a death-

row inmate executed in 1999 in Texas, was deemed to have a strong heartbeat more than 15 minutes after the lethal injection process began. It is very likely that both Elkins and Howard experienced excruciating pain during the execution process.

15. South Carolina, invoking the secrecy statute and AG letter, refuses to disclose the drugs it intends to use for executions. Any information whatsoever regarding the type of chemicals utilized is now inaccessible for attorneys who must inform the court and counsel clients about risks of excessive pain and possible violations of the Eighth Amendment. Similarly, South Carolina has refused to disclose the qualifications of those who will prepare the drugs and the inmates for execution, the qualifications of those who will administer the drugs, and how these executioners will administer the drugs during the execution process. Because access to information regarding the type of drugs and the execution protocol is barred by the secrecy statute and AG letter, as interpreted by the Department of Corrections, Justice 360 cannot exercise its professional speech rights and fulfill its ethical and professional responsibilities.

Electrocution issues

16. South Carolina also allows a death sentenced inmate to choose to be executed in the state's electric chair, known as "Old Sparky." Like the secrecy surrounding lethal injection, a great deal of information about South Carolina's electrocution procedure, and the physiological effects that procedure might have, is unknown. The Department of Corrections has refused to provide that information to attorneys at Justice 360, citing the secrecy statute and AG letter. Defendants' refusal to provide any information at all about the execution process is of great concern given past incidents and issues with electric chair executions—and the fact that the last electrocution occurred in 2008. *Death Row/Capital Punishment*, South Carolina Department of Corrections, (last visited Oct. 19, 2020), <http://www.doc.sc.gov/news/deathrow.html>.

17. States that previously used the electric chair, including South Carolina, moved to lethal injections in the wake of “gruesomely botched electrocutions.” And several states have found electrocution to be an unconstitutional form of execution under their state constitutions. The Georgia Supreme Court held that “death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment in Art. I, Sec. I, Part XVII of the Georgia Constitution.” *Dawson v. State*, 274 Ga. 327, 335 (2001). The Nebraska Supreme Court found that they could “no longer rely on the factual assumptions implicit in the U.S. Supreme Court precedent pertaining to the constitutionality of execution by electrocution.” *State v. Mata*, 275 Neb. 1, 38–39 (2008). Rather, based on evidence presented to the court of a “nature and quality that the Supreme Court never considered when it held electrocution was not cruel and unusual punishment, we cannot rationally defer to federal precedent.” *Id.* at 39. The evidence showed that instantaneous loss of brain function was highly unlikely, and that “deeper parts of the brain controlling consciousness and respiration could function even if some parts are damaged.” *Id.* at 60. “[A]fter an electrocution, there is no medical evidence of massive damage in the brain, which would indicate instantaneous death, or total loss of neuron function.” *Id.* at 60–61.

19. Evidence also shows that the claim that electrocution is virtually painless and leads to a rapid death is almost certainly wrong. See Harold Hillman, *The possible pain experienced during execution by different methods*, 22 Perception 745 (1992). “Death from electrocution could be due to asphyxia caused by paralysis of respiration, and to ventricular fibrillation.” *Id.* at 748 (citing T. Bernstein, *Theories of the causes of death from electricity in the late 19th century*, 9 Medical Instrumentation, 267–73 (1975)). “If so, several seconds or minutes could elapse during which the condemned person could be conscious.” *Id.* “The perceived absence of the normal

signs of severe pain is often due to these signs being masked by the procedure, or to the condemned person being physically restrained from demonstrating them, or to their being similar to those seen during dying. Therefore, the absence of signs of severe pain does not provide sufficient evidence for us to decide whether or not it occurs.” *Id.* at 751.

20. In addition to this study, Dr. Hillman has also testified that “contrary to representations by proponents of death by electrocution, large electrical shocks have never been shown to induce anesthesia, before unconsciousness . . . In order for consciousness to be lost, or nerve activity destroyed, the electrical current would have to penetrate the brain.” But during electrocution, an individual’s brain is “incapacitated through [the] relatively slow process of heating up by the passage of electricity through the body. In short, the brain literally cooks until death occurs.” Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 Wm. & Mary Bill Rts. J. 185, 198 (1992) (quoting Aff. of Dr. Harold Hillman at 1–3, *Poyner v. Murray*, 113 S. Ct. 419 (1992) (No. 92-5461) (cert denied)).

