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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RICHARD BERNARD MOORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RESPONSE IN OPPOSITION TO (SECOND) MOTION FOR STAY OF EXECUTION

The State, as Respondent, hereby makes a Response in Opposition to Moore's (Second) Motion for Stay of Execution filed on November 16, 2020.[1] Moore has shown no justiciable controversy and a last-minute stay is not only unwarranted – it would aggrieve finality and justice. In support of this position, the State would respectfully show the Court:

1. Moore does not contest that he has exhausted his ordinary remedies both state and federal. Granting Moore's motion for stay at this point would frustrate the extremely important need for finality. In observing that the balance of equities disfavors last-minute delay, the Supreme Court continues to recognize: "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019)

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[1] Moore previously filed a motion to suspend setting an execution date, which Respondent opposed. After issuance of the notice on November 6, 2020, by letter dated that same day, Moore asked this Court to construed his motion "as a motion to stay the execution pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996)," which Respondent also opposed. The motion is still pending as of this filing.

(quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). It is evident that the balance does not tilt in favor of Moore in this latest request. Moore murdered James Mahoney early in the morning of September 16, 1999, over twenty-one years ago. He was convicted and sentenced to death in October of 2001. In the nineteen years that have followed, Moore has received review at eight different levels of appeals in the State and Federal system. He also filed a successive post-conviction relief application that was summarily dismissed. His death sentence – a sentence that a jury of his peers determined was the appropriate sentence in this case – has been upheld. Moore does not presently contend in any of his various petitions currently before this Court that either his conviction or sentence is unconstitutional. Rather, he now asserts that he cannot chose a method of execution without more information on the specifics of each method presently authorized by the State. However, in light of the procedural history of this case; the responses of the South Carolina Department of Corrections ["SCDC"] filed on November 18, 2020; the facts admitted by Moore; and the relevant case law; Moore has failed to show any likelihood of a valid constitutional challenge.

2. Requests for stays of execution prior to exhaustion of ordinary remedies, state and federal, are routinely allowed; however, requests "at any later time" such as to pursue an action "in the original jurisdiction of this Court... must demonstrate that there are exceptional circumstances warranting the issuance of the stay." *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996). *Accord Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) ("Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm....").

3. Moore has been on notice (at the latest) since his October 2001 sentence of death was imposed that he would be executed either by lethal injection or electrocution. See S.C. Code

§ 24-3-530.[2] Moore's execution is currently set for December 4, 2020. Pursuant to S.C. Code § 24-3-530, Moore must choose between either lethal injection or electrocution no later than Friday, November 20, 2020. As of this filing, he has not yet done so. If he does not elect, by operation of statute and the fact he was convicted and sentenced in 2001, the method will be lethal injection. *Id.*

4. Moore has filed actions with this Court on November 16, 2020 seeking Common Law Remedial Writs of Certiorari and Mandamus, original jurisdiction review and declaratory relief. Those actions request "information about how [SCDC] intends to carry out the statutorily authorized execution methods of lethal injection or electrocution," and whether SCDC must provide information on protocols prior to the last day to elect a method of execution. (Nov. 16, 2020, Motion for Stay, p. 1). SCDC has filed a response in those actions, noting that nothing in S.C. Code § 24-3-530 confers a right to information on execution protocols; even so, SCDC has provided information rendering the actions moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("moot appeals result when intervening events render a case nonjusticiable"). Given the matter is moot, he has not shown the "extraordinary circumstances" necessary to support a stay of execution. *In re Stays, supra.* Moreover, he has not shown a likelihood of success as the case presently stands. Moore's arguments are short on facts and fail to acknowledge precedent that is squarely against him.

5. For instance, Moore boldly asserts a history of "botched" executions, (see Petition for Common Law Original Writs, pp. 9-10; Original Action Complaint, p. 5), but his argument is

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[2] Curiously, Moore's counsel previously admit to having some information on protocols from SCDC which, in turn, indicates some advanced preparation for these late filings. (See Common Law Original Writs, Exhibits; see also Motion to Temporarily Suspend Setting an Execution Date, Exhibit 4). This also brings into serious question Moore's repeated assertions of "secrecy" in the standard protocol; if a secret, it is not a well-kept one.

apparently grounded in little more than sensationalized and rare examples. The one South Carolina "example" he offers, the 1997 Elkins execution, references an execution process on an individual with physical attributes that ultimately made the process more difficult. [3] There is little doubt that individual idiosyncrasies may affect the length or complication of a legal execution, but that does not make the execution unconstitutional. The Supreme Court has set out the test for Eighth Amendment purposes. The question is whether the inmate has shown an " '***objectively*** intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.' " *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (emphasis added) (quoting *Farmer v. Brennan,* 511 U.S. 825, 842, 846, and n. 9 (1994)). Moore's example does not aid his argument for a constitutional violation in the use of lethal injection precisely because

> ... an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm."

Baze v. Rees, 553 U.S. 35, 50–51 (2008) (quoting *Farmer, supra*).

