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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Case No. 2001-021895

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RICHARD BERNARD MOORE  
*Petitioner,*

v.

STATE OF SOUTH CAROLINA,  
*Respondent.*

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REPLY TO RESPONSE TO (SECOND) MOTION FOR STAY OF EXECUTION

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After months of thwarting Richard Moore's attempts to obtain information about how SCDC plans to carry out his execution on **December 4, 2020**, Respondent asks this Court to deny Moore's motion to stay, and in doing so misrepresents Moore's arguments as last minute tools to delay his execution when, on the contrary, he has spent months trying to resolve this issue (even before this Court set an execution date) and is merely trying to obtain information in order to avoid a potentially torturous execution and to make the difficult decision of how he wishes to die. The majority of Respondent's arguments in support of denying a stay are irrelevant or addressed in Moore's Reply to SCDC and Bryan Stirling's return to his original jurisdiction petitions filed earlier today, November 19, 2020. However, Moore briefly submits the following in reply to Respondent's assertions.

Respondent misapprehends the fundamental point of Moore's requests. By indicating Moore was on notice of the statutory methods of execution in 2001 and that lethal injection has been allowed to proceed in federal executions, Respondent implies that all lethal injection

executions follow the same protocol.<sup>1</sup> That is false. As Moore submitted in his substantive pleadings on this issue, different jurisdictions carry out executions with different drugs and rates of administration (for lethal injection executions), different voltage and timing (for electrocution executions), and different training of the execution teams. This information is all imperative for Moore to consider in making his election between execution methods and to avoid a possibly painful and excruciating death in conformity with the United States and South Carolina Constitutions. But SCDC refuses to provide even the most basic information about the type of drugs they plan to use in a lethal injection execution, all while it publicly states they are not currently in possession of any drugs to carry out a lethal injection execution.<sup>2</sup>

Respondent's argument that counsel's access to past protocols somehow alleviates the need for information regarding how SCDC plans to operate in this instance is similarly disingenuous. Bryan Stirling, on behalf of SCDC, has publicly stated at legislative hearings that the drugs SCDC had under the old protocol expired and they would consider using alternative drugs due to the

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<sup>1</sup> To suggest that Moore could have brought this claim in 2001 is unfounded given that Respondent and SCDC would have undoubtedly argued his claim was not ripe without an impending execution (while he still had appeals pending) and because, at sentencing, they would not know how they would carry out an execution in the future upon the completion of appellate review. This is demonstrated by SCDC's response to a request for the execution protocol for Bobby Wayne Stone when this Court set an execution date upon completion of his state post-conviction relief proceedings. Contrary to Respondent's assertion in the pleading filed today, counsel *did* request the execution protocol at that time, even though they knew Stone was entitled to a stay of execution pending federal habeas review. Email Emily Paavola to Dayne Haile (Nov. 6, 2017), attached as Exhibit 1. SCDC responded "Your request for SCDC's Execution Protocol is denied." Email Dayne Haile to Emily Paavola (Nov. 13, 2017), Ex. 1.

<sup>2</sup> SCDC offered in pleadings yesterday to allow undersigned counsel confidential review of the execution protocol. As Moore pointed out in his reply earlier today, without possession of the drugs for carrying out an execution, any protocol available for review would necessarily be incomplete. Further, SCDC placed unreasonable restrictions on review of the protocol, such that any review would be inadequate. *See* Reply and Supplemental Reply.

agency's inability to obtain the drugs specified under the old protocols.<sup>3</sup> Because the relevant statute does not specify exactly which chemicals can be used under the direction of Stirling as director for SCDC, there is truly no way to know what SCDC plans to use to carry out the execution. Due process is simply not satisfied by Respondent's assertion that based on "past protocols . . . SCDC carefully plans and practices before carrying out an execution." Return at 5.<sup>4</sup> For these reasons, providing examples of executions gone horrifically wrong was not to sensationalize but to demonstrate the risks inherent in changes to execution protocols made without adequate oversight.

Finally, Respondent's argument that SCDC's offer to allow for confidential review of the execution protocol moots Moore's claims is incorrect for the reasons stated in Moore's reply and supplemental reply filed today. The parties are diametrically at odds over the constitutionally and statutorily required disclosure of information surrounding SCDC's plans for carrying out an execution. These issues have not been and cannot be resolved by the parties. To allow this Court adequate time to resolve these critical issues, a stay is warranted.

### **CONCLUSION**

For the reasons stated above and in Moore's Motion for Stay, this Court should enter a stay pending the resolution of Moore's claims.