21. In testimony in affidavits filed in the U.S. Supreme Court, Dr. Orrin Devinsky (experienced in the field of neurology and on the effects of electrocution on human body) said that “there is no evidence that intentional electrocution is either painless or humane. To the contrary, all credible scientific evidence indicates the opposite.” *Id.* at 197–98 (quoting Aff. of Dr. Orrin Devinsky, *Poyner v. Murray*, 113 S. Ct. 419 (1992) (No. 92-5461)) (cert denied).

22. In practice, the electric chair has led to condemned inmates living for as long as seventeen minutes during electrocutions, requiring several shocks to complete the execution. Timothy S. Kearns, *The Chair, the Needle, and the Damage Done: What the Electric Chair and the Rebirth of the Method-of-Execution Challenge Could Mean for the Future of the Eighth Amendment*, 15 Cornell J.L. & Pub. Pol’y 197, 220 (2005).

23. Testimony from a French scientist familiar with physiological effects of electricity which concludes: “In every case of electrocution . . . death inevitably supervenes but it may be very long, and above all, excruciatingly painful. I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be. In certain cases death will not have come about even though the point of contact of the electrode with the body shows distinct burns. Thus, in particular cases, the condemned person may be alive and even conscious for several minutes without it being possible for a doctor to say whether the victim is dead or not. . . This method of execution is a form of torture.” Nugent, *supra*, at 197. Human beings vary enormously in their powers of resistance to electrocution, which depends upon the strength of current and not upon voltage pressure. Kearns, *supra*, at 220.

24. In 1990, the state of Florida quite literally burned a man to death. During the execution by electric chair, six-inch flames erupted from Jesse Joseph Tafero’s head, and three jolts of power were required to stop his breathing. State officials claimed that the botched execution was caused by the inappropriate substitution of a synthetic sponge for a natural sponge that had been used in previous executions. Seven years later, Florida repeated their mistake with Pedro Medina, using the incorrect sponge and causing foot-high flames to shoot from the headpiece, filling the chamber with smoke and gagging the executioners. Medina’s chest continued to heave until the flames stopped and death came. And just two years after that, the state horribly botched yet another execution: Before Allen Lee Davis was pronounced dead, “the blood from his mouth had poured onto the collar of his white shirt, and the blood on his chest had spread to about the size of a dinner plate, even oozing through the buckle holes on the leather chest strap holding him to the chair.”

25. Florida is not the only state with horrifyingly botched electrocutions: in 1984, Georgia allowed a six-minute break in between the first and second volts to allow Alpha Otis Stephen's body to "cool" so they could examine him to determine if he was still alive. In this time, he struggled to breath, taking 23 breaths. A year prior, in Alabama, John Evans suffered immeasurably when sparks and flames erupted from the electrode attached to his leg, which then burst from the strap holding it in place and caught on fire. Smoke and sparks also came out from under the hood in the vicinity of Evans's left temple. Two physicians entered the chamber and found a heartbeat. The electrode was reattached to his leg, and another jolt of electricity was applied. This resulted in more smoke and burning flesh. Again, the doctors found a heartbeat. Ignoring the pleas of Evans's lawyer, a third jolt of electricity was applied. The execution took 14 minutes and left Evans's body charred and smoldering. Since 1912 when South Carolina began executing condemned prisoners by electrocution there have also been numerous instances where there was a malfunction and the person being executed was not just killed but tortured.

26. Electrocutation is making a comeback in several other states due to the persisting issues with lethal injection as a method of execution. Since Tennessee resumed executions in August 2018, five of seven inmates have chosen the electric chair as their method of execution. Jonathan Mattise and Kimberlee Kruesi, *Ultimate choice: Tennessee inmates wrestle with how to die*, *The Tennessean* (February 19, 2020, 5:00 AM), <https://www.tennessean.com/story/news/crime/2020/02/19/tennessee-inmates-wrestle-how-die-nicholas-sutton-execution-electric-chair/4800512002/>. Public defender Kelley Henry said in an interview with *The Tennessean*: "We know that electrocutions have failed. We know that flames could erupt at any moment. We know that the organs are burned . . . But is it better to experience

one to five minutes of an electrocution than a potential 15- to 20-minute lethal injection? Who can know?” *Id.*

27. Given these facts, inmates are left with the impossible choice of electing between methods they know nothing about. Henry explained that one complicating factor is that that if inmates speak publicly about the decision, “it could be misconstrued as exercising a choice and thus a waiver of their right to challenge what are unquestionably torturous forms of execution.” *Id.* Justice 360 is left with the equally impossible task of advising their clients and the court as to the risks of the execution methods in an informational vacuum.

