

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

RICHARD BERNARD MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RESPONSE IN OPPOSITION TO MOTION TO TEMPORARILY
SUSPEND SETTING EXECUTION DATE

Moore is under a sentence of death. He has exhausted his ordinary state and federal remedies and does not have a stay of execution in place. In response to the State's letter of November 2, 2020 informing this Court of the completion of remedies and absence of any stay, Moore has filed a motion to suspend setting an execution date. Respondent opposes the motion as Moore seeks to forbid compliance with a statutorily required ministerial function without cause or justification. The State respectfully would show the Court:

1. After exhaustion of ordinarily available state and federal remedies, the Clerk of the Supreme Court of South Carolina is tasked with sending notice to the South Carolina Department of Corrections 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 § 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 17-25-370. On November 2, 2020, the State sent a letter to this Court

confirming the exhaustion. Moore agrees that his federal habeas action concluded that day. (See Motion, p. 2). Even so, Moore seeks an order to prohibit the Clerk from performing his statutory duty. The motion lacks merit.

2. Moore's motion rests on various arguments having nothing to do with the exhaustion of ordinary remedies. Rather, his motion seeks relief based on allegations of *potential* issues with execution protocols or planned attendance, and *potential* other actions. However, "it 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). Setting aside for the moment the question of whether Moore's motion is authorized at all,¹ the facts before the Court show no intervention is warranted. The only question is whether the death sentence has been affirmed throughout Moore's various actions for review, both state and federal. It has. Moore does not contend otherwise. Therefore, Moore's motion should be denied and the Clerk should issue the notice.

3. Moore raises concerns over the COVID virus, but he fails to address the only question of any worth for this step in the process – whether the virus affects the Clerk's ability to issue the notice. Moore has made no such showing. It would be difficult to do. The Chief Justice

¹ Moore's motion is broadly based on COVID fears and possible concerns for third parties. He seeks to avoid the issuance of the notice, and therefore the setting of the execution date, for an undefined period of time. Authority to act (along with individual standing issues) are of immediate concern. But critically, Moore does not propose any specific challenge to the legality of his sentence or the legality of the execution process, nor does he make a request under *In re Stays*. Rather, Moore simply wants this Court to stop the process.

has issued orders allowing the appellate courts to function since the beginning of the State crisis. See <https://www.sccourts.org/coronavirus/covid-19/> (last checked Nov. 4, 2020). In fact, most recently, the Chief has ordered resumption of normal schedules, and jury trials have been successfully held across the State. *Id.* Memorandum, September 14, 2020, Sec. I (“As we have incrementally increased our court operations, it is now time to move toward normal court operating procedures.”); see also Sec. III (“Given the success of the pilot General Sessions jury trials held in August 2020, all judicial circuits should now prepare to conduct General Sessions and Common Pleas jury trials through the remainder of 2020.”).

4. Moore also raises concerns over the COVID virus within the Department of Corrections; however, that cannot affect the issuance of the notice which is a duty of the Clerk separate and apart (and not even in the location proximity) of the Department.²

5. Moore further contends he needs additional time to research whether he will or should file a petition for writ of habeas corpus in the original jurisdiction of this Court. Moore has inverted the process. Moore may “request for a stay pending the filing of” such a petition, but he “must demonstrate that there are exceptional circumstances warranting the issuance of the stay.” *In re Stays of Execution in Capital Cases*, 321 S.C. at 548, 471 S.E.2d at 142. To put a fine point on it, Moore must first show there is an execution process at hand to stay. Moore seeks to prevent ever getting to that juncture. The precedent on stays reveals nothing about prohibiting the Clerk

² Moore’s assertions also raise serious standing issues, such as the rights, if any, of third parties who may potentially be denied access. The statutory provision he references merely provides limits as to who may attend. See S.C. Code § 24-3-550. It would be odd to interpret the statute as allowing a defendant’s family, friend or counsel to indefinitely delay execution simply by avoiding attendance. At any rate, Moore’s assertions are speculative, and his motion premature at best. Respondent notes that Moore has filed a separate federal action seeking to secure a First Amendment right for his counsel and compel various information from the South Carolina Department of Corrections. See *Justice 360 v. Stirling, et al.*, C/A 3:20-03671-MGL (District of South Carolina).

from performing his statutory duty of issuing the notice of execution to the Department – a ministerial, non-discretionary duty that neither prevents nor inhibits a motion to stay. Second, to warrant habeas relief, Moore must allege not just a violation of a constitutional right, but one “which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.” *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quoting *State v. Miller*, 16 N.J.Super. 251m 84 A.2d 459 (1951)). Though the issue to be raised is at best a murky suggestion, it would appear that Moore wishes to launch yet another investigation into his own personal and family history. This has been the subject of investigation at multiple stages. Moore’s trial team investigated his background and family for purposes of his sentencing phase; his PCR team investigated (and investigated his trial team’s investigation); then his federal habeas team investigated (and investigated his PCR team’s investigation of the investigation).³ In fact, most recently, the Fourth Circuit considered and rejected Moore’s argument that additional mitigation would have altered the heart of his mitigation claim such that new review was warranted. In the federal habeas litigation, counsel presented “affidavits from other individuals who knew Moore as a child” to expand on background information. *Moore v. Stirling*, 952 F.3d 174, 184–85 (4th Cir.

