

**MEDIEVAL METHODS IN MODERN TIMES: THE CONSTITUTIONALITY OF  
SOUTH CAROLINA’S SENATE BILL 200 AND THE CREATION OF A FIRING  
SQUAD AS A MEANS OF EXECUTION**

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I. INTRODUCTION.....	446
II. BACKGROUND.....	447
A. <i>Constitutionality of Capital Punishment</i> .....	447
B. <i>Constitutional Methods for Inflicting Capital Punishment</i> .....	450
III. SOUTH CAROLINA’S SENATE BILL 200.....	452
A. <i>Previous Bills Attempting to Reform South Carolina’s Execution Methods</i> .....	452
B. <i>Introduction and Procedural History of Senate Bill 200</i> .....	455
IV. ANALYSIS.....	457
A. <i>South Carolina’s Department of Corrections Has Minimal Information to Create the Policies and Procedures Necessary for the Implementation of a Firing Squad</i> .....	457
B. <i>Senate Bill 200 Creates Potential Constitutional Violations</i> .....	464
1. <i>Lack of Medication to Reduce Pain</i> .....	464
2. <i>Inability to Determine the Level of Pain from a Gunshot Wound</i> .....	466
3. <i>The Time Between the Infliction of the Gunshot Wound and the Inmate’s Death is Unknown</i> .....	467
4. <i>South Carolina’s Law Enforcement Officers Tasked with Executing Inmates Experience Mental Turmoil and Trauma from Inflicting Capital Punishment</i> .....	469
V. CONCLUSION.....	470

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## I. INTRODUCTION

Although more than a decade has passed since the last firing squad execution in the United States, Richard Bernard Moore, a prisoner on South Carolina's death row, was given only two options when his execution date approached in April 2021—death by electrocution or death by firing squad.<sup>1</sup> The South Carolina Department of Corrections (SCDC) has conducted a total of 284 executions since the Department began documenting executions in 1912.<sup>2</sup> The particular methods for conducting these executions includes 248 electrocutions and 36 lethal injections, with the last electrocution occurring in 2008 and the last lethal injection execution conducted in 2011.<sup>3</sup> South Carolina's twelve-year moratorium on executions is reflective of a national trend.<sup>4</sup> The halt in executions is a direct result of the lack of availability of the medications necessary to carry out lethal injection executions.<sup>5</sup> Some state legislatures, such as Virginia's, have chosen to abolish the death penalty, finding the system "fundamentally flawed[,] . . . inequitable, [and] ineffective."<sup>6</sup> South Carolina's legislature, on the other hand, has created an alternative method to inflict capital punishment and lift the moratorium on executions.<sup>7</sup>

South Carolina's legislature, through passing Senate Bill 200, introduced execution by firing squad as an available method for the infliction of capital punishment.<sup>8</sup> As lethal injection drugs are widely unavailable, the passage of Senate Bill 200 has restricted an inmate's choice of execution method to either

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1. See *A South Carolina Death Row Inmate Picks a Firing Squad Over the Electric Chair*, NAT'L PUB. RADIO (Apr. 16, 2022), <https://www.npr.org/2022/04/16/1093193580/firing-squad-south-carolina> [<https://perma.cc/L77Y-648Q>].

2. *Death Row/Capital Punishment*, S.C. DEP'T OF CORR., <http://www.doc.sc.gov/news/deathrow.html> [<https://perma.cc/5AHN-X34U>].

3. See *id.*

4. See Maurice Chammah & Tom Meagher, *How the Drug Shortage has Slowed the Death-Penalty Treadmill*, THE MARSHALL PROJECT (Apr. 12, 2016), <https://www.themarshallproject.org/2016/04/12/how-the-drug-shortage-has-slowed-the-death-penalty-treadmill> [<https://perma.cc/8GNN-VYJ3>].

5. See *id.*; Elizabeth T. French, Note, *Making Executioners out of Pharmacists: Why South Carolina Should Not Adopt a Lethal Injection Secrecy Statute*, 72 S.C. L. REV. 971, 983 (2021).

6. *Virginia Abolishes the Death Penalty*, EQUAL JUST. INITIATIVE (Mar. 24, 2021), <https://eji.org/news/virginia-death-penalty-abolition/> [<https://perma.cc/6LBC-XYPK>].

7. See Peter Wade, *S.C. Death Row Prisoners Will Soon Have to Choose Between Firing Squad or Electrocution*, ROLLING STONE (May 6, 2021), <https://www.rollingstone.com/politics/politics-news/s-c-death-row-prisoners-will-soon-have-to-choose-between-firing-squad-or-electrocution-1166157/> [<https://perma.cc/Z264-U8PZ>].

8. S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

electrocution or the newly formed firing squad without any policies or procedural safeguards in place.<sup>9</sup> In response to this dilemma, the South Carolina Supreme Court halted executions until SCDC could create a viable firing squad.<sup>10</sup> The court's intervention reveals that both South Carolina's legislature and Governor Henry McMaster failed to consider the possible constitutional violations that would occur through the implementation of a firing squad.

This note will examine the Eighth Amendment implications of South Carolina's adoption of the firing squad as a means of execution. Readers of this Note should consider how the implementation of a firing squad as a method of execution will impact the physical and emotional experience of an inmate forced to experience it, which includes: a lack of medication as a sedative or for pain, the scientific inability to gauge the level of pain experienced from a gunshot wound, the unknown length of time from the initial gunshot wound to pronouncement of death, and the potential for a botched execution. More broadly, readers should further consider how a firing squad will affect those tasked with physically performing the procedure and how the implementation of this execution method could influence other state legislatures to introduce a similar method due to the nationwide shortage of lethal injection drugs.

## II. BACKGROUND

### A. *Constitutionality of Capital Punishment*

Over the past forty-seven years, South Carolina has participated in and supported the imposition of the death penalty.<sup>11</sup> However, as lethal injection drugs became extremely difficult to procure, the implementation of capital punishment within the Palmetto State has slowed to a grinding halt.<sup>12</sup> Before analyzing the current and changing landscape of capital punishment in South Carolina, it is necessary to first examine the United States Supreme Court cases that have shaped the specific policies and procedures for capital punishment cases in the modern era.

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9. *See id.*; Wade, *supra* note 7.

10. *Sigmon v. South Carolina*, No. 2021-000584 (S.C. June 16, 2021); *see* Jamiel Lynch & Travis Caldwell, *South Carolina Court Halts Executions Until the State's New Firing Squad Option is Finalized*, CNN (June 16, 2021), <https://www.cnn.com/2021/06/16/politics/south-carolina-firing-squad-executions-halted/index.html> [<https://perma.cc/H92X-9ACK>].

11. *See* John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL'Y 183, 183 (2016).

12. *See* Chammah & Meagher, *supra* note 4.

*Furman v. Georgia*, decided in 1972, embodies the Supreme Court's first, and only, declaration of the unconstitutionality of capital punishment in our criminal justice system.<sup>13</sup> In a 5-4 decision, the majority held that "the imposition and carrying out of the death penalty" for defendants charged with murder or rape, "constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."<sup>14</sup> Justice Brennan, writing a separate concurrence in support of the judgment, elaborated that "[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily."<sup>15</sup> Further, he compared the imposition of the death penalty as "little more than a lottery system" that picks and chooses the lives that cease to exist and those that continue within the confines of a prison cell.<sup>16</sup> Justice Brennan's concurring opinion "arose from the fact that the death penalty was imposed in only a fraction of cases in which it was legally available and the Justices could divine no rational basis explaining why some offenders were sentenced to death while others were spared."<sup>17</sup> Justice Brennan's statements encapsulated the growing concern that juries may have not only implicit biases, but also implicit racial biases.<sup>18</sup> Thus, either or both forms of bias could impact the jury's determination of whether to impose the death penalty.<sup>19</sup> Despite progress towards the abolishment of the death penalty, "no clear consensus emerged [among the Justices] as to why the death penalty, which had been upheld against constitutional attack just the year before, was now [considered] unconstitutional."<sup>20</sup> A shaky foundation for the abolishment of the death penalty was laid and, as one may anticipate, allowed for the death penalty to reemerge only a few short years later.<sup>21</sup>

Following *Furman*, state legislatures were tasked with amending their capital punishment policies and procedures to comply with the Supreme Court's mandate.<sup>22</sup> Two categories of statutes emerged: "mandatory death penalty statutes and guided discretion statutes."<sup>23</sup> These categories were "intended to reduce the role of jury discretion," thus addressing the Supreme Court's concern with the arbitrary nature in which juries impose the death penalty.<sup>24</sup> The mandatory statutes required that "if a defendant was found

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13. See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

14. *Id.*

15. *Id.* at 293 (Brennan, J., concurring).