JURISDICTION AND VENUE

28. This case arises under the United States Constitution and presents a federal question within this Court’s jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). This action is brought pursuant to 42 U.S.C. § 1983.

29. This Court has authority to grant declaratory relief pursuant to 28 U.S.C. § 2201(a) and § 2202.

30. Venue is proper under 28 U.S.C. § 1391(b). All Defendants are being sued in their official capacity, and their official places of business are all located within the State of South Carolina. The events giving rise to this Complaint are part of an unconstitutional state policy custom, and practice.

PARTIES

31. Plaintiff Justice 360 was established in 1988 as one of a number of Death Penalty Resource Centers initially funded by the Administrative Office of the United States Courts. Originally called the South Carolina Death Penalty Resource Center, the center was renamed

Justice 360 in 2016. Justice 360 is a non-profit organization whose mission is to promote fairness, reliability and transparency in the criminal justice system for individuals facing the death penalty.

32. Justice 360 represents individual death row inmates at all levels of the appellate process. Justice 360 also provides resources and support for other lawyers tasked with representing capital defendants.

33. Justice 360 advocates for policy change to address systemic flaws in the criminal justice system and educates the public to raise awareness about the administration of capital sentencing. In its capacity as an educational resource for attorneys and the public, Justice 360 offers consulting services, training programs and resource materials designed to give capital defense teams the tools they need to advocate effectively for their clients. Justice 360 engages in policy research and other joint projects with educational institutions, and provides services, including speaking publicly and publishing brochures, designed to help non-lawyers understand the issues involved in the administration of South Carolina's death penalty. Given the breadth of services that Justice 360 provides, it simultaneously functions as a legal service and as an educational and political non-profit organization.

34. Defendant Bryan P. Stirling is the Director of the South Carolina Department of Corrections ("SCDC") and is being sued in his official capacity. The SCDC has the authority to order the disclosure of the information sought by Justice 360.

35. Defendant Alan Wilson is the Attorney General of South Carolina. Upon information and belief, the Attorney General's office under Wilson's direction has the authority to review the SCDC's public records and disclosures.

**VIOLATION OF THE FIRST AND EIGHTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION**

36. Justice 360 incorporates by reference the allegations of paragraphs 1 through 35 as though fully set forth herein. Justice 360 has an affirmative, enforceable right under the First Amendment to engage in professional speech with its clients, expert witnesses, and ultimately the court. The secrecy statute, as interpreted by the Attorney General and the SCDC, impermissibly burdens this right and prevents Justice 360 from communicating with its clients, consulting expert witnesses, and assessing and ultimately bringing a challenge in court. To the extent the court determines that the SCDC's interpretation of the statute violates the canon of constitutional avoidance, it is free to give a narrower reading to the plain language of the code, and to order disclosure of the sought-after information to Justice 360.

I. The secrecy statute burdens Justice 360's ability to communicate with clients.

37. Without detailed information about a proposed execution protocol and the benefit of expert analysis, Justice 360 cannot perform its essential role and counsel clients about the risk of pain a particular protocol entails, including with regard to a client's particular medical condition. Justice 360's clients depend on this specialized advice in order to make important decisions, including whether to elect lethal injection or electrocution, and whether to bring an Eighth Amendment challenge to Defendants' proposed methods of execution. Whether a particular method of execution violates the Eighth Amendment depends on how that method compares to feasible, readily implemented alternatives, but without adequate information, Justice 360 cannot assess the comparative risks of alternative methods or advise its clients regarding whether any alternative method (e.g., the firing squad, which has been proposed in other jurisdictions) is likely to "significantly reduce[] a substantial risk of severe pain." *Bucklew*, 139 S. Ct. at 1127.

38. Lawyers are bound by the professional rules of responsibility, which obligate lawyers to inform clients about the practical implications of their legal rights, and to zealously

advocate their clients' position under the rules of the adversary system. *See South Carolina Rules of Prof'l Conduct, Preamble: A Lawyer's Responsibilities* 407(2) (2020). Full compliance with the rules of professional responsibility is critical because these rules serve a variety of important functions, including promoting fairness to litigants, safeguarding the integrity of judicial proceedings, and enhancing public confidence in the judicial system. *See id.* at 407(6).

