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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.

Appellate Case No. 2002-021895

RESPONSE IN OPPOSITION TO MOTION TO STAY

EXECUTION SET FOR FRIDAY APRIL 29, 2022

The Clerk of this Court issued an Execution on Notice on April 7, 2022. The execution is currently scheduled for Friday April 29, 2022. Petitioner Richard Bernard Moore moved to stay the execution the same day the Execution Notice was issued. The State opposes the stay for these reasons:

1. Moore's sentence has been repeatedly affirmed through challenges in both state and federal courts.¹ The Clerk has previously issued notices in this case, and Moore has previously sought to stay his execution. The pertinent challenges and dispositions are recounted briefly here.

2. On November 6, 2020, after exhaustion of Moore's ordinary remedies, the Clerk issued an execution notice.

¹ This Court recently summarized the multiple levels of review in denying habeas relief. *See Moore v. Stirling*, Opinion No. 28088 (S.C. Sup.Ct. filed April 6, 2022) (Appellate Case No. 2020-001519). Briefly, this includes a direct appeal; proportionality review; a post-conviction relief (PCR) action and appeal; a federal habeas action and appeal; and an original jurisdiction habeas action which afforded another proportionality review. The courts have consistently upheld the sentence.

3. On November 16, 2020, Moore filed, in this Court's original jurisdiction, a petition for declaratory relief, common law certiorari or mandamus (demand for access to protocols).

4. On November 19, 2020, Moore also filed a petition for writ of habeas corpus in the original jurisdiction of this Court. (*See* Appellate Case No. 2020-001519).

5. On November 20, 2020, this Court denied the petitions filed November 16, 2020. (Appellate Case No. 2020-001508).

6. By copy of a letter dated November 25, 2020 between the South Carolina Department of Corrections counsel, Daniel C. Plyer, Esq., and Moore's attorney, counsel for the Department of Corrections advised that since Moore failed to elect, lethal injection became the method for the execution then scheduled for December 4, 2020. *See* S.C. Code § 24-3-530 (A) (1995) ("The election for death by electrocution or lethal injection must be made in writing fourteen days before the execution date or it is waived. If the person waives the right of election, then the penalty must be administered by lethal injection.").

7. On November 30, 2020, this Court issued an order staying the execution:

Because Appellant waived his right to elect the method of his execution, section 24-3-530 of the South Carolina Code (2007) provides the penalty must be administered by lethal injection. The Court has now been advised the South Carolina Department of Corrections does not have, and will not be able to obtain, the drugs required for execution by lethal injection by December 4, 2020. Accordingly, we stay the execution until the South Carolina Department of Corrections advises the Court it has the ability to perform the execution as required by the law.

(*State v. Moore*, Order of Nov. 30, 2020, Appellate Case No. 2001-021895).

8. By Order of January 28, 2021, the Court directed the parties in the original jurisdiction habeas action to brief two issues: (1) Was Petitioner's death sentence disproportionate to the penalty imposed in similar cases? and (2) In determining the proportionality of the death

sentence, should similar cases in which the death penalty was not imposed be considered? (*State v. Moore*, Order of Jan. 28, 2021, Appellate Case No. 2020-001519).

9. The Legislature passed a bill amending S.C. Code § 24-3-530, which sets out the methods of execution, and the Governor signed the bill into law on May 14, 2021. The amended statute provides that an inmate under a sentence of death “shall suffer the penalty by electrocution,” and then provides a conditional election of an alternative method of execution depending on whether one or both alternative methods are available to the Department at that time. S.C. Code § 24-3-530 (A). The methods provided in the statute now include the firing squad.

10. On May 20, 2021, Moore filed another motion for stay pending the resolution of his habeas action.

11. On March 18, 2022, the State notified this Court that the Department of Corrections now has the capability to carry out executions by either electrocution or firing squad. (March 18, 2022 Letter of the Attorney General, with copy of Letter from Director Stirling).

12. On April 6, 2022, this Court issued an opinion in the state habeas matter and concluded that no relief was due. *See Moore v. Stirling*, Opinion No. 28088 (S.C.Sup.Ct. filed April 6, 2022) (Appellate Case No. 2020-001519).

13. By Order dated April 6, 2022, this Court construed the former motion for stay as a motion to stay issuance of the notice and denied the motion without prejudice. (*See Moore v. Stirling*, Order of Apr. 6, 2022, Appellate Case No. 2020-001519).