16. See *id.*

17. Blume & Vann, *supra* note 11, at 184.

18. See *id.* at 184-85.

19. See *id.* at 185.

20. *Id.* at 184 (footnote omitted).

21. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

22. See Blume & Vann, *supra* note 11, at 185.

23. *Id.*

24. *Id.*

guilty of a capital offense, then the death penalty was imposed—no ifs, ands, or buts.”<sup>25</sup>

Mandatory statutes were quickly invalidated as being in direct conflict with *Furman*'s ruling.<sup>26</sup> The Supreme Court held in *Woodson v. North Carolina* that, although a jury may arbitrarily impose the death penalty, “we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”<sup>27</sup> Thus, the mandatory statutes, while removing the jury's discretion to either impose or not impose the death penalty in certain cases, nevertheless “treat[ed] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”<sup>28</sup>

Despite invalidating mandatory statutes, the Supreme Court upheld the constitutionality of guided discretion statutes.<sup>29</sup> These statutes “attempted to reduce arbitrariness by creating new procedures” that included processes such as establishing a “bifurcated trial (separating the issues of guilt-or-innocence and punishment), the creation of statutory aggravating circumstances limiting eligibility for capital punishment, permitting consideration of mitigating circumstances, and mandatory appellate review (including proportionality review).”<sup>30</sup>

The Supreme Court found in *Gregg v. Georgia*, decided only four years after *Furman*, that the guided discretion statute created by Georgia's legislature was constitutional.<sup>31</sup> Georgia's guided discretion statute “retain[ed] the death penalty for six categories of crime: murder, kidnaping [sic] for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking” and required “[t]he judge (or jury) [to] hear additional evidence in extenuation, mitigation, and aggravation of punishment.”<sup>32</sup> The Court explained that “the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated” and “that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for

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25. *Id.*

26. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

27. *Id.* at 304 (citation omitted).

28. *Id.*

29. Blume & Vann, *supra* note 11, at 185.

30. *Id.*

31. *See* *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

32. *Id.* at 162–63.

any crime regardless of its depravity and impact on society.”<sup>33</sup> Despite highlighting “that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death[,]” the Supreme Court ultimately held that “that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.”<sup>34</sup> The Court noted that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*[,]” in which “[t]he legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”<sup>35</sup> Thus, the state legislatures that enacted pro-capital punishment procedures, South Carolina being one of those states, provided the Court with factual support in finding the death penalty as a constitutional means of punishment.<sup>36</sup> Ultimately, the Court was extremely clear about its opinion on capital punishment by rendering it a constitutional form of punishment in our criminal justice system and even went as far to note that “the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”<sup>37</sup> The infliction of the death penalty was once again rendered a constitutional method for punishment and remains so to this very day.<sup>38</sup>

### B. *Constitutional Methods for Inflicting Capital Punishment*

The debate concerning the infliction of capital punishment, while rendered constitutional by the Supreme Court, has shifted in modern times to analyzing and scrutinizing the methods used to inflict the death penalty.<sup>39</sup> In *Glossip v. Gross*, the Supreme Court began the opinion by finding that “because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’”<sup>40</sup> In *Glossip*, four inmates on Oklahoma’s death row filed a preliminary injunction claiming that the state’s “use of three drugs: (1) sodium thiopental, ‘a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection,’ (2) a paralytic agent,

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33. *Id.* at 179.

34. *Id.* at 181–82, 87.

35. *Id.* at 179–80 (footnote omitted).

36. *See id.* at 179–81.

37. *Id.* at 187.

38. *See States and Capital Punishment*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> [https://perma.cc/QJ83-PEK8].

39. *See, e.g., Glossip v. Gross*, 576 U.S. 863, 867 (2015).

40. *Id.* at 869 (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)) (alteration in original).

which ‘inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration,’ and (3) potassium chloride, which ‘interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest’” violated their<sup>41</sup> Eighth Amendment rights.<sup>42</sup> The Court noted that “petitioners [must] establish a likelihood that they can establish both that Oklahoma’s lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.”<sup>43</sup> The Eighth Amendment forbids “long disused (unusual) forms of punishment that intensif[y] the sentence of death with a (cruel) ‘superadd[ition]’ of ‘terror, pain, or disgrace.’”<sup>44</sup> Ultimately, the *Glossip* Court “held 5-4 that [the] death row inmates failed to establish that the drug midazolam created ‘a substantial risk of severe pain’ when used as the first of three drugs in Oklahoma’s lethal injection procedure.”<sup>45</sup> Therefore, lethal injection can be a constitutional method of execution.

Although the first lethal injection execution in the United States occurred in 1982, the Supreme Court did not rule on the constitutionality of lethal injection execution until 2008 in *Baze v. Rees*.<sup>46</sup> Whether the Supreme Court would be receptive of novel methods of execution about which there is limited information available is entirely unknown, as the Court’s argument in *Baze* partially hinged on the fact that the federal government and thirty-six states already used lethal injection executions.<sup>47</sup>

While execution by lethal injection is considered to be the most prevalent method of capital punishment, execution by lethal injection is an unlikely option for most inmates on death row today.<sup>48</sup> “Since 2011, over fifty pharmaceutical companies worldwide have implemented measures and made public statements to prevent their drugs and chemicals from being used in lethal injections.”<sup>49</sup> Accordingly, “all pharmaceutical companies creating FDA-approved medicines oppose their drugs being used in lethal injections and have created protocols to prevent such use.”<sup>50</sup>

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41. Throughout this Note, I will use the pronoun “they” and its inflected or derivative forms (their, theirs, themselves) as a generic third-person singular pronoun.

42. *Glossip*, 576 U.S. at 868–69 (quoting *Baze*, 553 U.S. at 44).

43. *Id.* at 878.

44. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (quoting *Baze*, 553 U.S. at 48).

45. Deborah W. Denno, *The Firing Squad As “A Known and Available Alternative Method of Execution”* *Post-Glossip*, 49 U. MICH. J.L. REFORM 749, 749 (2016).

46. *See Baze*, 553 U.S. at 41; *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline> [<https://perma.cc/N8DG-74CF>].

47. *See Baze*, 553 U.S. at 40.

48. *Glossip*, 576 U.S. at 868 (quoting *Baze*, 553 U.S. at 42); *see French*, *supra* note 5, at 973; *Chammah & Meagher*, *supra* note 4.

49. *French*, *supra* note 5, at 977.