39. The secrecy statute, as interpreted by the Attorney General and the SCDC, impairs Justice 360's ability to comply with its ethical obligations. Secrecy suppresses attorneys' ability to have full and frank, constitutionally protected conversations within the attorney-client relationship, and restricts their ability to advocate their clients' position to others in accordance with the rules of professional responsibility. Because attorneys working for Justice 360 cannot comply with their ethical obligations to its clients—and therefore cannot satisfy the regulatory requirements that the State imposes on attorneys' professional speech—without knowledge of the subject matter of their clients' rights and potential claims, Defendants' policy imposes a substantial burden on Justice 360's right to free speech. *See NIFLA*, 138 S. Ct. at 2373 (restrictions on professional speech that impose more than "incidental burdens" violate the First Amendment).

II. The secrecy statute burdens Justice 360's ability to communicate with experts.

40. Without vital information about a proposed method of execution, Justice 360 cannot communicate with expert witnesses because they are unable to assess the potential effectiveness of the drug sequencing or the risks of serious pain, including with regard to how the drug may interact with an inmate's particular medication or health condition. An expert witness cannot evaluate the fitness of the drug for its intended use without access to information regarding the source of the drug, as well as the makeup and qualifications of the execution team. The same is true with regard to electrocution: Without detailed knowledge of the electrocution protocol, an

expert witness cannot assess the likely physiological effects, degree or length of pain, or likelihood of a substantial risk of severe pain.

41. The many unknowns surrounding execution via electrocution, together with Defendants' secrecy regarding its possible lethal injection procedures, prevent Justice 360 and its expert witnesses from comparing both methods to each other and to possible alternatives such as the firing squad. Justice 360 and its experts are thus unable to evaluate whether either method amounts to cruel and unusual punishment prohibited by the Eighth Amendment and are unable to advise death sentenced inmates about their legal rights and choices.

42. When secrecy prevents inmates from challenging critical aspects of their own executions, the Eighth Amendment protection loses its effect because attorneys are unable to utilize expert witness opinions to measure whether one method of execution is constitutional or should be replaced by another feasible and readily implemented method. Preventing Justice 360 from accessing information central to the subject matter of litigation suppresses Justice 360's protected speech.

III. The secrecy statute burdens Justice 360's ability to assess whether its clients' constitutional rights are in jeopardy.

43. Justice 360 has an affirmative, enforceable right of professional speech under the First Amendment to litigate the intrusion upon the Eighth Amendment on its clients' behalf. Justice 360's mission is to ensure that inmates have adequate representation when facing the death penalty when there is a non-frivolous cause of action. The burden is on the inmate, through his attorney, to ensure the protection of his own constitutional rights by initiating litigation where necessary. But without adequate access to information, Justice 360 is unable to assess whether its clients' constitutional rights are at risk, and is thus unable to determine whether it should pursue their claims in court.

44. To avoid mere speculation, attorneys require vital information about the method of execution in order to evaluate whether a claim is colorable *before* informing the court. Without full information regarding the nature and the source of the lethal chemicals and the process for administering them, the procedure for electrocution, the likely effects the individual will experience, and the likelihood of a botched execution, Justice 360 cannot conduct the necessary legal work to determine whether an inmate's case has sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Accordingly, Justice 360 is deprived of its First Amendment right to exercise its right to professional speech.

IV. The secrecy statute burdens Justice 360's ability to advocate for its clients in court.

45. By depriving Justice 360 of access to information critical to its clients' rights, the State impedes Justice 360's First Amendment right to vindicate its clients' constitutional protections in court. Without robust accurate information, Justice 360 cannot, satisfy its clients' burden of informing the judge about the Eighth Amendment risks a particular method of execution poses, because Justice 360s cannot bring claims based on speculation. *Baze v. Rees*, 553 U.S. 35, 53–54 (2008) (plurality opinion).

46. Limiting the range of permissible attorney speech obstructs the Court's ability to make an informed decision on the constitutionality of the protocol and merits of the case, impairing the judge's duty to promote public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety under Rule 1.2 of the Model Code of Judicial Conduct. Without precise and specific information, Defendants may intrude so far as to inhibit a judge from preventing a violation to an inmate's Eighth Amendment rights by allowing a cruel and unusual, excessively painful execution.

