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.

Case No. 2002-021895

MOTION TO STAY

Petitioner Richard Bernard Moore asks this Court to stay his execution, currently set for **April 29, 2022**, because there are "exceptional circumstances warranting the issuance of [a] stay." *In re Stays of Executions in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996). Specifically, Moore requests a stay of execution: (1) to allow him to seek a writ of certiorari in the Supreme Court of the United States to review this Court's denial of his federal due process claim which this Court denied; and, (2) to permit the orderly resolution of ongoing litigation regarding the recently enacted execution methods statue pending in the Richland County Court of Common Pleas.

On April 6, 2022, this Court denied Moore's request for a stay of execution pending the resolution of his petition for writ of habeas corpus in the Court's original jurisdiction. The denial was "without prejudice to his right to request a stay of execution when the issue is ripe for decision." Order, *Moore v. Stirling*, No. 2020-001519 (Apr. 6, 2022). With today's issuance of a Notice of Execution, Moore's request for a stay of execution became ripe. For the reasons set forth below, this Court should stay Moore's execution.

I. Moore Should Be Given an Opportunity to Present the Constitutional Issue of Proportionality Review to the Supreme Court of the United States.

Moore intends to seek review by the Supreme Court of the United States of this Court's decision denying his claims that his death sentence is disproportionate as a matter of state and federal law to his offense, in comparison to similar cases. In its opinion, this Court recognized Moore's comparative proportionality claim as flowing from the right to "meaningful appellate review" necessary "to avoid the arbitrariness and inconsistencies deemed unconstitutional in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)]." *Moore v. Stirling*, No. 28088, slip op. at 8 (April 6, 2022). *See also id.* at 12 ("Our General Assembly has specifically required comparative proportionality review as an essential component of South Carolina's capital sentencing scheme to avoid the arbitrariness discussed in *Furman*, *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)], *Pulley* [*v. Harris*, 465 U.S. 37 (1984)], and other cases."). Accordingly, this Court's opinion denying Moore relief and concluding that his sentence is not disproportionate raises federal issues subject to the jurisdiction of the Supreme Court of the United States.

As Justice Hearn thoroughly explained in her dissenting opinion, Moore's case demonstrates that South Carolina's death penalty "system is broken," and the Supreme Court of the United States should have an opportunity to review the issues raised in this case. A petition for writ of certiorari is due on **July 5, 2022.** To allow time for Moore to file the petition and for the Court to consider it, this Court should stay Moore's execution pending certiorari.

II. A Stay Should Be Granted to Allow for Resolution of Litigation Currently Pending in the Lower Court

a. The State Courts Should Be Given an Opportunity to Decide What is Constitutional Under South Carolina Law.

On April 7, 2022—the day after this Court's decisions set in motion Moore's possible execution under the amended execution statute—Moore filed a complaint in the Richland County

Court of Common Pleas challenging the applicability of the amended execution statute and the constitutionality of the firing squad and the electric chair. *Moore v. Stirling*, No. 2022-CP-40-01813. The Defendants are the South Carolina Department of Corrections (SCDC), its director, Bryan Stirling, and Governor Henry McMaster. Moore's allegations and claims are the same as those raised by death-sentenced inmates Freddie Owens and Brad Sigmon and are expected to track the litigation in *Owens v. Stirling*, No. 2021-CP-42-02306. A status conference is scheduled before Judge Newman in the *Owens* litigation on **Monday, April 11, 2022.**[1]

Whether the firing squad and the electric chair violate the South Carolina Constitution are open questions. No court has ever resolved a methods-of-execution challenge in South Carolina. The firing squad has never been used (and thus its legality never considered) in South Carolina, and it was last addressed by the United States Supreme Court in 1878—nearly 100 years before the Eighth Amendment was incorporated and applied to the states in *Robinson v. California*, 370 U.S. 662 (1962). *See Wilkerson v. Utah*, 99 U.S. 130 (1878). It is especially important that the issue be resolved by this Court given that the manner in which SCDC has said it intends to carry out executions by firing squad has never been used by any state to undersigned counsel's knowledge.[2] The constitutionality of the electric chair has also never been considered in the modern era of capital punishment in South Carolina, and the Supreme Court of the United States

[1] Though Moore's suit has not been pending as long as *Owens*, the *Owens* litigation has made significant progress and Moore does not raise any claims not also raised in the *Owens* litigation. Following remand of *Owens* to the South Carolina courts—based, in part, on a finding that "the questions being raised here are novel and/or complex issues of State law that *have not been decided by the South Carolina Courts*"—the parties agreed to a schedule for expedited resolution of the litigation, including a short briefing schedule on Defendants' motion to dismiss and a joint request for an expedited hearing.