50. *Id.*

As a result, the only viable execution option provided to death row inmates was electrocution.<sup>51</sup> As death row inmates must “plead and prove a known and available alternative” method of execution to succeed on an Eighth Amendment claim, inmates in each state are generally not provided with more than one option for their execution.<sup>52</sup> Most states have experienced a moratorium on death row executions as a result of electrocution being the only available method of execution.<sup>53</sup> In an effort to rectify this moratorium, states, including South Carolina, began to seek and implement other execution methods to inflict capital punishment.<sup>54</sup> South Carolina’s legislature introduced Senate Bill 200 and the passage of which led to the emergence of a firing squad as a possible method of executing our inmates on death row.<sup>55</sup>

### III. SOUTH CAROLINA’S SENATE BILL 200

#### A. *Previous Bills Attempting to Reform South Carolina’s Execution Methods*

The attempt to modify South Carolina’s capital punishment procedures and establish the possible execution method of a firing squad began years before the passage of Senate Bill 200.<sup>56</sup> In 2015, the South Carolina House of Representatives first introduced the possibility of implementing a firing squad through House Bill 4038.<sup>57</sup> This bill sought to amend and reform South Carolina law by establishing “[a] person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution, lethal injection, or death by firing squad, at the election of the person, under the direction of the Director of the Department of Corrections.”<sup>58</sup> According to House Bill 4038, if “lethal injection under this section is held to be unconstitutional by an appellate court of competent jurisdiction,” the only other available alternatives for execution were either electrocution or the firing squad.<sup>59</sup> The bill established that, if an inmate selected execution by firing squad, “the [D]irector of the Department of Corrections, or his designee, shall select a five-person firing squad of local or

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51. *Id.* at 995.

52. *Glossip*, 575 U.S. at 880; see *Authorized Methods by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state> [<https://perma.cc/2CLY-D3FC>].

53. See *Authorized Methods by State*, *supra* note 52.

54. See, e.g., S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

55. See *id.*; *Death Row/Capital Punishment*, *supra* note 2.

56. See, e.g., H.R. 4038, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2015); H.R. 4121, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2015).

57. See H.R. 4038.

58. *Id.*

59. *Id.*



state law enforcement officers” and that “[t]he Department of Corrections is authorized to promulgate regulations related to the procedures that must be followed in administering the death penalty by firing squad.”<sup>60</sup> While House Bill 4038 was referred to the Committee on Judiciary, it ultimately failed to pass to the Senate.<sup>61</sup>

South Carolina’s efforts to reform its capital punishment laws continued with House Bill 4121, which sought to remove lethal injection as a viable method of enforcing capital punishment and, instead, established only death by electrocution.<sup>62</sup> This bill similarly failed to pass to the Senate, and the legislature’s attempt to reform S.C. Code Ann. § 24-3-530 was rejected.<sup>63</sup>

In 2018, the legislature returned to the topic of capital punishment through introducing House Bill 4615 and Senate Bill 872.<sup>64</sup> These bills were primarily concerned with the availability of lethal injection as a potential method of execution.<sup>65</sup> While lethal injection would still be offered as a potential method of execution, these bills nevertheless restricted an inmate’s selection of this method.<sup>66</sup> If an inmate selected lethal injection as the method of execution, the selection was contingent upon whether the lethal injection drugs were “available at the time of election.”<sup>67</sup> Therefore, if the lethal injection drug was unavailable at the time of the inmate’s election date, electrocution was the only available method of execution.<sup>68</sup> While House Bill 4615 ultimately failed, Senate Bill 872 passed and was introduced to the House.<sup>69</sup> Given the similarity between these two bills, as each expressed much the same sentiment, it is interesting that one passed to the House and the other failed. The answer may present itself in the ultimate outcome of Senate Bill 872.<sup>70</sup> While Senate Bill 872 was referred to the House Committee on Judiciary, it ultimately failed in the House.<sup>71</sup> This suggests that at the time, the South Carolina House had a general apprehension towards reforming capital punishment, at least in the particular manner that Senate Bill 872 would have altered its protocols.

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60. *Id.*

61. *See* H.R. 2015–2016-4038, 121st Sess., at 18 (S.C. 2015).

62. H.R. 4121, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2015).

63. *See* H.R. 2015–2016-4121, 121st Sess., at 13 (S.C. 2015).

64. *See* H.R. 4615, 2017–2018 Gen. Assemb., 122d Sess. (S.C. 2018); S. 872, 2017–2018 Gen. Assemb., 122d Sess. (S.C. 2018).

65. *See* H.R. 4615; S. 872.

66. *See* H.R. 4615; S. 872.

67. H.R. 4615; S. 872.

68. *See* H.R. 4615; S. 872.

69. *See* H.R. 2017–2018-4615, 122d Sess., at 596 (S.C. 2018); S. 2017–2018-872, 122d Sess., at 19, 62 (S.C. 2018).

70. *See* S. 2017–2018-872, 122d Sess., at 62 (S.C. 2018).

71. *See id.*; H.R. 2017–2018-872, 122d Sess., at 20 (S.C. 2018).

Despite the unsuccessful attempts to reform § 24-3-530, it is nevertheless unsurprising, given the number of times the legislature attempted to reform capital punishment, that the topic was again revisited in 2019.<sup>72</sup> Following Senate Bill 872, House Bill 3301 and Senate Bill 176 sought to make similar changes to South Carolina's lethal injection laws.<sup>73</sup> Both House Bill 3301 and Senate Bill 176 would permit lethal injection but, if the requisite drugs were not available, would make electrocution the only available means of execution.<sup>74</sup> Following in the footsteps of the previous attempts to reform § 24-3-530 and the House's general apprehension of reformation to capital punishment, House Bill 3301 failed.<sup>75</sup> While Senate Bill 176 passed in the Senate and was found favorable by the Committee on Judiciary, it also failed in the House.<sup>76</sup>

Certain members of the legislature, displeased with the lack of success in reforming the lethal injection portion of § 24-3-530, changed their strategy.<sup>77</sup> The introduction of a firing squad as a method for execution, previously mentioned in 2015 through House Bill 4038, was again discussed in House Bill 4417 in 2019.<sup>78</sup> House Bill 4417 read:

[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 person, lethal injection, if it is available at the time of election, or by firing squad under the direction of the Director of the Department of Corrections.<sup>79</sup>

While House Bill 4417 introduced a firing squad as a possible method of execution, it also included lethal injection as a possible method of execution.<sup>80</sup>

The procedural and substantive history of these bills reveals a pattern in the legislature's attempts to compensate for the lack of availability for lethal injection drugs. While House Bill 4417 ultimately failed, as did previous bills attempting to reform § 24-3-530, this piece of legislation marks the precipice of South Carolina's full-on embrace of Senate Bill 200 and the implementation of a firing squad.<sup>81</sup>

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72. See H.R. 3301, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

73. See *id.*; S. 176, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

74. H.R. 3301; S. 176.

75. See H.R. 2019–2020-3301, 123d Sess., at 164 (S.C. 2019).

76. See S. 2019–2020-176, 123d Sess., at 22 (S.C. 2019); H.R. 2019–2020-176, 123d Sess., at 11 (S.C. 2020).

77. See H.R. 4417, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

78. See *id.*

79. *Id.*

80. See *id.*

81. See H.R. 2019–2020-4417, 123d Sess., at 50 (S.C. 2019); see also S. 2019–2020-176, 123d Sess., at 22 (S.C. 2019).

*B. Introduction and Procedural History of Senate Bill 200*

Senate Bill 200 was pre-filed on December 9, 2020, and introduced to the Senate on January 12, 2021.<sup>82</sup> It read:

[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.<sup>83</sup>

Senate Bill 200 almost entirely mirrored House Bill 4417 and passed in the senate on March 2, 2021, receiving thirty-two ayes and eleven nays.<sup>84</sup> The bill was subsequently sent to the House on March 3, 2021 and was referred to the Committee on Judiciary one day later, on March 4, 2021.<sup>85</sup> On April 28, 2021, the Committee received a favorable report with amendment to the Judiciary.<sup>86</sup> On May 6, 2021, despite the House voting down previous bills attempting to reform § 24-3-530, Senate Bill 200 passed in the House with sixty-five ayes and forty-three nays.<sup>87</sup> The bill was subsequently sent back to the Senate on May 12, 2021, and the Senate concurred and enrolled in the House amendment with thirty-two ayes and eleven nays.<sup>88</sup> Senate Bill 200 was ratified on May 13, 2021, signed by Governor Henry McMaster on May 14, 2021, and became effective the same day.<sup>89</sup>

While some members of the legislature marked Senate Bill 200's passage as a successful solution to the state's lack of availability of lethal injection drugs, others lamented the introduction of a seemingly archaic method of execution into South Carolina's criminal justice system.<sup>90</sup>