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[3] Respondent through undersigned counsel cannot confirm but would not doubt that Elkins attempted to assist his executioners in acknowledgment of his individualized issues. *See generally* Capital Punishment: Strategies for Abolition, Cambridge University Press, p. 166 and n. 67, citing "Killer Helps Officials Find a Vein at His Execution," *Chattanooga Free Press*, 13 June 1997, p. A7. ("Because Elkins' body had become swollen from liver and spleen problems, it took nearly an hour to find a suitable vein for the insertion of the catheter."); *see also* https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers (last visited Nov. 19, 2020) ("The condemned inmate waived his court appeals. His lawyer, Kevin Bell, said the once slightly built Elkins had swollen from spleen and liver problems and was uncomfortable in prison."). Elkins voluntarily waived his right for further review and requested the sentence be carried out. See John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939, 964 n. 131(2005) (noting Elkins resolve "despite significant pressure from their attorneys"). His sentence had been reviewed and affirmed on direct appeal. *See State v. Elkins*, 312 S.C. 541, 542, 436 S.E.2d 178, 178 (1993).

Two other examples of executions outside South Carolina that Moore offers include the Lockett (Oklahoma) execution in 2014 and the Wood (Arizona) execution also in 2014. (Petition for Common Law Original Writs, pp. 9-10). But the Supreme Court also considered these very cases in *Glossip*, placing emphasis on the fact that each is distinguishable based on individual variables, not concern over lethal injection executions as a whole, concluding, "the Lockett and Wood executions have little probative value for present purposes." *Glossip*, 576 U.S. at 892–93. *See also Baze,* 553 U.S. at 53 ("it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated").[4]

Moore also suggests that SCDC could possibly effect "execution by battery acid, by strychnine, by ricin, or by any other chemical SCDC elects to inject into his body," (Original Action Complaint, p. 9), a parade of horribles specifically designed to shock, but one that lacks a logical basis. *See generally Glossip*, 576 U.S. at 893 ("outlandish rhetoric reveals the weakness of ... legal arguments"). Counsel[5] is fully aware of past protocols that argue SCDC carefully plans and practices before carrying out execution.[6] The same is true of the argued risk of pain and suffering if certain steps are not done correctly, or if done by a disgruntled employee. (Original

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[4] Most recently, the federal government has carried out seven (7) executions by lethal injection since July. https://www.bop.gov/about/history/federal_executions.jsp (last checked Nov. 19, 2020).

[5] This very well may fall into the category of never conceding any method is appropriate: "Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable. But as Justice Frankfurter stressed in *Resweber,* '[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation.' 329 U.S., at 471, 67 S.Ct. 374 (concurring opinion). Th[e Supreme] Court has ruled that capital punishment is not prohibited under our Constitution, and that the States may enact laws specifying that sanction." *Baze*, 553 U.S. at 61.

[6] Oddly, counsel had another client scheduled for execution in 2017, Bobby Wayne Stone, but did not then, and does not now, assert it was necessary to have updated copies of protocols for that election.

Action Complaint, pp. 10-11). Again, this concern has been previously answered by the Supreme Court:

> This Court has ruled that capital punishment is not prohibited under our Constitution, and that the States may enact laws specifying that sanction. "[T]he power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant,* 499 U.S. 467, 491, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). State efforts to implement capital punishment must certainly comply with the Eighth Amendment, ***but what that Amendment prohibits is wanton exposure to "objectively intolerable risk," Farmer, 511 U.S., at 846, and n. 9, 114 S.Ct. 1970, not simply the possibility of pain.***

Baze, 553 U.S. at 61–62 (emphasis added) (quoting *Farmer, supra*).

To be clear, this is an execution process at issue. The result will be death, and the process may not be pain-free:

> Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual.

Id. at 50.

Consequently, the Constitution does not demand the avoidance of all risk of pain in carrying out executions. "Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." *Baze*, 553 U.S. at 47. Further, Moore's passing and summary assertion that electrocution would not be acceptable fares little better than his general attacks on lethal injection. The Supreme Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment" including reviewing electrocution. *Id.* at 48. Rather, the crux of the test to identify "forbidden punishments" are those an inmate shows will have 'the deliberate

infliction of pain for the sake of pain—'superadd [ing]' pain to the death sentence through torture and the like." *Id.* at 48-49. Moore does not go so far as to make that allegation here.[7]

To sum up, "the principle, settled by *Gregg,* [is] that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." *Baze*, 553 U.S. at 47.

6. Moore has not shown that his petitions would or should be allowed.[8] Therefore, his motion for stay based on those petitions should be denied.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the State submits that Moore's motion for stay should be denied.

Respectfully Submitted,

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[7] Tennessee just carried out execution by electrocution in several cases. *See generally Zagorski v. Haslam*, 139 S. Ct. 20, (Mem)–21, 202 L. Ed. 2d 343 (2018) (noting denials of applications for stays).

[8] Again, Moore does not contest the legality of his sentence. The Governor retains the ability to delay the execution date to afford the agency time to complete preparations. *See generally* S.C. Code 24-21-910.

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CERTIFICATE OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Respondent's Response in Opposition to (Second) Motion for Stay of Execution, and Certificate of Service has been forwarded to Petitioner's counsel, Lindsey S. Vann, Esq., via email today, November 19, 2020 to lindsey@justice360sc.org, to Hannah Freedman, Esq. at hannah@justice360.org, and to John H. Blume, Esq. at jb94@cornell.edu

I further certify that all parties required by Rule to be served have been served.

This 19th day of November, 2020.

Donna D'Alessio

Donna D'Alessio,
Legal Assistant to Melody J. Brown, Senior Assistant Deputy Attorney General and to William Edgar Salter, III, Senior Assistant Attorney General