47. As a political, non-profit public-interest organization, Justice 360 has the right to facilitate judicial participation and oversight in the lethal injection and electrocution process to deter government misconduct, prevent wrongdoing, and ensure humane executions under the Eighth Amendment.

V. *The secrecy statute burdens Justice 360's ability to communicate with other lawyers.*

48. Secrecy prevents Justice 360 from communicating with opposing counsel to negotiate a settlement agreement that would safeguard its clients' rights, and also prevents Justice 360 from communicating with other lawyers who may cooperate with Justice 360 and enrich its understanding of its clients' constitutional claims. Effective advocacy for the inmates facing execution is undeniably enhanced by group association among other lawyers and is essential to carry out Justice 360's mission.

VI. *The secrecy statute burdens Justice 360's political and associational rights.*

49. Lastly, lack of information about the electrocution procedure and the denial of access to the details of the lethal injection protocol encroaches on Justice 360's political and associational rights. In *NAACP v. Button*, the U.S. Supreme Court established that lawful advocacy, including litigation, against government intrusion is a constitutionally protected form of political expression. 371 U.S. 415, 437 (1963); *see also id.* at 429 (“[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.”). Justice 360 is an expressive association because its purpose is to use litigation and other forms of constitutionally protected advocacy to reform policies and practices in capital proceedings. Justice 360 has the right to carry out these expressive activities by associating with the court, other lawyers, expert witnesses, and its clients.

VII. Defendants' have no legitimate interest in secrecy.

50. No proper basis exists for defendants to abridge Justice 360's constitutional rights guaranteed by the First and Eighth Amendments. The Attorney General's interpretation of the secrecy statute is absurd and refuted by its plain language.

51. Even if Defendants' interpretation of the state statute is correct, the law is not narrowly tailored to serve a compelling government interest. Since the law impermissibly burdens Justice 360's protected speech, the statute is subject to strict scrutiny. It fails strict scrutiny's tailoring requirement for at least five reasons: (1) purported fears of harassment and retaliation are unsubstantiated and overblown, especially when measures can be taken to protect the particular executioners involved in the execution; (2) protecting private entities from reputational and economic injury is not a cognizable state interest; (3) the stated nexus between secrecy and ability to carry out death sentences is speculative and a mere matter of administrative convenience; (4) suppressing First Amendment freedoms to protest is not a cognizable state interest, there is no compelling government interest here; and (5) whatever interest the state has in secrecy can be avoided by narrowly construing it under the cannon of constitutional avoidance to ensure it does not prohibit disclosure of the necessary information.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and:

- (a) Declare that Plaintiff is engaged in professional speech protected by the First Amendment to the United States Constitution to engage in speech with the court and clients about the source, composition, and quality of the lethal injection drugs that have been, are, or will be used in executions, as well as

the qualifications of the team members selected to perform the execution, as well as the information sought related to the electrocution protocol;

- (b) Declare that Plaintiff has a First Amendment right to political speech with the public about the source, composition, and quality of the lethal injection drugs that have been, are, or will be used in executions, as well as the qualifications of the team members selected to perform the execution, as well as the information sought related to the electrocution protocol;
- (c) Declare that Plaintiff has an associational right protected by the First and Eighth Amendments to engage and counsel its clients and the court in ensuring that society's standards of decency continue to "evolve," protecting its clients' Eighth Amendment rights; and safeguarding the judiciary's ability to complete its proper function of evaluating the constitutionality of lethal injection protocol as well as the electrocution protocol;
- (d) Declare that Plaintiff has the right to know the details of the lethal injection protocol, including the source, composition, and quality of its lethal injection drugs, as well as the qualifications of the team members selected to perform executions;
- (e) Declare Plaintiff has the right to know the details of the execution protocol, including the amperage, voltage, electrodes, the means of ensuring accuracy, whether it has a line-of-sight, whether and what the "back off" plan is, the qualifications of the execution members, how the DOC will

ensure the inmate has died, and other details of the protocol pursuant to Justice 360's request;

- (f) Declare South Carolina Code § 24-3-580 is unconstitutional as applied to Justice 360 and enjoin enforcement of the Code as applied to Justice 360, or, in the alternative, declare under the canon of constitutional avoidance that SCAG Opinion, 2015 WL 4699337 and the South Carolina Department of Correction's interpretation of is improper and should be invalidated;
- (g) Order a judicial inspection of the execution facilities;
- (h) Order Defendants to pay Plaintiff's costs and attorney fees pursuant to 42 U.S.C. § 1988; and
- (i) Grant Plaintiff such other and further relief as the Court deems just and proper.