Regardless of one's position, it is undisputable that the implementation of Senate Bill 200 into South Carolina's policies and procedures surrounding capital punishment was anything but smooth sailing.<sup>91</sup> Shortly after the bill's passage, the Director of SCDC stated that, despite the bill's mention of lethal injection and firing squad as two available methods for execution,

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82. See S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

83. *Id.*

84. S. 2021–2022-200, 124th Sess., at 59 (S.C. 2021); see H.R. 4417.

85. S. 2021–2022-200, 124th Sess., at 168 (S.C. 2021); H.R. 2021–2022-200, 124th Sess., at 4 (S.C. 2021).

86. H.R. 2021–2022-200, 124th Sess., at 64 (S.C. 2021).

87. H.R. 2021–2022-200, 124th Sess., at 31 (S.C. 2021).

88. S. 2021–2022-200, 124th Sess., at 51 (S.C. 2021).

89. See S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

90. See Wade, *supra* note 7.

91. See Lynch & Caldwell, *supra* note 10.

electrocution was the only available method for inflicting capital punishment at that time.<sup>92</sup> The Director explained that “[l]ethal injection is unavailable due to circumstances outside of the control of the Department of Corrections[,] and [the] firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies.”<sup>93</sup> Therefore, while Senate Bill 200 lifted the moratorium on capital punishment in South Carolina, it ultimately resulted in death row inmates not having a choice.<sup>94</sup>

Immediately affected by this change in legislation were Brad Keith Sigmon and Freddie Eugene Owens, two inmates on South Carolina’s death row set to be executed on June 18, 2021 and June 25, 2021, respectively.<sup>95</sup> On June 9, 2021, attorneys for both Sigmon and Owens petitioned the U.S. District Court for the District of South Carolina, Greenville Division, to halt their executions on the grounds that, with the state’s inability to access lethal injection drugs, the implementation of Senate Bill 200 resulted in electrocution as the only available execution method.<sup>96</sup> Sigmon’s and Owens’s attorneys argued that execution by the electric chair violated their clients’ Eighth Amendment rights because electrocution creates a demonstrated risk of severe pain and suffering, and lethal injection is a readily available alternative that significantly reduces the risk of severe pain posed by electrocution.<sup>97</sup> However, in response to the complaint, “lawyers representing the Department of Corrections and Bryan Stirling, the [D]irector of the Department of Corrections[,] said that the state had tried every avenue to procure the drugs,” including an unsuccessful attempt to have the drugs compounded.<sup>98</sup>

U.S. District Judge Bryan Harwell denied the temporary restraining order because of “[l]egal precedent itself regarding the constitutionality of electrocution, the many legal challenges to lethal injection itself, and the apparent good faith efforts of the State of South Carolina to procure lethal

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92. *See id.*

93. *Id.*

94. *See id.*

95. *See id.*

96. *See* Devyani Chhetri & Daniel J. Gross, *U.S. Judge Denies Effort of 2 Greenville County Men to Halt Executions*, GREENVILLE NEWS (June 15, 2021), <https://www.greenvilleonline.com/story/news/local/south-carolina/2021/06/11/death-row-greenville-sc-judge-denies-two-inmates-halt-executions/7633288002/> [https://perma.cc/4L2G-6LFF].

97. *See id.*; Complaint for Temp., Preliminary, and Injunctive Relief and Declaratory Judgment at 23, 28, Sigmon v. Stirling, No. 21-CV-01651 (D.S.C. June 3, 2021).

98. Chhetri & Gross, *supra* note 96; Defendants’ Response to Motion for Temp. Restraining Ord. and Preliminary Injunction, Sigmon v. Stirling, No. 21-CV-01651 (D.S.C. June 8, 2021).

injection drugs.”<sup>99</sup> Judge Harwell remarked that “the stories detailing the horrors of executions, regardless of the method, underscore one important Eighth Amendment principle—the Eighth Amendment does not guarantee a painless death.”<sup>100</sup> The South Carolina Supreme Court was quick to issue a temporary stay of execution pending issuance of Judge Harwell’s order.<sup>101</sup> On June 16, 2021, only two days until Sigmon’s date for execution, the South Carolina Supreme Court halted executions until the firing squad procedure was finalized.<sup>102</sup> SCDC “said it had received the court’s order halting the upcoming executions and was working on creating the policies and procedures [of a firing squad].”<sup>103</sup> In particular, SCDC noted that it was “looking to other states for guidance through this process” and would “notify the court when a firing squad becomes an option for executions.”<sup>104</sup> This statement begs the question—what state, or states, is South Carolina looking to for guidance?

#### IV. ANALYSIS

##### *A. South Carolina’s Department of Corrections Has Minimal Information to Create the Policies and Procedures Necessary for the Implementation of a Firing Squad*

Prior to the passage of Senate Bill 200, there were only three states that provided a firing squad as an available method of execution: Mississippi, Oklahoma, and Utah.<sup>105</sup> Execution by firing squad is an unpopular option for death row inmates, with “[s]tatistics from the three states that still allow inmates to choose firing squads . . . show[ing] that inmates do not prefer firing squad [as a means of execution].”<sup>106</sup> In fact, “[a] list of executions in Oklahoma for the last 100 years shows no inmate has ever chosen death by firing squad.”<sup>107</sup> Similarly, “no inmate in Mississippi has chosen the firing squad in the last forty years.”<sup>108</sup> “In Utah, only two inmates chose to be

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99. *Sigmon v. Stirling*, No. 21-CV-01651, 2021 WL 2402279, at \*6 (D.S.C. June 11, 2021), *appeal dismissed*, 2021 WL 6102494 (4th Cir. June 24, 2021), *appeal dismissed sub nom. Owens v. Stirling*, 2021 WL 6106434 (4th Cir. June 24, 2021).

100. *Id.* at \*5.

101. *See Sigmon v. South Carolina*, No. 2021-000584 (S.C. June 16, 2021); Lynch & Caldwell, *supra* note 10.

102. Lynch & Caldwell, *supra* note 10.

103. *Id.*

104. *Id.*

105. *See Michael Conklin, No, the Firing Squad is Not Better Than Lethal Injection: A Response to Stephanie Moran’s A Modest Proposal*, 44 SEATTLE U. L. REV. 357, 361 (2021).

106. *Id.*

107. *Id.*

108. *Id.*

executed by the firing squad in the last forty years.”<sup>109</sup> It is important to note that “the two inmates’ reasons for choosing execution by firing squad appear not to be due to the perception that lethal injection is ‘more painful and far less humane’” and may instead be attributed either to “a desire to embarrass the state” or to adhere to personal religious beliefs.<sup>110</sup>

Utah, the only state that has used a firing squad to execute inmates on death row in the last forty years, is perhaps, unsurprisingly, one of the only states that has also documented its policies and procedures for the implementation of a firing squad.<sup>111</sup> Thus, when SCDC proclaimed they were “looking to other states for guidance through [the] process” of creating a firing squad, one must assume that the only possible policies and procedures SCDC is referring to are Utah’s.<sup>112</sup> In reading and observing Utah’s documented procedures, one can obtain a potential glimpse of the kinds of policies and procedures that would be implemented in South Carolina’s future firing squad.

Utah has a “technical manual for executions” that includes descriptions of the policies and procedures for the implementation of the death penalty, including a graphic depiction of the manner in which death by firing squad is conducted.<sup>113</sup> The manual documents the existence of an “execution team” that consists of “a five-person squad with a team leader and at least one alternate.”<sup>114</sup> In 2015, the South Carolina legislature introduced House Bill 4038, noting that, if an inmate chose death by a firing squad, “the director of the Department of Corrections, or his designee, shall select a five-person firing squad of local or state law enforcement officers.”<sup>115</sup> While the formation of a five-person firing squad is not specifically implemented in Senate Bill 200, it is nevertheless apparent that South Carolina’s legislature is familiar with Utah’s structure of a five-person firing squad and has considered implementing the same policies and procedures notated within Utah’s execution manual, as reflected in House Bill 4038.