[2] SCDC announced it intends to carry out firing squad executions with only three shooters using unspecified caliber rifles. SCDC Press Release (Mar. 18, 2022), https://public.doc.state.sc.us/agency-news-public/homeAction.do?method=view&id=594.

has never ruled on whether it violates the Eighth Amendment to the United States Constitution. The last time the constitutionality of the electric chair reached the Supreme Court in 2000, after a series of spectacularly botched executions, Florida—seeing the writing on the wall—elected to moot the case by changing its method from electrocution to lethal injection, and the Court dismissed the case as improvidently granted. *See Bryan v. Moore*, 528 U.S. 960 (Oct. 26, 1999) (granting a stay of execution and a petition for writ of certiorari to the Supreme Court of Florida to decide whether execution by electrocution violates the Eighth Amendment), *dismissed by* 528 U.S. 1133 (Jan. 24, 2000) ("In light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution' pursuant to the recent amendments to Section 922.10 of the Florida Statutes, the writ of certiorari is dimissed [sic] as improvidently granted.").

The electric chair has been overwhelmingly rejected by the majority of state legislatures, and the last two states to consider it have found it violates their constitutions. *Dawson v. State*, 554 S.E.2d 137, 143 (Ga. 2001) (holding electrocution "inflicts purposeless physical violence and needless mutilation that makes no measurably contribution to accepted goals of punishment"); *State v. Mata*, 745 N.W.2d 229, 277–78 (Neb. 2008) (finding electrocution "will result in unnecessary pain and agonizing suffering" and "has proven itself to be a dinosaur more benefitting the laboratory of Baren Frankenstein than the death chamber of state prisons.").[3]

[3] When electrocution was first adopted as a method of execution in the late 1800s and early 1900s, it was believed to cause a quick and painless death. That view has proven to be scientifically unsound, and over two centuries of experience have demonstrated that electrocution causes torturous suffering and mutilation of the body even if carried out according to plan. *See* Affidavit of Dr. John Wikswo, attached as Exhibit A. The process has not been (and cannot be) improved since the time of the first electrocution, carried out by the State of New York in 1890, went horribly wrong. Stuart Banner: THE DEATH PENALTY: AN AMERICAN HISTORY, pp. 186-88 (Harvard Univ.

This Court should stay Moore's execution date because the pending litigation raises novel and important questions of South Carolina law that should be decided before any executions take place. This Court should not allow Moore's execution to moot the pending litigation before any court in South Carolina has addressed such weighty issues as whether the only methods of execution offered to Moore are unconstitutional. Instead, this Court should assign a single judge exclusive jurisdiction and order the lower court to decide the issues in this case on an expedited schedule. *See* S.C. Const. Art. V, § 4.

b. SCDC Has Provided No Evidence It Has Made a Good Faith Effort to Obtain Lethal Injection Drugs.

Although S.C. Code Ann. § 24-3-530 (2021) provides for *three* methods of execution, including lethal injection (which has been repeatedly upheld by the United States Supreme Court, *see e.g., Baze v. Rees*, 553 U.S. 35, 62 (2008)), Defendants assert that lethal injection is unavailable because they are unable to obtain the necessary drugs. Following this Court's issuance of the execution notice, SCDC indicated it does not intend to make lethal injection available as a method of execution for Moore's election. *See* SCDC Press Release, Apr. 7, 2022 ("Methods available are the electric chair and firing squad.").[4]

However, Defendants have steadfastly refused to produce any evidence that they have even attempted to purchase lethal injection drugs since Stirling became the Director of SCDC in 2013. Meanwhile, thirteen states and the federal government have carried out 223 executions by lethal injection in the past eight years, including two in Oklahoma and one in Alabama within the past

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Press 2002). Electrocution also carries a substantial risk of a "botch" event, such as fire, sparking, power outages and failed executions, and there have been numerous botched electrocutions since it was first used in South Carolina in 1912.

[4] https://public.doc.state.sc.us/agency-news-public/homeAction.do?method=view&id=599

two months.[5]

When this Court asked Stirling to explain why lethal injection was not available in June of 2021, he provided a letter from Hikma Pharmaceuticals, a New Jersey pharmaceutical company, which simply reminded SCDC of Hikma's public opposition to its products being used for lethal injection.[6] *See* Stirling Letter dated June 8, 2021, attached as Exhibit F. Nothing in the letter indicates that it was in response to a specific request from SCDC for lethal injection drugs.[7] More significantly, Hikma does not sell *any* of the drugs listed by SCDC as potential drugs for its lethal injection protocols.[8] Its letter therefore provides no support for SCDC's claim that it has made affirmative efforts to obtain lethal injections drugs and does not demonstrate that lethal injection drugs are unavailable from manufacturers.

