

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

MIKAL D. MAHDI.....Petitioner,

v.

STATE OF SOUTH CAROLINA.....Respondent.

Appellate Case No. 2014-002131

**RESPONSE IN OPPOSITION TO MOTION TO STAY
THE SETTING OF AN EXECUTION DATE**

On December 8, 2006, Petitioner, Mikal D. Mahdi, was sentenced to death for the murder of Captain James E. Myers. On January 9, 2023, the State advised by letter that Petitioner had concluded his ordinarily available remedies and did not have a currently pending action challenging his conviction or sentence. That same day, Petitioner moved to stay the setting of an execution date, essentially requesting this Court direct the Clerk not to issue an execution notice.

The State opposes the stay for these reasons:

1. On June 18, 2004, Mahdi murdered Capt. Myers in Calhoun County. On November 30, 2006, Mahdi waived his right to a jury and entered guilty pleas to murder, second degree burglary, and grand larceny. The Honorable Clifton Newman heard and accepted the pleas. Judge Newman held capital sentencing proceedings December 1-6, 2006. Then, on December 8, 2006, Judge Newman issued a decision announcing his finding of two statutory aggravating

circumstances¹ and his determination that death was the appropriate sentence for the murder of Capt. Myers. Mahdi's pleas and sentence of death have been repeatedly affirmed through challenges in both state and federal courts. These challenges include review of direct appeal issues (via a petition for writ of certiorari) with proportionality review; a post-conviction relief action; a post-conviction relief appeal; and review in a 28 U.S.C. § 2254 (federal habeas corpus) action. *See Mahdi v. Stirling*, 20 F.4th 846, 856 (4th Cir. 2021), *cert. denied*, No. 22-5536, 2023 WL 124121 (U.S. Jan. 9, 2023); *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807, 807 (2009).

2. After such exhaustion, the Clerk of this Court is tasked with sending notice to the South Carolina Department of Corrections (SCDC) to carry out the execution. *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996); *Reed v. Ozmint*, 374 S.C. 19, 23–24, 647 S.E.2d 209, 211 (2007); S.C. Code Ann. § 17-25-370. The date of execution shall be “the fourth Friday after receipt of such notice ... unless stayed by the order of the Supreme Court or respite or commutation of the Governor.” S.C. Code Ann. § 17-25-370. Because the setting of the date is governed by this statutory procedure, Mahdi's request for this Court to “stay the setting of an execution date” is a request to prohibit the issuance of the notice. His request should be denied.

3. “[I]t is a ministerial duty of the Clerk of this Court to issue an execution notice pursuant to § 17-25-370.” *Roberts v. Moore*, 332 S.C. 488, 488, 505 S.E.2d 593 (1998). The duty is ministerial because it is prompted by “fixed and designated facts” and does not provide any “discretion in determining how or whether the act shall be done or the course pursued.” *See Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008) (defining ministerial duty). The only

¹ Murder in the commission of a burglary, and murder in the commission of larceny involving the use of a deadly weapon, S.C. Code Ann. § 16–3–20(C)(a)(1)(d) and (f).

question is whether the death sentence has been affirmed throughout Mahdi's various actions for review, both state and federal. It has. Mahdi does not contend otherwise. (See Motion, p. 2). Therefore, the notice should be issued in compliance with the statutory provision.

4. At this point, after so many levels of review without relief, Mahdi must show "exceptional circumstances warranting the issuance of [a] stay" of execution. *In re Stays*, 321 S.C. at 548, 471 S.E.2d at 142. Mahdi asks this Court to "stay" the ministerial duty (rather than the execution as contemplated in *In re Stays*)² due to the civil action challenging the 2021 amendment to S.C. Code Ann. § 24-3-530 as litigated by other inmates. (Motion, p. 2). He is not a party to the action and has not challenged the statute. He has not elected a method of execution. Yet he seeks essentially to be treated the same as if he had been a party and claims he is similarly situated. More precisely, Mahdi shares a *generally* similar situation rather than being *similarly* situated. He has a sentence of death and he has exhausted his ordinary remedies. But he has not challenged the statute and the injunction granted by Judge Newman speaks to execution of the plaintiffs – a fact Mahdi asserts in his motion. (Motion, p. 3, referencing Judge Newman's order "enjoining SCDC from executing the plaintiffs"). He also asserts this Court issued stays for the inmates involved in that litigation to complete the litigation thus he should have one too. (Motion, p. 3). But, again, he is not in the same position as he has not made such a challenge.

5. Mahdi is actually attempting to limit the process that could show whether he may potentially be "similarly situated" in some respect. The notice is integral to the process necessary

² As the State similarly noted in opposing the request in John Richard Wood's case, that separate litigation may be a basis *for a motion* for stay *after* a notice is issued, but not before. Mahdi fails to note that in his reference to the letter response in Wood. (See Motion, p. 5). In other words, it may be argued, but it is not a basis to prevent ordinary protocol in issuing a notice. Further, the basis is insufficient to warrant a stay for all the reasons cited here.

to establish “availability of methods” and election of method. However, Mahdi argues essentially that the steps that follow the issuance are burdensome, a mere “formality,” ahead of the inevitable stay that this Court will issue.³ (Motion, pp. 4-5, he asserts “the Court has already made fairly clear that it has no intention of permitting any executions to proceed during the pendency of its review of the methods of execution matter”). He wholly misapprehends the process. S.C. Code Ann. § 24-3-530, as amended in 2021, provides that an inmate under a sentence of death “shall suffer the penalty by electrocution,” and then provides a conditional election of an alternative method of execution depending on whether one or both alternative methods listed (lethal injection and the firing squad) are available to the Department at that time. S.C. Code Ann. § 24-3-530 (A).⁴ The statute also prompts the Director to “certify by affidavit under penalty of perjury” whether the