Utah’s manual mandates that each member of the squad “must be [a] certified peace officer[.]” and have “proved their firearms proficiency by passing an accuracy test under similar conditions as would be present in an

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109. *Id.*

110. *See id.* at 361–62. Some individuals who practice Mormonism believe that sin must be acquitted through blood atonement. *See id.* One of the two individuals in Utah who chose death by firing squad was an active Mormon. *Id.* The individual suggested that death by firing squad would equate to blood atonement for their actions. *Id.*

111. *See* Nadia Pflaum, *How Utah’s Execution by Firing Squad Works*, STANDARD-EXAM’R (Apr. 10, 2017), <https://www.standard.net/police-fire/courts/2017/apr/10/how-utahs-execution-by-firing-squad-works/> [https://perma.cc/RL6P-JHNB].

112. Lynch and Caldwell, *supra* note 10.

113. *See* Pflaum, *supra* note 111.

114. *Id.*

115. H.R. 4038, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2015).

actual execution.”<sup>116</sup> While Senate Bill 200 makes no mention as to specifically who would be tasked with carrying out an execution by firing squad, House Bill 4038—introduced in 2015—also suggested that the firing squad be comprised of “local or state law enforcement officers.”<sup>117</sup> When comparing House Bill 4038 to Utah’s execution manual, it becomes clear that Utah’s manual is slightly more specific concerning the eligibility of a member of the firing squad, as Utah’s manual requires the individual to pass a proficiency test in order to be on the squad.<sup>118</sup> While House Bill 4038 made no mention as to a proficiency examination its members would need to take or pass, these two documents have nearly identical requirements because the firing squad must be comprised of members of law enforcement.<sup>119</sup> It is likely that SCDC will follow the language explicated in House Bill 4038 and Utah’s execution manual for Senate Bill 200 and comprise the firing squad of its own local or state law enforcement officers.

The next concern that logically follows is whether the firing squad members are assigned to the firing squad or volunteer to be on the squad. With other means of execution, South Carolina established protocols that assign SCDC officers to the execution rather than receiving volunteers.<sup>120</sup> While Senate Bill 200 does not speak to the selection of the firing squad members, it is inferred the members will either be selected by SCDC and tasked with carrying through the executions or will volunteer. Jim Harvey, the previous Commander of the Central Correctional Institution in Columbia, South Carolina, shed some light on how specific law enforcement officers were chosen during this time to carry-out the state’s executions.<sup>121</sup> In an interview more than fifty years after his time as Commander, Harvey noted the task of creating an execution team “fell to him and a few others to develop the steps for how the state would [conduct executions] once more.”<sup>122</sup> Harvey explained that “many of the rules he settled on were not written down” and were only relayed to individuals that had an active role in the execution process, such as the individuals that “escorted the condemned to the death chamber.”<sup>123</sup> While he wanted these policies and procedures to remain secret at the time, Harvey has changed his perspective on keeping these methods

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116. Pflaum, *supra* note 111.

117. H.R. 4038; *see* S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

118. *Compare* H.R. 4038, *with* Pflaum, *supra* note 111.

119. *See supra* sources cited in note 117.

120. *See, e.g.*, Chiara Eisner, *They Executed People for the State of South Carolina. For Some, It Nearly Destroyed Them.*, THE STATE (Jan. 4, 2022), <https://www.thestate.com/news/local/crime/article254201328.html> [<https://perma.cc/PVS3-R2WJ>].

121. *See id.*

122. *Id.*

123. *Id.*

undisclosed.<sup>124</sup> Harvey revealed that one of the procedures previously kept from the public was how “executioners were chosen.”<sup>125</sup>

Harvey has since noted that he individually chose the executioners “from the most responsible he knew among [his] staff” to comprise the members for carrying out capital punishment.<sup>126</sup> He expressed the misconception that “[m]ost people think you pick volunteers for that” but “[t]hat’s the last thing [he] wanted do.”<sup>127</sup> Harvey further elaborated that “[a]nybody who would volunteer to kill somebody is not somebody I wanted working for me.”<sup>128</sup> Harvey was a Commander for Central Correctional Institution in Columbia until 1998, and his methods of selecting specific members of the corrections facility for the execution positions were likely followed at least until this date.<sup>129</sup> While the Utah manual makes no mention as to whether executioners volunteer, the practices described by Harvey suggest that South Carolina’s tradition of the Commander selecting the specific officials to comprise the execution procedures will continue.

On March 18, 2022, SCDC issued a press release to formally announce that “it is now able to carry out an execution by firing squad as required by law.”<sup>130</sup> The formal release is only a page and a half long and encapsulates an overview of the protocols and procedures enacted by the department for the implementation of a firing squad.<sup>131</sup> Specifically, the protocols overview reads:

Three firing squad members will be behind the wall, with rifles facing the inmate through the opening. The rifles and open portal will not be visible from the witness room. All three rifles will be loaded with live ammunition.

The witnesses will see the right-side profile of the inmate. The inmate will not face the witness room directly. The electric chair faces the witnesses directly.

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124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.*

130. Press Release, S.C. Dep’t of Corr. (Mar. 18, 2022), <https://documents.deathpenaltyinfo.org/SC-News-Release-Firing-Squad-Protocol-2022-03-18.pdf> [<https://perma.cc/X6YF-EJ3G>].

131. *See id.*



The inmate will wear a prison-issued uniform and be escorted into the chamber. The inmate will be given the opportunity to make a last statement.

The inmate will be strapped into the chair, and a hood will be placed over his head. A small aim point will be placed over his heart by a member of the execution team.

After the warden reads the execution order, the team will fire. After the shots, a doctor will examine the inmate. After the inmate is declared dead, the curtain will be drawn and witnesses escorted out.

Members of the firing squad are volunteer SCDC employees. They must be certain qualifications.<sup>132</sup>

While SCDC has now formally outlined its protocols and procedures, the information provided is sparse and prompts more questions than answers. As Utah's execution manual is one of the only sources available documenting the protocols and procedures of a firing squad, the manual allows for similarities and comparisons to be drawn to SCDC's release. Further, Utah's execution manual may fill some of the gaps regarding the limited information provided in SCDC press release.<sup>133</sup>

Utah's execution manual states that each firing squad will have an "execution team leader" who is tasked with "supplying .30-caliber rifles, live rounds of ammunition, blank rounds of ammunition [referred to in the manual as 'wax bullets'], administering practice sessions and providing backup rifles and ammunition."<sup>134</sup> For a member of the firing squad to prove their proficiency, "a target is placed at a minimum of 21 feet [away] and must be the same dimensions as the target that will be placed over the condemned's heart on the day of the execution."<sup>135</sup> If one of the team members "[fails] to accurately hit the specified target with one round from each weapon fired[.]" then the team member is "disqualified."<sup>136</sup> The team then uses the "same weapons," the .30-caliber rifles, for the "execution itself."<sup>137</sup> While SCDC's protocols claim that volunteer employees "must meet certain qualifications" to demonstrate their proficiency, the press release fails to specifically state how their capabilities will be measured.<sup>138</sup>

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132. *Id.*

133. *See supra* text accompanying notes 111–115.