³ The crime in this case occurred twenty-one years ago. Moore was convicted and sentenced in October 2001. Over the ensuing nineteen years, he has had direct review, a state PCR hearing, and certiorari review of the order denying relief. He continued his challenges and received federal habeas review by a magistrate judge, the district court, the Fourth Circuit, and consideration of a petition by the Supreme Court of the United States. Moore even sought delay within the extensive review process. After Respondents moved for summary judgment on his federal habeas claims, Moore moved on December 4, 2015, for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust previously-unexhausted claims in a successive state PCR action. This was two days before the statute of limitations in 28 U.S.C. 2244(d)(1) expired. Over Respondents’ objection that he had no legal right to return to state PCR (which was later vindicated in state court), the magistrate judge stayed proceedings on January 13, 2016. Moore’s successive state PCR application was summarily dismissed on May 11, 2017, but the stay was not lifted until October 22, 2018. Not only did Moore make these challenges, Moore has received representation by a series of qualified attorneys throughout this process, and has also received funding at the state and federal level in order to fully investigate claims.

2020), *cert. denied* 2020 WL 6385899 (U.S. Nov. 2, 2020). The District Court and the Fourth Circuit found the information did not “fundamentally alter the mitigation-evidence claim,” noting the mitigation evidence already in the state court records from sentencing and post-conviction review. 952 F.3d 176 and 185.

If the only claim Moore is alluding to depends upon a social history workup (or more accurately at least a third social history workup), then it is highly unlikely that Moore can show the necessity for a stay, much less that he could possibly meet his high burden in a habeas action in this Court’s original jurisdiction. Moore appears similarly situated to another capital defendant who sought state habeas relief and whose petition was rejected:

Petitioner has been afforded more than sufficient judicial review. Specifically, Petitioner raised this issue on PCR, but was denied relief on this ground. This Court reviewed Petitioner’s direct appeal as well as his PCR proceeding. The federal district court, the federal circuit court, and the United States Supreme Court have also reviewed Petitioner’s case. Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. 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, 479–80, 671 S.E.2d 600, 603 (2008) (citations omitted).

Distinguishing himself from Williams, though not in a way helpful to him, Moore asks not for a stay in order to pursue a habeas action, but asks for a stay in order to pursue an investigation as to whether to a habeas action may be filed. He asks too much especially in light of the full investigations in his past actions. *Accord Owens v. Stirling*, 967 F.3d 396, 417 (4th Cir. 2020) (“The Supreme Court has likewise rejected the notion that counsel must tell a defendant’s life history with elaborative detail, reasoning that where (as here) counsel put forth ‘substantial mitigation evidence,’ any cumulative evidence about the same circumstances heard by the jury offers ‘an insignificant benefit, if any at all.’ *see Wong v. Belmontes*, 558 U.S. 15, 23, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam)”). The Fourth Circuit in *Owens* also cited to *Bobby v.*

Van Hook, 558 U.S. 4, 11 2009, for this particularly on point observation: “[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative” *Id.* A “could have done more” argument is an opened invitation to unwarranted delay. Even so, such an argument is not properly made in Moore’s motion to prohibit the Clerk’s performance of his ministerial duty.

6. Lastly, Moore asks for a stay so he may investigate and pursue possible clemency proceedings before the Governor. Clemency is an executive function separate and apart from the Clerk’s duty to issue the notice. See generally S.C. Code § 24-21-910. Again, Moore makes an argument that cannot apply to the ministerial function at issue.⁴

7. The death penalty is constitutional. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). A jury determined death was the appropriate sentence in this case. That determination, and counsel’s quality of representation – both at trial and in PCR action – has been investigated, challenged, and afforded no relief to Moore. It is time for the notice to issue.

CONCLUSION

“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Whether Moore will eventually seek a stay in this Court or in federal court, and whether additional stays will be deemed warranted or not, we must, at the very least, be able to move forward so those questions may be

⁴ This also goes back to Moore’s theory that more investigation is needed which is suspect given the multiple investigations along the way. Simply, another round of investigation in hopes of dredging up a new theory on old facts is particularly unpersuasive. Even in matters of first phase issues, late developments are understandably suspect. See generally *Herrera v. Collins*, 506 U.S. 390, 417–18 (1993) (questioning affidavits “given over eight years after petitioner’s trial” and in absence of “satisfactory explanation” for delay).

properly developed and addressed in proper form and context. Moore's motion to prevent performance of the Clerk's ministerial duty should be denied.

Respectfully Submitted,

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