14. With no legal impediment to issuance of the notice, the Clerk issued an execution notice on April 7, 2022. By operation of statute, Moore’s execution will take place on April 29, 2022. *See* S.C. Code § 17-25-370 (execution must take place the fourth Friday after receipt of notice by the Commission of the Department of Corrections).

15. At this point after so many levels of review without relief, Moore must show “exceptional circumstances warranting the issuance of [a] stay” of execution. *In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996).

16. As a first basis for requesting a stay of his April 29, 2022 execution date, Moore asserts that he “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.” (Motion, p. 2). Moore cannot show a jurisdictional basis for seeking certiorari. A viable petition would require an alleged error of federal law:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. § 1257 (a). *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) confirms Moore cannot meet this requirement. In fact, Moore expressly concedes he will ask, at least in part, for review on a matter of state law. (Motion, p. 2). But this Court’s opinion shows that he will be unable to show a federal basis for a viable petition. This Court’s opinion is based on review as mandated by state law, S.C. Code § 16-3-25(C), and explained that it could revisit that statutorily required review through a defendant’s right to due process under the state constitutional guarantee of due process, S.C. Const. art. I, § 3. (Opinion No. 28088 at [unnumbered] pp. 12-13). There is no federal question to present. *See generally In re Stays*, 321 S.C. at 544, 471 S.E.2d at 141 (after conclusion of state direct appeal review, requiring defendant to set out the proposed federal question to obtain

a stay for purposes of filing a petition in the United States Supreme Court).² Not to mention Moore has been twice afforded a proportionality review. He is due no more. A stay is not warranted.

17. Moore next contends a stay is warranted in order for him to continue litigating a now existing (since April 7, 2022) challenge to the amended statute, S.C. Code § 24-3-530, and the authorized methods of execution. (Motion, pp. 2-3).³ The action is currently pending.⁴ He has alleged in the Richland County action that the 2021 amendment to S.C. Code § 24-3-530 is “improperly retroactive, ex post facto, unconstitutionally vague, and an improper delegation of legislative power...” (C/A 2022-CP-40-0183, Complaint at p. 3). He further seeks an order declaring that electrocution and the firing squad are both unconstitutional methods of execution under the State Constitution, (C/A 2022-CP-40-0183, Complaint at p. 3), and, for the court to “declar[e] the amended execution statute requires inmates be provided a choice between at least two constitutional methods of execution...” (C/A 2022-CP-40-0183, Complaint at pp. 3-4).⁵

² Though *In re Stays* references the process in the context of direct appeal review, it would be illogical to require less after completion of ordinary remedies. Further, the passage notes what can only be uncontested – a federal issue is required for review in the Supreme Court.

³ By supplement to his motion for stay submitted via letter addressed to the Clerk of this Court dated April 12, 2022, Moore asserted that his action will be combined with the pending case for death-sentenced inmates Brad Sigmon and Freddie Eugene Owens. Though the parties to the civil litigation have agreed to expedited resolution, (*see* Motion, p. 3 n. 1), there is no agreement that the execution should be stayed.

⁴ On Thursday April 14, 2022, the Honorable Jocelyn Newman denied Respondents’ Motion to Dismiss made under Rules 12(b) (1) and (6), SCRCPP. There is no pending motion for injunction as of this filing.

⁵ None of the claims appear meritorious. The circuit court previously denied a preliminary injunction based upon the similar allegations in the Sigmon and Owens civil action during the time a prior execution notice was pending based on its finding the plaintiffs were unable to show a likelihood of success on the merits. (Appellate Case No. 2021-000606, Order Denying Plaintiffs’ Motion for Preliminary Injunction received June 11, 2021). The appeal from that denial was abandoned when this Court issued its June 16, 2021 stay. (Appellate Case No. 2021-000606). Although the circuit court recently denied a motion to dismiss (emphasizing repeatedly at the

Moore contends that without a stay, the questions posed in the litigation are likely to evade review.⁶ (Motion pp. 5 and 8). In essence, Moore has shown that civil litigation is now pending, but he has not shown circumstances warranting a stay.

18. Our statute allows for the possibility of electing a method, limited upon the availability of the method to the Department. *See* S.C. Code § 24-3-530 (A) (election of method “must be made in writing fourteen days before each execution date or it is waived”). Moore has today chosen the firing squad as his method of execution. (Notice of Election, filed April 15, 2022). “By declaring his method of execution” Moore “has waived any objection he might have to it.” *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). *See also State v. Langford*, 833 P.2d 1127, 1129 (Mont. 1992) (state statute allowed “Langford the opportunity to elect between lethal injection and hanging as a method of execution” and by electing hanging, “he rendered moot any claim concerning the constitutionality of hanging as a method of execution”).

