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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FREDDIE EUGENE OWENS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 1999-011364

RESPONSE IN OPPOSITION TO SECOND MOTION FOR A STAY OF EXECUTION

Petitioner Freddie Eugene Owens's execution is scheduled for Friday, September 20, 2024. Owens, through counsel, filed a post-conviction relief (PCR) application in the Greenville County clerk's office on Friday, August 30, 2024. That same day, in this Court, Owens filed a motion for a stay of execution to allow litigation of his recently filed PCR action. The State filed a response in opposition to the motion on September 5, 2024. That motion is still pending.

On September 5, 2024, after the State's response was filed to the first motion, Petitioner filed a second motion for a stay of execution and also filed a petition for writ of habeas corpus in this Court's original jurisdiction. In that petition, Owens attempts to raise two stale claims based on a jury instructions and essentially the form of verdict from the 1999 trial jury (or perhaps the 2006 sentencing). He also requests a second statutory proportionality review citing *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022). Owens has failed to show any error much less constitutional error warranting the exercise of original jurisdiction.

RELEVANT LAW

In re Stays of Execution in Cap. Cases, 321 S.C. 544, 471 S.E.2d 140 (1996) provides for the narrow possibility of an additional stay of execution for a successive PCR action.[1] To obtain a stay in such circumstances, a petitioner's "motion must demonstrate that there are exceptional circumstances warranting the issuance of the stay." *Id.*, 321 S.C. at 548, 471 S.E.2d at 142. The high bar is understandable as the execution notice issues only after exhaustion (or waiver) of ordinarily available state and federal remedies. *See* S.C. Code Ann. § 17-25-370. *Accord Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) (noting the Supreme Court has "vacated a stay entered by a lower court as an abuse of discretion where the inmate waited to bring an available claim until just 10 days before his scheduled execution for a murder he had committed 24 years earlier").

"Habeas relief" in this Court's original jurisdiction "will be granted only for a constitutional claim," so great that "in the setting," it "constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002) (citing *Gibson v. State*, 329 S.C. 37, 39, 495 S.E.2d 426, 428 (1998) (citing *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990)). The standard is high, and it is anticipated the need for such review will be accordingly rare. "At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Williams v. Ozmint,* 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008).

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[1] *In re stays* also requires that the motion be filed "no later than fifteen (15) days prior to the date of the scheduled execution." 321 S.C. at 548, 471 S.E.2d at 142. Petitioner has met the time component of the filing, having filed the motion on September 5, 2024, before the scheduled September 20, 2024, execution.

CLAIMS IN THE 2024 ORIGINAL JURISDICTION PETITION FOR WRIT OF HABEAS CORPUS

In his newest filing, Owens alleges:

> (1) there is a "burden shifting of the element of malice" in the 1999 jury instructions, (Pet. at 7);
>
> (2) that his death sentence is "inherently disproportionate because there has been no finding that he killed, intended to kill, or showed reckless disregard for human life, " (Pet. at 12); and
>
> (3) that he "has a right to have this Court conduct comparative proportionality review under the standard announced in *Moore v. Stirling.*" (Pet. at 18).

He requests a stay to litigate these claims.

ARGUMENT TO DENY THE MOTION FOR STAY

The most obvious hurdle to Owens's most recent filing is that the first two issues, though non-meritorious, were nonetheless available from 1999 forward. He did not raise the issues in the normal course of proper litigation. In no sense can it be said that the "system" failed Petitioner where the fault in not raising these claims earlier lies with him. *Williams, supra.* Moreover, there cannot be a "gross miscarriage of justice" as at the end of the day, these claims cannot support any relief. *Id.* Lastly, his request for an additional proportionality review is not warranted. He has received one and is not entitled to another. *See State v. Owens*, 378 S.C. 636, 641, 664 S.E.2d 80, 82 (2008).

Again, Owens has had ample opportunity to litigate claims regarding his conviction and sentence – a trial, three sentencing proceedings, a 2009 PCR action, C/A 2009-CP-23-074 (Response in Opposition, Attachment 1, Order of Dismissal), a PCR action appeal,[2] a federal

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[2] A record of the PCR proceedings may be found in Appellate Case No. 2013-001026.

habeas corpus action and appeal, an attempted successive PCR action filed in 2016 on alleged mitigation evidence denied as improperly successive and untimely, and a 2021 petition for writ of habeas corpus in this Court's original jurisdiction that this Court denied in April 2022.[3] Notably, this is a second attempt to enter into additional litigation and delay the September 20, 2024 execution. Owens also has filed a successive PCR action and seeks a stay to litigate those separate claims. He did not include the jury instruction or fact-finding claim in the PCR action which implicitly concedes that the issues are barred. At any rate, Owens has exhausted his ordinary remedies, both state and federal, and received no relief. He cannot show constitutional claims warranting the extraordinary exercise of original jurisdiction habeas corpus review. Concomitantly, he cannot show the "exceptional circumstances" required to obtain a stay at this late date. *In re Stays, supra.* The motion should be denied.