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<sup>3</sup> And if the protocol remains unchanged from 2008 (the last protocol undersigned counsel obtained), neither SCDC nor Respondent have affirmatively stated the protocol remains unchanged, even one day before the deadline for Moore's execution method election.

<sup>4</sup> Notably, Respondent's prior statements about the care taken by SCDC in implementing procedures and protocols have proven incorrect. In a letter to this Court dated November 9, 2020 in this matter, counsel for Respondent indicated that SCDC "is currently drafting and/or completing guidelines for safely attending executions" during the COVID-19 pandemic. But SCDC's filing yesterday included an affidavit from Colie Rushton indicating that "While SCDC has established COVID-19 protocols, which are publicly available on SCDC's website, those protocols would not materially affect or modify execution protocols." Rushton Aff. ¶ 12, Nov. 18, 2020.

Respectfully submitted,

s/ Lindsey S. Vann

LINDSEY S. VANN

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Justice 360

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November 19, 2020.

# **EXHIBIT 1**

**Subject:** Fwd: SCDC Execution Protocol  
**Date:** Thursday, August 23, 2018 at 2:45:32 PM Eastern Daylight Time  
**From:** Emily Paavola  
**To:** Cortelyou Churchill Kenney  
**CC:** John H. Blume, Lindsey S. Vann, Amelia Courtney Hritz

This is our correspondence with SCDC regarding the execution protocol for Bobby Stone. Vincent Barton is general counsel for SCDC.

----- Forwarded message -----

**From:** Dayne Haile (C027588) <[Haile.Dayne@doc.sc.gov](mailto:Haile.Dayne@doc.sc.gov)>  
**Date:** Mon, Nov 13, 2017 at 12:13 PM  
**Subject:** RE: SCDC Execution Protocol  
**To:** Emily Paavola <[Emily@justice360sc.org](mailto:Emily@justice360sc.org)>  
**Cc:** "John H. Blume" <[jb94@cornell.edu](mailto:jb94@cornell.edu)>, John Warren <[jwarren@simmonsfirm.com](mailto:jwarren@simmonsfirm.com)>, Jill Rider <[Jill@blumelaw.com](mailto:Jill@blumelaw.com)>, "Barton Vincent (C028988)" <[Vincent.Barton@doc.sc.gov](mailto:Vincent.Barton@doc.sc.gov)>

Your request for SCDC's Execution Protocol is denied. SCDC's Execution Directives is a Restricted policy. Thank you.

**Dayne Haile, Administrative Manager**

**Office of General Counsel**

**South Carolina Department of Corrections**

**Post Office Box 21787**

**Columbia, South Carolina 29221-1787**

**(803)896-2380 (Office)**

**(803)896-1766 (Fax)**

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**From:** Emily Paavola [mailto:[Emily@justice360sc.org](mailto:Emily@justice360sc.org)]  
**Sent:** Monday, November 06, 2017 2:05 PM  
**To:** Dayne Haile (C027588) <[Haile.Dayne@doc.sc.gov](mailto:Haile.Dayne@doc.sc.gov)>  
**Cc:** John H. Blume <[jb94@cornell.edu](mailto:jb94@cornell.edu)>; John Warren <[jwarren@simmonsfirm.com](mailto:jwarren@simmonsfirm.com)>; Jill Rider <[Jill@blumelaw.com](mailto:Jill@blumelaw.com)>  
**Subject:** SCDC Execution Protocol

**\*\*\* This is an EXTERNAL email. Please do not click on a link or open any attachments unless you are confident it is from a trusted source. \*\*\***

Dear Dayne:

I would like to request a copy of SCDC's Execution Protocol. The Attorney General's office asked for an execution order to be issued for Bobby Stone today, and the South Carolina Supreme Court did issue an order setting a date for December 1st. Mr. Stone's case is pending in federal court, and his habeas petition is not due until March of next year, so there is no reason for the AG's request. We expect that the execution will be stayed soon. However, since we want to be prepared for even remote possibilities, we would like to see the protocol. Please send a copy as soon as possible. Thanks for your help.

Sincerely,

Emily Paavola

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RICHARD BERNARD MOORE  
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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a copy of the Reply to Response to (Second) Motion for Stay was served by email this 18<sup>th</sup> day of November, 2020, upon the following:

Donald J. Zelenka, DZelenka@scag.gov

Melody Brown, MBrown@scag.gov

Ed Salter, ESalter@scag.gov

Barton Vincent, Vincent.Barton@doc.sc.gov

s/ Lindsey S. Vann

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