October 19, 2020

RESPECTFULLY SUBMITTED

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Columbia, South Carolina.

EXHIBIT A

September 1, 2020

Bryan P. Stirling
Director, South Carolina Department of Corrections
PO Box 21787
Columbia, SC 29210

Re: South Carolina Department ("SCDC") of Corrections Execution Protocols

Dear Bryan:

We represent three death row inmates whose cases are nearing the end of their judicial appellate review proceedings: Richard Moore, Brad Sigmon, and Khalil-Divine Black Sun-Allah (FKA Freddie Owens). Each of these individuals has been denied relief in the Fourth Circuit Court of Appeals and will be seeking review by the Supreme Court of the United States in the coming weeks and months. Given the low number of cases that receive Supreme Court review, it is likely one or more of our clients will have execution dates set in the late fall or winter.

In anticipation of these likely execution dates, we write to ask you to provide us with the following information, which is necessary for us to adequately advise our clients regarding their choice of execution method pursuant to S.C. Code § 24-3-530 and to fulfill our duties to provide them with adequate legal representation.

- The SCDC **lethal injection directive or protocol** (current and/or as proposed to be in place at the time of the upcoming executions) and related information, including, but not limited to:
 - The type(s) of lethal injection drug(s) to be used;
 - The supplier(s) and/or compounder(s) of the lethal injection drugs (and any supplier(s) of components to be used in compounding) and the date or dates on which the drugs were manufactured;
 - Information about quality control measures used to ensure the purity and efficacy of the lethal injection drugs, including the results of any tests or analyses performed on the drugs;
 - Information about storage and handling of the lethal injection drugs, including, but not limited to: all current and past storage locations; temperature controls in the storage locations and any vehicles used for transport; light control measures in the storage locations and any vehicles used for transport; the chain of custody for the drugs; and the job titles and qualifications of all personnel with access to the storage location;

- The expiration dates of lethal injection drugs to be used in the executions, including, if relevant, the expiration dates of any stabilizing compounds and the expiration dates of the active execution drug or drugs;
 - The mechanism or formula to be used for determining dosages and rates of drug administration for individual condemned men;
 - Whether and how SCDC medical or other staff will conduct physical examinations of the condemned men prior to execution to identify any possible issues in administering the lethal injection drugs (*i.e.*, IV placement concerns) and/or medical issues that could affect the efficacy and or pain caused by the lethal injection drug(s); and
 - Whether and how SCDC medical or execution staff will monitor the condemned men during the lethal injection process to ensure the lethal injection drugs work as intended, including whether observers will be provided a line of sight to the condemned men, and what, if any, remedial steps SCDC will implement if the execution process appears to be compromised or ineffective.
 - Whether and what measure will be taken to ensure that inmate's counsel or other representative present at an execution will be able to communicate with outside authorities, including court personnel, in the event the lethal injection process does not appear to be working as intended, to seek the intervention of these authorities.
- The SCDC **electrocution directive or protocol** (current and/or as proposed to be in place at the time of the upcoming executions) and related information, including, but not limited to:
 - Information regarding the current operability of the electric chair, including the dates and nature of any repairs, modifications, or upgrades to the chair since its last use; the location and condition of the storage facility where the chair has been housed since its last use; and the dates and nature of any examinations or inspections of the chair since its last use;
 - Information regarding the current intended to be administered, the voltage intended to be administered, and how such voltage will be administered and for what length(s) of time to the condemned men, and the safety measures taken to ensure the electrocution will not result in a substantial risk of severe pain to the condemned men;
 - Information regarding any testing or proposed testing of the electric chair since its last use, including: the nature of the tests (e.g. use of live mammals, any electronic or electrical testing equipment, etc.); the results of any testing including raw data; and details and results of any additional testing contemplated before use;
 - Whether and how SCDC medical or other staff will conduct physical examinations of the condemned men prior to execution to identify any possible issues in administering the electric chair and/or medical issues that could impact the efficacy of the electric chair;
 - Whether and how SCDC medical or execution staff will monitor the condemned men during the electrocution process to ensure the electric chair works as intended, whether and what the "back off" plan is should the process not work as intended; and what, if any, remedial steps SCDC will implement if the execution process appears to be compromised or ineffective.