ARGUMENT IN OPPOSITION TO THE MOTION FOR A STAY

Much like Owens's first motion for stay filed August 30, 2024, Owens attempts to recycle known facts in hopes of staying in litigation. Respondent has this day filed a return to the petition for writ of habeas corpus and incorporates by reference each and every argument in support of the fact that the petition should be denied. In brief form, the salient points are these:

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[3] Appellate Case No. 2021-000609. Owens wishes to rely on some of the same materials submitted in his last original jurisdiction filing. (*See* Pet. at 26-28 and n. 15 and 16, attempting to rest on materials from Dr. Hunter and Dr. Gur). As set out in the State's response in the prior original jurisdiction petition, Dr. Hunter was a "new" expert (though he relied on old materials) in the 2021 original jurisdiction petition action, and the Dr. Gur materials were submitted in the federal habeas action. *See* Appellate Case No. 2021-000609, Return at 3-4, filed June 21, 2021. This is truly a matter or repackaging old materials. Moreover, the gist of his argument is again an "aspect of youth" in regard to proportionality. (*See* Pet., at 27). Again, just as in 2021, the State submits that evidence of youth was fully investigated and presented in Owens's re-sentencing, then investigated again in PCR, then investigated again in federal habeas corpus proceedings. Owens was denied relief at each stage of review. He has shown no circumstances to support extraordinary relief.

- That record shows his current claims lack merit. For instances, Owens asserts he was convicted on accomplice liability, and "[r]ecognizing that the 1999 jury had not found Mr. Owens to be the shooter, the 2006 re-sentencing judge included for the jury's consideration the mitigating circumstance that "[t]he defendant was an accomplice in the murder committed by another person and his participation was relatively minor." (Pet., at 2). Owens greatly overreaches. There is no basis to assert that the 1999 guilt phase jury did not find him to be the shooter – the evidence certainly supported that he was by multiple admissions and identification by type of mask.[4]

- At the outset, it is inescapable that Owens could have raised a challenge to the 1999 jury trial instructions at any point over the twenty-plus years he has been in litigation. Moreover, the evidence at trial showed through multiple admissions, including his own, that he was responsible for Ms. Graves being shot. Even so, he is wrong to assert that the jury instructions for murder in 1999 trial contained a mandatory presumption on malice. (Pet., at 1). When read in context, the instructions repeatedly explain permissive inferences and the one portion of the full charge that Owens criticizes is not so firm in its direction as Owens would argue. Even so, there is overwhelming, and uncontested evidence of malice such that any error could only be harmless.

- There is no requirement that a fact-finding must be returned to determine the triggerman where an accomplice accompanies the defendant at an armed robbery. Even so, the facts here consistently showed Petitioner was the triggerman, not the least of which came through Owens's admissions that he was the shooter. Though he could have been convicted on accomplice liability, the evidence consistently supported that he was the shooter – a fact he took great pride in.

- This Court is required to conduct a proportionality review pursuant to S.C. Code 16-3-25(C)(3). The Court fulfilled its duty and made a proportionality review as part of the 2008 direct appeal following the third sentencing proceeding. *State v. Owens,* 378 S.C. 636, 641, 664 S.E.2d 80, 82 (2008). Owens posits that he should receive a new S.C. Code § 16-3-25(C)(3) proportionality review pursuant to *Moore v. Stirling*, 436 S.C. 207, 871 S.E.2d 423 (2022). His request is not only late, it is unavailing. *Moore* did not mandate new proportionality reviews for all, and this Court has not gone outside capital cases in making its proportionality review analysis in two cases that were considered after *Moore*.

- Further, in *Moore,* this Court acknowledged not only that "severity and brutality of crimes may vary," but also that juries have the discretion to determine the appropriate sentence for the particular individual before them. *Moore,* at 229, 871 S.E.2d at 435.

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[4] Petitioner asserts the "[v]ideo of the shooting shows two unidentifiable, masked assailants, both holding guns." (Pet., at 4). However, as more fully set out below, the masks were different – one from hosiery, one a ski mask – and Owens was identified as wearing the ski mask at that robbery. Yet the larger point is one he concedes by this observation – both individuals were armed major participants. Malice was not at issue, only identity, and a death sentence is constitutional for either of the two-armed men who killed Ms. Graves during the armed robbery.

And it firmly resolved that the "[t]his Court's scope of review does not allow it to disregard the factual findings in the case and pronounce an alternative sentence" when nothing "negate[s] the jury's findings...." *Id.* The reality of that limitation greatly undercuts the entirety of Petitioner's position.

- Further away from the *Moore* argument, Owens hopes to persuade the Court on statistics and surface analysis – one as yet unchallenged for accuracy or bias, but decidedly not relevant as to Owens's character. It is, at base, an opinion on broad inquiries and subjective data points. In contrast, a Greenville County jury assessed that death was the appropriate sentence after consideration of the individual and his crime. That decision should remain undisturbed.

- Owens then suggests the two cases cited in this Court's direct appeal proportionality review show only "superficial similarities" to Owens's case, (Pet., at 22), yet, the cases show precisely what this Court noted – the death sentence was not excessive considering other similar cases. Moreover, his further suggestion for review simply requires ignoring certain evidence in individualized sentencing. As the Fourth Circuit related it its opinion, the evidence at sentencing "included testimony about Owens's killing of his fellow inmate on the eve of his first sentencing trial—the 'elephant in the room,' as" Owens's counsel later described it. *Owens v. Stirling*, 967 F.3d 396, 406 (4th Cir. 2020). On top of the other murder (which is noticeably absent from Owens's offered evaluation of proportionality) is Owens's nearly uncontrollable behavior in the Department of Corrections, and his continued bent to do violence.

CONCLUSION

Based on the foregoing, Respondent submits Owens has failed to show a basis for allowing additional proceedings. A stay at this time would only result in unwarranted delay in carrying out the sentence that every sentencer has found appropriate for this petitioner – death. The State asks this Court to "deny [this] meritless request[] expeditiously." *See Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring in the denial of certiorari).

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