134. Pflaum, *supra* note 111.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Press Release, *supra* note 130.

When an inmate chooses the firing squad as the particular method for their execution in Utah, the firing squad will convene on the execution date.<sup>139</sup> The “team leader loads each rifle with two rounds, taking care that none of the firing squad members can observe which weapon is loaded with blanks.”<sup>140</sup> The intention is that having one rifle loaded with the blank ammunition ensures that “no single member of the squad would experience personal guilt for the killing.”<sup>141</sup> In comparison, SCDC’s press release specifies that “[a]ll three rifles will be loaded with live ammunition,” signaling either a lack of attention or care as to whether those carrying out the execution are cognizant of their level of participation in the execution.<sup>142</sup>

At the time of execution for death by a firing squad in Utah, a target is then placed “over the condemned inmate’s heart” by a staff member of the facility by the direction of the warden.<sup>143</sup> The staff member then “exits the execution chamber[,]” and “the warden signals the curtains in the viewing room to be opened.”<sup>144</sup> There is no mention in the manual as to who precisely can be in the viewing room or who is required to be in the viewing room. The SCDC release, like Utah’s manual, is vague regarding witnesses for execution. While the release makes no mention of precisely who will observe the execution, the protocol does include that “[t]he witnesses will see the right-side profile of the inmate” and that “[t]he inmate will not face the witness room directly.”<sup>145</sup> As described within Utah’s manual, once the staff member exits from the room, “[t]he inmate is allowed to speak for no more than two minutes.”<sup>146</sup> Furthermore, “[i]f the inmate swears, he [or] she forfeits the remainder of the two minutes allotted for last words.”<sup>147</sup> The warden then “places a hood over the inmate’s head and exits the execution chamber.”<sup>148</sup> This procedure is similarly described in SCDC’s press release, which states that “[t]he inmate will be given the opportunity to make a last statement” and then “will be strapped into the chair, and a hood will be placed over his head.”<sup>149</sup> It is important to note that, at this point in time, neither Utah’s execution manual nor SCDC’s press release make any mention of drugs to be given to an inmate in order to calm his or her nerves or paralyze them, as is done in lethal injection executions.<sup>150</sup>

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139. See Pflaum, *supra* note 111.

140. *Id.*

141. Denno, *supra* note 45, at 784.

142. See Press Release, *supra* note 130.

143. Pflaum, *supra* note 111.

144. *Id.*

145. Press Release, *supra* note 130.

146. Pflaum, *supra* note 111.

147. *Id.*

148. *Id.*

149. Press Release, *supra* note 130.

150. See *id.*; Pflaum, *supra* note 111.

In Utah's manual, the firing squad is then counted down, and as long as there has been "no stay or delay in the execution . . . ordered," the squad then fires its first round of ammunition.<sup>151</sup> Once the live ammunition has been fired by the five members of the firing squad, including the one member that has the wax bullet, "[a] designated execution team member then starts a stopwatch."<sup>152</sup> The warden "may order a physician to check the inmate's vital signs within three minutes of the shots being fired," but only "[i]f the inmate appears unconscious."<sup>153</sup> After the first three minutes, "[t]he physician is to monitor the vital signs every 60 seconds for a period of 10 minutes."<sup>154</sup> This portion of the Utah manual touches an imperative concept involved in the infliction of capital punishment—time. The protocols outlined in SCDC's press release are virtually silent regarding the amount of time that may pass from when the shots inflicted to the pronouncement of death.<sup>155</sup> The release simply states that "[a]fter the shots [are fired], a doctor will examine the inmate" and that "[a]fter the inmate is declared dead, the curtain will be drawn and witnesses escorted out."<sup>156</sup> However, Judge Jocelyn Newman has stated in a recently-issued opinion that "[f]ollowing the first volley, if the inmate appears unresponsive, a physician is called to check the inmate's vital signals" and that "[v]ital signs are checked every sixty seconds until none are present, at which time the physician will certify death."<sup>157</sup> Further "if vital signs continue to be present after ten minutes, the firing squad team will fire a second volley at the inmate."<sup>158</sup> It is unclear where this information originates from, as there are no footnotes included in the specific section of the opinion labeled "Methods of Execution—South Carolina's Firing Squad."<sup>159</sup> The opinion simply states that "[t]he parties largely agree on the mechanics of each method of execution," but no additional information is provided regarding specific sources to review.<sup>160</sup> Therefore, SCDC seemingly furnished the opposing parties with a general overview of the policies and procedures for execution by firing squad. Additionally, the general overview discussed in the opinion goes beyond the information provided in the general release and is not yet available to the public.

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151. Pflaum, *supra* note 111.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* Press Release, *supra* note 130.

156. *Id.*

157. Owens v. Stirling, No. 2021-CP-4002306, at \*7 (S.C. Ct. C.P. Richland Cnty. Sept. 6, 2022).

158. *Id.*

159. *See id.*

160. *Id.*

In Utah's execution manual, if the inmate is still alive after ten minutes, the "warden shall order the physician to leave the execution chamber and order the firing squad to get ready to fire" once more.<sup>161</sup> Therefore, there is a possibility that an inmate would be shot four times during the volley, still be alive after ten minutes, and then be shot an additional four times by a second volley, totaling eight gunshot wounds. The second volley "will be counted down to fire" and "may be ordered in quicker succession if the inmate appears obviously conscious after the first volley."<sup>162</sup> Similar to the first volley, the physician then waits three minutes after the second volley to "enter the execution chamber and monitor the inmate's vital signs until death can be certified."<sup>163</sup> At this point, Utah's execution manual does not detail any further instructions and it is assumed that an inmate would officially be pronounced deceased after a total of eight gunshot wounds and twenty minutes.<sup>164</sup> It is critical to note that SCDC's protocols fail to mention loading the rifles with two rounds of ammunition, and it only vaguely describes that "[a]ll three rifles will be loaded with live ammunition."<sup>165</sup> Although not directly stated, it is obviously assumed that loading the rifles with at least one round of ammunition will be necessary for this method of execution.

### *B. Senate Bill 200 Creates Potential Constitutional Violations*

As SCDC begins to formulate and implement its own policies and procedures for enacting a firing squad, Senate Bill 200 creates potential constitutional violations that will likely be litigated before the United States Supreme Court. Many states may follow South Carolina's efforts in implementing a firing squad as a method of inflicting capital punishment due to the lack of availability of lethal injection drugs nationwide.<sup>166</sup> The following touches on some, but certainly not all, of the potential constitutional violations that could occur in South Carolina's use of a firing squad.

#### *1. Lack of Medication to Reduce Pain*

The first issue that must be discussed when analyzing whether the implementation of a firing squad violates the Eighth Amendment against cruel and unusual punishment is the extent of the physical pain an inmate would experience during the execution. This has proven quite a difficult question to

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161. Pflaum, *supra* note 111.

162. *Id.*

163. *Id.*

164. *See id.*

165. Press Release, *supra* note 130.

166. *See Chammah & Meagher, supra* note 4.

answer, as even methods deemed constitutional by the United States Supreme Court, such as lethal injection, have procured mixed results regarding whether particular methods for execution produce pain for those experiencing it.<sup>167</sup> However, despite the inconsistencies in the level of potential pain reported, an effort has been made to reduce the pain and discomfort an inmate would experience during execution by lethal injection.<sup>168</sup> During a lethal injection procedure, medications are given to the inmates at the beginning of the execution process that act as painkillers and sedatives to reduce their pain and discomfort from the procedure.<sup>169</sup> In South Carolina specifically, pentobarbital is the drug used as a painkiller, as it “will cause a person’s central nervous system to shut down in a manner similar to other barbiturate overdoses.”<sup>170</sup>

In the context of execution by firing squad, however, there is no mention in Utah’s execution manual of any painkillers or sedatives administered prior to an inmate being executed by the firing squad.<sup>171</sup> As examined in *Glossip*, a successful Eighth Amendment method-of-execution claim occurs when an inmate establishes that the method “creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.”<sup>172</sup> Therefore, inmates on South Carolina’s death row must demonstrate that the firing squad causes a risk of severe pain and that this risk is substantial when compared to other execution methods available. Inmates are executed by a firing squad without any medication to reduce their pain, calm their nerves, or place them in a trance-like state. Instead, an individual experiencing execution by a firing squad has the knowledge and perception that, very soon, they will be shot with three bullets to the chest.<sup>173</sup>

If certain sedatives and pain medications are given during one method of execution, this same medication should be provided or made available to inmates for all methods of execution. Critics may argue that providing medications is not necessary for all types of execution, as inmates are

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167. See, e.g., Noah Caldwell et al., *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NAT’L PUB. RADIO (Sept. 21, 2020), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection> [https://perma.cc/6JHH-PGKP].

