

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Nov 05 2020

S.C. SUPREME COURT

Case No. 2001-021895

RICHARD BERNARD MOORE
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

REPLY TO RESPONSE IN OPPOSITION TO MOTION TO TEMPORARILY SUSPEND
SETTING EXECUTION DATE

Petitioner, Richard Moore, submits the following in reply to Respondent's Response in Opposition to Motion to Temporarily Suspend Setting Execution Dates ("Response in Opposition"). Respondent does not dispute the risks associated with carrying out an execution during the COVID-19 pandemic or offer any procedures for countering those risks; instead, Respondent asserts this Court does not have the authority to amend its own operating procedures to minimize these risks. This is demonstrably false as this Court has made numerous adjustments to the judicial system operations due to the pandemic.

The procedure for issuing an execution notice upon the completion of federal habeas proceedings is set forth in this Court's opinion in *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996), not a statute. Contrary to Respondent's assertion, this Court has the authority to amend this procedure. Since March, this Court has repeatedly demonstrated and exercised its authority to amend its "normal operating procedures" to minimize the risks posed by the COVID-19 pandemic to participants in the legal system and the public. *See*,

e.g., Memorandum from Chief Justice Beatty (Sept. 25, 2020) (“For the past six months, our state and nation have battled the ongoing COVID-19 pandemic. During this time, the South Carolina Judicial Branch has been forced to alter our courts’ normal operating procedures.”); Order No. 2020-04-14-01 (Apr. 14, 2020) (“In light of the extraordinary challenges presented by the current emergency, this Court finds it necessary to supplement and, in some situations, to alter significantly, the current practices regarding the operation of the trial courts. In the event of a conflict between this order and [the various South Carolina rules of procedure], this order shall control.”) [hereinafter April 14 Order]. *Cf. In re Stays of Executions in Capital Cases*, 321 S.C. at 548, 471 S.E.2d at 142 (allowing for a stay of execution upon a “demonstrat[ion] that there are exceptional circumstances warranting the issuance of a stay”).

Respondent further suggests that the procedure whereby the Clerk of Court issues an execution notice can only be altered if Moore demonstrates that “the virus affects the Clerk’s ability to issue the notice.” Response in Opposition at 2. Respondent’s argument ignores what this Court has clearly understood and contended with—that the operation of the judicial system during this pandemic has wide-ranging health impacts on “the public, litigants, lawyers and court employees.” April 14 Order. As described in detail in Moore’s motion, the issuance of an execution notice sets in motion a series of events, each of which poses risks to the public, the Department of Corrections, counsel for Moore, and statutorily authorized witnesses to an execution. This Court need not, and should not, ignore the health implications of its normal operating procedures simply because one step in the process may not pose a significant risk when viewed in isolation.¹ Neither

¹ Indeed, this Court has continuously looked at the broader risks associated with normal operation of the judicial system. In particular, the court has done so by temporarily suspending jury trials and only recently allowing for jury trials with significant safety modifications to protect those involved despite the fact that issuing jury summonses, if viewed in isolation, could be done safely by the clerks of court.

Respondent nor the South Carolina Department of Corrections have offered any argument that an execution could be safely carried out during this pandemic. To avoid those risks, this Court should temporarily suspend setting an execution date until the risks are mitigated.

Respondent also attempts to minimize the impact of COVID-19 on undersigned counsel's ability to investigate and prepare for clemency and possible state habeas proceedings based on the fact that Moore has previously had resources for conducting a family history investigation. This argument ignores that the issues relevant to clemency and state habeas proceedings are different from those relevant in state post-conviction and federal habeas proceedings. For example, remorse, character, and rehabilitation after a capital conviction and sentence are core to a capital clemency proceeding and likely to be relevant to the Governor's clemency decision. Because evidence on these topics is uniquely relevant to clemency and continues to develop over time, investigation into and compilation of clemency evidence is typically not systematically completed until a clemency proceeding is imminent. This is true in Moore's case, where undersigned counsel have uncovered some evidence relevant to these character questions during prior investigations but have not completed a systematic investigation. Now, marshalling sources of this information—*i.e.* witnesses who could provide affidavits, appear on video, or speak directly to decision-makers—is substantially hindered by the pandemic. To allow for adequate investigation and presentation of evidence for a clemency presentation and consultation with Moore about remaining legal proceedings, this Court should delay issuing an execution notice.

Finally, Respondent asserts that Moore is asking for an indefinite stay of execution. That also is not true. This Court could, for example, maintain the status quo for a reasonable period of time (e.g., sixty days), and then allow Respondent to ask that an execution date be set if it chooses to do so or order further briefing. Then, depending on the then state of the pandemic, this Court

could make a decision at that time about whether circumstances would permit an execution to proceed. A similar procedure was adopted in the recent delay of a September 30, 2020 Texas execution where the court withdrew an execution warrant and set a hearing for March 5, 2021 to revisit the question of whether an execution could safely proceed. *See* Order Withdrawing Execution Date, *Texas v. Trevino*, No. 1977CR1717D (Sept. 15, 2020), *available at* <https://files.deathpenaltyinfo.org/documents/Trevino-TX-290-DC-Order-Withdrawing-Execution-Date-2020-09-15.pdf>.

CONCLUSION

For the reasons stated above and in the motion, this Court should temporarily suspend setting an execution date due to the COVID-19 pandemic to protect the safety of the public and those involved in carrying out an execution and to allow undersigned counsel to adequately investigate and prepare for executive clemency and habeas corpus proceedings and to consult with Moore regarding other potentially necessary end of life decisions.

Respectfully submitted,

s/ Lindsey S. Vann

LINDSEY S. VANN
HANNAH L. FREEDMAN
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME
Cornell Law School
1582 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

November 5, 2020.