³ Mahdi labels the processes involved as “superadded processes” and argues that they “place substantial stress and anxiety on both SCDC staff and inmates,” (Motion, p. 5), but he fails to tether the assertion of “superadded process” to some definitional difference. While “superadded” has been used in connection with the level of pain associated with the actual execution process in evaluation of an Eighth Amendment claim, see *e.g. Bucklew v. Precythe*, 587 U.S. ____, 139 S. Ct. 1112, 1126–27 (2019) (“when it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved, the law has always asked whether the punishment ‘superadds’ pain well beyond what’s needed to effectuate a death sentence”), the phrasing is markedly out of place with describing established protocols and steps in anticipation of execution. Moreover, as described more fully above, the process has significant value in form and function. The process is not unnecessary or gratuitously burdensome. Mahdi’s wording is out of place.

⁴ The Supreme Court recently summarized the differing offered methods in death-penalty states: “In the 27 States with the death penalty, lethal injection is by far the most common method of execution. See *ibid.* Fifteen States, including Georgia, authorize only the use of lethal injection. Nine States authorize lethal injection plus one or more other specified methods; of those (to use an example relevant here), four approve the firing squad. And three States provide that if their authorized methods (including lethal injection) are found unconstitutional, then they may carry out a death sentence by any constitutional means.” *Nance v. Ward*, 597 U.S. ____, 142 S. Ct. 2214, 2219 (2022) (footnotes omitted). It noted that South Carolina has provided a firing squad option. *Id.*, n. 2. In that case, the Supreme Court sent the habeas action back to district court to consider the inmate’s request for the firing squad even when Georgia did not have that option in its statute. *Id.*

listed methods are available *at the time he receives the notice* from the Clerk.⁵ S.C. Code Ann. § 24-3-530 (B). An inmate may thereafter elect a method or waive by failing to act within the required time. S.C. Code Ann. § 24-3-530 (A) (election of method “must be made in writing fourteen days before each execution date or it is waived”).⁶ “By declaring his method of execution” Mahdi will have “waive[d] any objection he might have to it.” *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). See also *State v. Langford*, 833 P.2d 1127, 1129 (Mont. 1992) (state statute allowed “Langford the opportunity to elect between lethal injection and hanging as a method of execution” and by electing hanging, “he rendered moot any claim concerning the constitutionality of hanging as a method of execution”). Further, election of one method renders moot complaints as to methods that will not be used as those methods could have no bearing on the execution. See, e.g., *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (“Because Stanford is given the option of electrocution and lethal injection, we need not evaluate the constitutionality of electrocution.”); *Woods v. Comm’r, Alabama Dep’t of Corr.*, 951 F.3d 1288, 1291 (11th Cir.) (2020) (“The addition of nitrogen hypoxia served to moot a pending challenge to the constitutionality of Alabama’s lethal-injection protocol.”) (citing *In re Ala. Lethal Injection*

⁵ In a June 16, 2021 Order staying the execution in a separate case – notably issued *after* the amendment requiring an affidavit by the Director – this Court acknowledged that it had requested *additional* information on the availability of both methods (i.e., lethal injection and firing squad), and the Director complied by submitting additional information. (See June 16, 2021, Freddie Eugene Owens, Appellate Case No. 2006-038802). It would appear prudent to allow the process here to continue according to the statutory provisions, as intended, and for the Court to receive a new affidavit with up to date information, along with any additional response(s), if requested. But the point here remains that none of those processes are prompted in the absence of a notice.

⁶ In connection with prior notices issued for other inmates, on March 18, 2022, the State notified this Court that the Department of Corrections now has the capability to carry out executions by either electrocution or firing squad. (March 18, 2022 Letter of the Attorney General, with copy of Letter from Director Stirling, Freddie Eugene Owens, Appellate Case No. 2006-038802).

Protocol Litig., No. 2:12-cv-316-WKW (M.D. Ala. filed Apr. 6, 2012)); *accord 21A Am. Jur. 2d Criminal Law § 863* (Feb. 2022 Update) (“a statute which permits an offender sentenced to death to choose whether he or she shall be executed by lethal injection or by lethal gas does not violate the Eighth Amendment merely because it offers two unpleasant alternatives to a person who would rather select neither”).

6. Mahdi’s additional reference to the stay issued in John Richard Wood’s case does not aid his position. Mahdi is rightfully constrained to admit the order preventing issuance in that case was based solely on a then pending post-conviction relief action challenging competency to be executed, not the pendency of the separate civil action brought by other parties. (Motion, p. 4 and n. 2).⁷ Mahdi is not similarly situated to Wood as he has not made a challenge to his competency to be executed.

CONCLUSION

For all the above reasons, Mahdi’s motion should be denied.

Respectfully Submitted,

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⁷ Mahdi is incorrect that the State asserted in its informal response in Wood that the civil litigation pending on appeal “may form a proper basis for the Court to prevent the Clerk from issuing an execution date.” (Motion, p. 5). Quite the opposite. The State argued that Wood – who merely filed a letter advising of a PCR action to challenge competency to be executed – failed to “properly request a stay” via a motion filed after the notice. The State maintained that the Clerk *should not exercise discretion* but issue the notice in accordance with proper procedure. (Letter dated Nov. 2, 2022, John Richard Wood, Appellate Case No. 2002-022661). Though he is wrong on that point, Mahdi is right to concede that this Court did not stay the issuance based on the civil litigation by other inmates, but premised on a challenge to his competency to be executed. (Nov. 17, 2022 Order, John Richard Wood, Appellate Case No. 2002-022661).

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