SCDC's description of its efforts to identify a compounding pharmacy to supply the drugs prove even less informative. In his letter to this Court, Stirling asserted that "SCDC has also explored having a licensed pharmacy and pharmacist compound the drugs," and "[t]hose efforts

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[5] *Execution Database*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/execution-database (last visited March 20, 2022).

[6] This policy is clearly stated on Hikma's website, which includes a public statement that it "object[s] in the strongest possible terms to use of any of our products for the purpose of capital punishment." Hikma, *Use of Products in Capital Punishment*, https://www.hikma.com/about/our-policies-and-positions/use-of-products-in-capital-punishment/.

[7] Hikma has a practice of sending similar letters to departments of corrections across the country. *E.g.*, David Ferrara, *Company Demands Return of Drug Planned for Zane Floyd Execution*, June 25, 2021, https://perma.cc/F9HK-U25Z.

[8] SCDC has indicated that it has a three-drug protocol involving Pentobarbital, Pancuronium Bromide and Potassium Chloride. *See* Letter from Daniel Plyler regarding SCDC's lethal injection protocol dated November 20, 2020, attached as Exhibit G. SCDC has further stated that if sufficient quantities of these three drugs cannot be obtained, it intends to use a single dose of Pentobarbital Sodium. *Id*. None of these drugs is listed as a product that Hikma produces. *See* https://www.hikma.com/products/us-products/.

have also failed." *Id*. This provides no explanation of the extent of SCDC's efforts or why those efforts failed, and in other settings Stirling has stated that SCDC declined to ask the legislature for funding to construct a compounding pharmacy because they could purchase drugs more cheaply on the open market. *See* John Monk, *Controversial bill proposed to get stalled SC executions back on track*, The State, Mar. 6, 2016, https://www.thestate.com/news/local/article64471007.html ("[I]t just didn't make a lot of sense to use tax dollars to buy something we could get for a lot less on the open market.").

When Defendants repeated their claim that they had made a good faith effort to acquire lethal injection drugs in front of the District Court of South Carolina (and relied on the same basis they offered to this Court), Judge Bryan Harwell asked if Defendants wished to supplement the record. Tellingly, Defendants twice declined this suggestion—first asserting that the district court could simply take judicial notice of Defendants' submission in State court (*See* District Court Transcript Excerpt at p. 34-35, attached as Exhibit H); and second, claiming "[n]o matter what we put in there, it's never going to be enough." *Id*. at p. 42. Defendants have declined to answer Owens's and Sigmon's requests for discovery about what, if any, efforts they have made to obtain lethal injection drugs. Instead, they filed a motion asking the circuit court to stay discovery and/or issue a protective order. *See* Motion for Protective Order, attached as Exhibit I. The circuit court has not ruled on the motion, and Defendants have not responded to the discovery requests.

The electric chair and the firing squad are antiquated, barbaric methods of execution that virtually all American jurisdictions have left behind in favor of lethal injection.[9] Moore should not

[9] American jurisdictions have spent the last 150 years implementing more humane methods of execution, culminating with every death penalty jurisdiction in the country using lethal injection as its only or default method of execution. They did so because, as the Supreme Court of the United States has recognized, lethal injection is the most humane method available. *Baze v. Rees*, 553 U.S. 35, 62 (2008). Indeed, in 1995, South Carolina made lethal injection its default method of

be forced to die by either of these methods without, at a minimum, a reasonable showing that SCDC is unable to obtain lethal injection drugs, despite a demonstrable and good faith effort. In addition, this Court has concluded that S.C. Code Ann. § 24-3-530 (2021) provides a "statutory right of inmates to elect the manner of their execution." *See State v. Sigmon*, No. 2002-024388 (June 16, 2021); *State v. Owens*, No. 2006-038802 (June 16, 2021). In order for an inmate to make a meaningful election, SCDC must offer at least two methods of execution that are both independently constitutional. A choice between one constitutional method and one that is unconstitutional is no choice at all. Whether the electric chair, the firing squad, or both violate the South Carolina Constitution are all open questions that must be first be resolved, lest this Court sanction an unconstitutional and/or statutorily unlawful execution.

c. The Issues in this Case will Reoccur.

The time to decide the questions in this case is now. There are thirty-seven men on South Carolina's death row. If the litigation currently pending in the circuit court is rendered moot by Moore's execution, the issues will arise again for any subsequent executions in South Carolina. This Court should not allow an execution to take place before the issues raised below can be resolved, once and for all.

CONCLUSION

For the reasons stated above, this Court should stay Moore's execution pending the resolution of his petition for writ of certiorari in the Supreme Court of the United States and the pending litigation in the Richland County Circuit Court.

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execution because it is "more humane than dying in the electric chair." *Legislative Watch: Death Penalty*, The Times & Democrat (Orangeburg, S.C.), Mar. 2, 1985, at 2B.

Respectfully submitted,

s/ Lindsey S. Vann

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