- Whether and what measure will be taken to ensure that inmate's counsel or other representative present at an execution will be able to communicate with outside authorities, including court personnel, in the event the lethal injection process does not appear to be working as intended, to seek the intervention of these authorities.
- Information of the following as it relates to both lethal injection and electrocution execution protocols:
 - Job titles and numbers of personnel to make up the execution team, including the titles and number of any SCDC staff, the titles and number of any federal, state, and local law enforcement officers, and the titles and number of any individuals hired on a contractual basis;
 - The professional qualifications of the execution team;
 - All documents describing the functions that will be performed by SCDC staff and any contractors who will participate in the executions;
 - The level of training received by each member of the execution team;
 - Details of any training received and/or proposed for members of the execution team; and
 - The price paid for any lethal injection drugs or materials used in lethal injection or electrocution, or, if any materials are donated, the fact of their donation.
- The following information as it relates to COVID-19 and executions by lethal injection or electrocution in the custody or control of SCDC:
 - Any modifications to the protocols and/or witness access planned due to the COVID-19 pandemic;
 - All records that relate to COVID-19 testing statistics at Broad River Correctional Facility, including the number of tests administered to prisoners and staff; the statistical results of those tests; the dates the tests were administered; the number of staff who tested positive who are included in the execution team; and
 - All documents or materials pertaining to any contact tracing and other steps taken by SCDC to identify staff and prisoners who may have been exposed to individuals infected with COVID-19 before any planned executions.

Thank you in advance for your assistance in this matter.

Sincerely,



Lindsey S. Vann
Hannah L. Freedman
Justice 360

Joshua Snow Kendrick
Kendrick & Leonard, PC

Rob Lee
Attorney-at-Law

Counsel for Richard Moore

Counsel for Brad Sigmon

Counsel for Freddie Owens

EXHIBIT B



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Safety, Service, and Stewardship

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

September 29, 2020

Justice 360
Ms. Lindsey S. Vann and Ms. Hannah L. Freedman
900 Elmwood Ave., Suite 200
Columbia, SC 29201

Kendrick & Leonard, PC
Mr. Joshua Snow Kendrick
1522 Lady St., Suite A
Columbia, SC 29201

Mr. Rob Lee
Attorney-at-Law
111 Witcover Street
Marion, SC 29571

Re: South Carolina Department (SCDC) of Corrections Execution Protocols

Dear Ms. Vann, Ms. Freedman, Mr. Kendrick and Mr. Lee:

Director Stirling asked that I review and respond to your correspondence of September 1, 2020. We appreciate you informing SCDC that Richard Moore, Brad Sigmon, and Freddie Owens are nearing the end of their judicial appellate review proceedings. The Attorney General's Office has given a similar timeframe for possible notices.

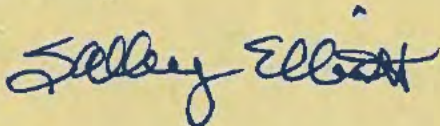
You have asked for the protocols for lethal injection and electrocution. First, as you are probably aware, we have publicly indicated that we do not have any of the drugs in our possession to perform an execution by lethal injection. Information about suppliers/and or compounders of the lethal injection drugs and information about security and medical personnel is not to be released given SCAG Opinion, 2015 WL 4699337. S.C. Code Section 24-3-580 prohibits the disclosure of the execution team member's identity or identifying information. The Attorney General opinion clarifies the meaning of "member of an execution team" broadly construing those terms and protecting the identities of individuals and companies involved in the process of an execution via lethal injection. We do not agree that you are entitled to the information you have requested. If you have authority for your request, please provide it to me.

Ms. Vann et al.
September 29, 2020
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The SCDC protocols to carry out an execution, whether by lethal injection or electrocution, have been developed and implemented over the years with the safety and security of all involved in mind. We continue to look at our processes in light of COVID-19. As you would agree, preventive measures to contain this disease have been quickly evolving. SCDC does have an extensive COVID-19 protocol that is on our website. We are also working on updating any preventive measures to be used during an execution during COVID-19.

Please forward any future correspondence related to execution protocols to me. If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Salley Elliott". The signature is written in a cursive style with a small mark above the 'i' in Elliott.

Salley W. Elliott
Chief Legal and Compliance Officer

cc: Mr. Bryan P. Stirling, Director of the South Carolina Department of Corrections
Honorable Alan Wilson, South Carolina Attorney General