168. See *id.*

169. See Susie Neilson, *Lethal Injection Drugs’ Efficacy And Availability for Federal Executions*, NAT’L PUB. RADIO (July 26, 2019), <https://www.npr.org/2019/07/26/745722219/lethal-injection-drugs-efficacy-and-availability-for-federal-executions> [https://perma.cc/U78E-BLZ9].

170. *Id.*; see *Overview of Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols> [https://perma.cc/VXB8-UKK9].

171. See Pflaum, *supra* note 111.

172. *Glossip v. Gross*, 576 U.S. 863, 878 (2015).

173. See *id.*

provided a choice of which method of execution to receive.<sup>174</sup> However, regardless of the particular method of execution an inmate selects, these medications are given solely to reduce the immense amount of dread, stress, and pain an inmate would experience during an execution by lethal injection.<sup>175</sup> Therefore, an execution without these medications forces an inmate to experience the emotions and physical sensations that the implementation of these medications seeks to prevent. An inmate could argue that, if they are executed without painkilling medications to reduce their dread, stress, and pain, the state is violating the Eighth Amendment by causing a risk of severe pain that is substantial when compared to other execution methods available, such as lethal injection if offered as an available method.<sup>176</sup>

## 2. *Inability to Determine the Level of Pain from a Gunshot Wound*

Next, without access to medication reducing the pain and discomfort an inmate would experience during the procedure, it is difficult to assess how much pain an inmate would experience during an execution by a firing squad. The inability to determine the level of pain could potentially allow an inmate to present a “demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.”<sup>177</sup> While many researchers, scientists, and even physicians have attempted to assess and determine the level of pain an inmate would feel upon being shot by a firing squad, there is no definitive answer or consensus among the medical community as to the level of pain an inmate experiences when executed by a firing squad.<sup>178</sup> The Royal Commission on Capital Punishment, in analyzing the validity of implementing a firing squad, revealed the firing squad is not an efficient method of inflicting capital punishment as it does not provide a “certainty of causing immediate death.”<sup>179</sup> The Royal Commission seems to posit that, because the firing squad is not efficient for execution, death by firing squad causes unnecessary pain as compared to other execution procedures. Scientist Harold Hillman determined that “[p]ersons hit by bullets feel as if they have been punched . . . .”<sup>180</sup> Hillman’s findings are similarly reflected through the experiences of two inmates in Utah who chose death by

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174. See, e.g., Megan McCracken, *Legally Indefensible: Requiring Death Row Prisoners to Prove Available Execution Alternatives*, 41 CHAMPION 46, 47 (2017).

175. See *Overview of Lethal Injection Protocols*, *supra* note 170.

176. See discussion *supra* Section II.B.

177. *Glossip*, 576 U.S. at 878.

178. See, e.g., Denno, *supra* note 45, at 785–86.

179. Harold Hillman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION 745, 745 (1993).

180. *Id.*

firing squad as their execution method.<sup>181</sup> In the first instance, “[a]fter the bullets hit the target, the inmate’s heartbeat stopped 15.6 seconds later, yet he was not declared dead until two-and-a-half minutes after the shooting.”<sup>182</sup> Similarly, the second inmate made an involuntary movement after the four bullets entered his heart but was not pronounced dead by the physician until two minutes later.<sup>183</sup> Thus, the medical community has failed to reach a true consensus as to how much pain an inmate experiences after being executed by a firing squad.

### 3. *The Time Between the Infliction of the Gunshot Wound and the Inmate’s Death is Unknown*

The passage of time from the moment an inmate is executed until the inmate is rendered deceased is crucial in the analysis of whether a particular execution method is constitutional because it indicates the total time during which an inmate experiences pain.<sup>184</sup> The total length of time of the execution is a hotly debated topic by abolitionists of capital punishment.<sup>185</sup> The longer the span of time between execution and death, the more likely the infliction of the capital punishment method is a violation of the Eighth Amendment’s protections against cruel and unusual punishment because a long stretch of time indicates an inmate has experienced prolonged suffering.<sup>186</sup> As examined in *Glossip*, an inmate could present a successful Eighth Amendment method-of-execution claim by demonstrating that the length of time of the execution, and subsequently the pain endured during that span of time, displays a demonstrated risk of severe pain when compared to available alternatives and that the risk is substantial.<sup>187</sup>

The description of the two Utah inmates described above serves as an example of the total length of time for a firing squad execution.<sup>188</sup> For instance, while the second inmate made an involuntary movement right after death, seeming to suggest that his heart had stopped, the inmate was not pronounced dead until two minutes after the initial bullet wounds.<sup>189</sup> While the inmate stopped feeling pain at the two minute mark, the issue that arises

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181. See, e.g., Denno, *supra* note 45, at 785–86.

182. *Id.* at 786.

183. *Id.*

184. See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> [<https://perma.cc/Y3GB-JXES>].

185. See Conklin, *supra* note 105, at 364–65, 67.

186. See *id.* at 367.

187. See *Glossip v. Gross*, 576 U.S. 863, 878 (2015).

188. See discussion *supra* Section IV.B.2.

189. See Denno, *supra* note 45, at 786.

is determining for how long of the duration of the execution did the inmate experience pain.<sup>190</sup> The unknowable variable of the total length of time of pain endured and whether two minutes is a sufficient amount of time to constitute a violation of the Eighth Amendment is an issue that must be determined in examining the constitutionality of a firing squad. Further, the United States Supreme Court has yet to address whether an execution spanning two minutes results in an Eighth Amendment violation.<sup>191</sup>

A botched execution can also represent cruel and unusual punishment.<sup>192</sup> A botched execution occurs when an error in the process of executing an inmate leads to a prolonged period of time after the initiation of the execution until the inmate is declared deceased.<sup>193</sup> There have only been three inmates executed by a firing squad in the United States “since 1976, when *Gregg v. Georgia* once again enabled executions . . . .”<sup>194</sup> Each of these executions was carried through with proper protocol and procedures and did not result in a botched execution or a delay in the death of the inmate.<sup>195</sup> The botch rate for execution by lethal injection, on the other hand, was 7.12% between 1910–2010.<sup>196</sup>

When initially comparing the possibility of a botched execution between a firing squad and lethal injection, it may appear as though execution by firing squad is the superior method to reduce the potential of experiencing a botched execution. However, given that the potential data set is only comprised of three executions by firing squad, it is imprudent to draw any generalizations that execution by a firing squad would result in a lower botch rate than lethal injection executions. The number of executions by a firing squad is a much smaller variable compared to the number of executions by lethal injection and the amount of literature detailing the proper policies and procedures is so scant.

The variables described above are all pieces of information that SCDC must consider when beginning to implement the policies and procedures for its own firing squad.<sup>197</sup> As previously discussed, the concepts that should weigh heavily on the mind of the Director of SCDC, who creates the policies and procedures for Senate Bill 200, are as follows: the minimal information and literature dedicated to ethical procedures for carrying out a firing squad; the small number of states that use this method and the rarity with which this method is selected; the lack of medication given to inmates to reduce their

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190. *See Glossip*, 576 U.S. at 878.

191. *See, e.g., Stern*, *supra* note 184.

192. *See, e.g., Conklin*, *supra* note 105, at 364–67.

193. *See id.* at 366–67.

194. Denno, *supra* note 45, at 781 (footnote omitted).

195. *See id.*

196. *Id.*

197. *See* discussion *supra* Sections IV.B.1–B.4.



pain and emotional turmoil while experiencing execution; the lack of knowledge as to exactly how long it takes an inmate to die after being shot three times; and lastly, the potential for a botched execution.<sup>198</sup> One final, although certainly not minimal, variable when considering the proper procedures for implementing a firing squad is the experience of the individuals tasked with carrying out this procedure.