19. To the extent Moore has attempted to make a conditional waiver, (*see* Attachment 1), there is no provision for making a conditional waiver under the terms of the statute.⁷ Moore’s

hearing the low bar to clear to survive a Rule 12(b) motion), the earlier order denying the motion for a preliminary injunction is telling as to what the circuit court really thinks of the claims in that litigation.

⁶ In making the argument, Moore asserts “[t]here are thirty-seven men on South Carolina’s death row.” (Motion, p. 8). The roster actually shows thirty-five men are on Death Row. <https://www.doc.sc.gov/news/death-row-report.pdf> (last checked April 12, 2022).

⁷ Moore’s suggestion in his attempted qualification of his waiver that both available methods are unconstitutional is rather telling. “The Constitution allows capital punishment.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019). “It necessarily follows that there must be a means of carrying it out.” *Baze v. Rees*, 553 U.S. 35, 47 (2008). Moore’s attempted waiver does not imply that he would suggest another method, but that he does not wish to be executed by the readily available methods offered. *Bucklew*, 139 S.Ct. at 1128-29 (“we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative—assuming, of course, that the inmate is more interested in avoiding unnecessary pain than in delaying his execution.”); *cf. Glossip v. Gross*, 576 U.S. 863, 878 (2015) (“The preliminary injunction posture

election of the firing squad renders moot complaints as to methods that will not be used. Those methods have no bearing on the execution scheduled for April 29, 2022. *See, e.g., Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (“Because Stanford is given the option of electrocution and lethal injection, we need not evaluate the constitutionality of electrocution.”); *Woods v. Comm’r, Alabama Dep’t of Corr.*, 951 F.3d 1288, 1291 (11th Cir.) (2020) (“The addition of nitrogen hypoxia served to moot a pending challenge to the constitutionality of Alabama’s lethal-injection protocol.”) (citing *In re Ala. Lethal Injection Protocol Litig.*, No. 2:12-cv-316-WKW (M.D. Ala. filed Apr. 6, 2012)); *accord 21A Am. Jur. 2d Criminal Law § 863* (Feb. 2022 Update) (“a statute which permits an offender sentenced to death to choose whether he or she shall be executed by lethal injection or by lethal gas does not violate the Eighth Amendment merely because it offers two unpleasant alternatives to a person who would rather select neither.”).

20. To the extent Moore complains that the Department of Corrections has failed to demonstrate by sufficient evidence that it has made a good faith effort to obtain lethal injection drugs, (Motion, pp. 5-8), again, those complaints are moot. *LaGrand, supra. Langford, supra.* But even so, the argument is vague in its suggestion of acceptable parameters and devoid of any legal basis for a challenge. Moore does not explain what would be sufficient in his view, or what “evidence” needs to be offered where nothing in the statute places a burden on the Director or the Department to make any showing about why a method of execution is not available. Moreover, S.C. Code § 24-3-530 does not guarantee or require that lethal injection will be available. In fact, a plain reading of the statute supports the conclusion that there is no guarantee that all three methods must be available at the same time. An interpretation to the contrary would render

of the present case thus requires petitioners to establish a likelihood that they can establish both that Oklahoma’s lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.”).

superfluous the express provision included by the Legislature that the Director certify whether the listed methods are available at the time he receives the notice from the Clerk. S.C. Code § 24-3-530 (B). Indeed, the Director provided that required affidavit on April 8, 2022. In light of the structure of the statute, Moore's complaint is nonmeritorious. However, Moore has made his election of a method of execution and the challenges to lethal injection availability are moot.

21. To the extent Moore requests a single judge preside over the lower court matter, (*see* Motion, p. 5), that appears unnecessary in light of Moore's representation that the matters have been joined and Judge Newman is presiding over the cases.

CONCLUSION

Moore's motion to stay his execution scheduled for April 29, 2022 should be denied.


Respectfully Submitted,

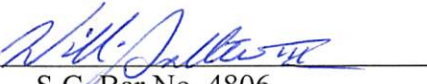
ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. EDGAR SALTER, III
Senior Assistant Attorney General

By: 
S.C. Bar No. 14244

By: 
S.C. Bar No. 4806

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

April 15, 2022