4. *South Carolina's Law Enforcement Officers Tasked with Executing Inmates Experience Mental Turmoil and Trauma from Inflicting Capital Punishment*

As previously mentioned, it is likely that state prison staff and will comprise South Carolina's firing squad.<sup>199</sup> Since the implementation of Senate Bill 200, the Palmetto State has produced a plethora of buzz-worthy articles aimed at discussing the implications and repercussions for enacting this specific piece of legislation.<sup>200</sup> One particular article sought to capture the perspectives of ten individuals involved in performing South Carolina's death row executions to assess how this profession has affected their mental and physical health.<sup>201</sup> Craig Baxley, employed by SCDC, spoke out concerning his involvement in the execution of an inmate on the electric chair and his administration of lethal injection drugs to inmates.<sup>202</sup> Baxley, who was a member of the Marine Corps prior to his career with the SCDC, reported experiencing mental and emotional turmoil from his participation in executions.<sup>203</sup> In fact, he exclaimed that he felt as if he "was the carrier out of the state-assisted homicide."<sup>204</sup> He further elaborated that "despite previously being a devoted Baptist and attending church each Sunday, he "stopped going to services and started thinking about suicide."<sup>205</sup> Former execution Commander Jim Harvey expressed much the same sentiment as Mr. Baxley, lamenting that "[h]e would be consumed by stress for weeks before each execution, and afterwards, it would be at least five days until he felt somewhat back to normal."<sup>206</sup> Baxley's and Harvey's experiences while working for SCDC, along with the multitude of other individuals who have participated in executions, require us to take a step back and ponder: what exactly are we

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198. See discussion *supra* Sections IV.B.1–B.4.

199. See discussion *supra* Section IV.A.

200. See, e.g., Eisner, *supra* note 120 (detailing the perspectives and experiences of three men who worked on South Carolina's death row).

201. See *id.*

202. See *id.*

203. See *id.*

204. See *id.*

205. *Id.*

206. *Id.*

asking our own state's citizens to perform when we force them to carry out capital punishment?

Despite the SCDC implementing procedures aimed at removing the guilt and accountability that executioners administering lethal injections will necessarily feel, Mr. Baxley and Mr. Harvey still experienced an adverse impact from their actions.<sup>207</sup> As such, this allows us to consider the type of mental anguish and life-long trauma a law enforcement officer would be forced to confront if required to become a member of the firing squad team. Ultimately, the use of a firing squad as a method for inflicting capital punishment creates potential constitutional violations and also places firing squad members at risk of experiencing significant trauma.

## V. CONCLUSION

South Carolina's legislature, through enacting Senate Bill 200, was searching for a method to remedy the ten-year moratorium on death row executions.<sup>208</sup> While this law may have the potential to lift the moratorium, as it offers the firing squad as a potential available method of execution, this form of capital punishment unearths a number of potential constitutional violations.<sup>209</sup> With only three other states offering a firing squad as an available alternative for execution and the lack of Supreme Court precedent as to the constitutionality of this method, the SCDC has very little information or history to aid it in crafting protocols and procedures for the creation of a firing squad that abides by Eighth Amendment standards.<sup>210</sup> As such, the likelihood that the SCDC creates a firing squad that violates the Eighth Amendment and results in cruel and unusual punishment is probable, but whether the Supreme Court hears the issue is entirely unknown. As of September 6, 2022, Richland County Court of Common Pleas Judge Jocelyn Newman "issued an injunction preventing the state from carrying out executions using a firing squad or the electric chair, ruling that those methods violate the state's constitutional prohibition against 'cruel, unusual, and corporal punishments.'"<sup>211</sup> In Judge Newman's opinion, she lamented that "South Carolina turned back the clock . . . . [And] the General Assembly ignored advances in scientific research and evolving standards of humanity

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207. *See id.*

208. *See* discussion *supra* Part I.

209. *See* discussion *supra* Sections IV.B.1–B.4.

210. *See* discussion *supra* Section IV.A.

211. *South Carolina Trial Court Rules in Favor of Death-Row Prisoners Challenging Execution Methods*, DEATH PENALTY INFO. CTR. (Sept. 9, 2022), <https://deathpenaltyinfo.org/news/south-carolina-trial-court-rules-in-favor-of-death-row-prisoners-challenging-execution-methods> [<https://perma.cc/Y9GM-SDAX>]; *Owens v. Stirling*, No. 2021-CP-4002306, at \*37–38 (S.C. Ct. C.P. Richland Cnty. Sept. 6, 2022).

and decency.”<sup>212</sup> In response, “[a] spokesperson for Governor Henry McMaster said that [the] governor disagreed with the court’s ruling and would appeal.”<sup>213</sup>

Based on the lack of availability of lethal injection drugs, coupled with the unknown protocols and procedures for the implementation of a firing squad, South Carolina removed an inmates’ choice of a reasonable available alternative method for execution. The passage of Senate Bill 200 ultimately resulted in electrocution being the sole and primary method of execution in South Carolina, a method abolished in forty-two states as well as the District of Columbia and Puerto Rico.<sup>214</sup> Even though Judge Newman issued an injunction preventing SCDC from carrying out executions using a firing squad or the electric chair, Governor Henry McMaster appealed the decision.<sup>215</sup> Given the heightened commentary and scrutiny surrounding this topic, SCDC’s ability to create a “viable” firing squad will nevertheless pose constitutional issues that will eventually be addressed by the United States Supreme Court, even if many years down the road.<sup>216</sup> In essence, South Carolina is seeking to lift its moratorium on enacting capital punishment through creating a method of execution in an experiment-like fashion.

South Carolina should, through observing other states that have faced similar issues with lethal injection drug shortages and considered the possibility of implementing other methods of carrying out executions, overturn Senate Bill 200 and abolish the death penalty altogether. Virginia’s legislature, for instance, was in a very similar situation to South Carolina’s legislature in that their lethal injection drugs were expiring, and there was a moratorium on executions.<sup>217</sup> While Virginia’s legislature discussed the possibility of implementing a firing squad, the state ultimately decided to abolish the death penalty to avoid any constitutional violations that may arise from inflicting capital punishment.<sup>218</sup> Virginia was the “23rd state, and the first in the South, to eliminate capital punishment entirely.”<sup>219</sup> Due to the potential constitutional violations South Carolina likely will face with the

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212. *Owens*, No. 2021-CP-4002306, at \*37.

213. *South Carolina Trial Court Rules in Favor of Death-Row Prisoners Challenging Execution Methods*, *supra* note 211.

214. *See Wade*, *supra* note 7; *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> [https://perma.cc/DC6X-USBW].

215. Notice of Appeal, *Owens*, No. 2021-CP-4002306 (S.C. Ct. C.P. Richland Cnty. Sept. 14, 2022).

216. *See discussion supra* Sections IV.B.1–.B.4.

217. *See Samantha O’Connell, Virginia Becomes First Southern State to Abolish the Death Penalty*, AM. BAR ASS’N (Mar. 24, 2021), <https://www.americanbar.org/groups/committees/> [https://perma.cc/7G3R-CV9T]; Chammah & Meagher, *supra* note 4.

218. *See O’Connell, supra* note 217.

219. *Id.*

implementation of a firing squad, South Carolina should follow Virginia's example and find that capital punishment no longer has a place within our justice system.

In conclusion, consider the story of Mr. Harvey, a man who at one time created the very rules used to execute inmates on South Carolina's death row.<sup>220</sup> Mr. Harvey's perspective on capital punishment has been altered by his experience in carrying out executions, as he "no longer supports capital punishment."<sup>221</sup> When questioned as to why his belief has shifted, Mr. Harvey expressed that "there's so much inequity in who gets the death penalty and who doesn't."<sup>222</sup> He subsequently "point[ed] to the fact that over 1,000 people are serving life sentences in South Carolina for murder" and elaborated that there is "very little difference between them and the guys sitting on death row for the same offense."<sup>223</sup> If the man who once created and adamantly supported capital punishment recognizes the injustice perpetuated by its continuation in South Carolina's justice system, can our legislature and governor not do the same?

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220. See Eisner, *supra* note 120.

221. *Id.*

222. *Id.*

223. *Id.*