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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RICHARD BERNARD MOORE,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

Case No. 2002-021895

REPLY TO THE STATE'S RESPONSE TO MOTION TO STAY

The State asks this Court to allow Richard Moore's execution, scheduled for **April 29, 2022**, which would have the effect of mooting litigation pending in the circuit court and preventing him from seeking review at the Supreme Court of the United States. Petitioner, Richard Bernard Moore, asks only that this Court stay his execution long enough that he may obtain complete judicial review of his death sentence and of South Carolina's new execution method statute. That statute, which has not been interpreted by any court and which differs from all other execution method statutes in the country, is the subject of ongoing litigation in the circuit court, where Judge Jocelyn Newman recently denied a motion to dismiss the lawsuit and indicated her intention to set the case for a trial. If this Court does not stay Moore's execution, South Carolina will do what no other American jurisdiction has done: carry out an execution, by a method that is entirely novel to the state, with a trial date looming on the method's constitutionality. Of course, there is no remedy for an unlawful execution. Accordingly, exceptional circumstances warrant a stay to avoid allowing an unconstitutional execution.

The State offers three main reasons for denying a stay: (1) Moore's proportionality

argument does not raise a federal question that the Supreme Court of the United States can review, (2) the lawsuit pending in Richland County challenging the execution statute and methods of electrocution and firing squad as unconstitutional has no merit, and (3) Moore waived any challenges to the execution methods by making an election of execution method pursuant to the statute. None of these arguments can override the fact that denial of a stay risks South Carolina carrying out an execution in violation of the Constitution.

I. Moore's proportionality arguments raise federal questions and warrant a stay to allow consideration by the Supreme Court of the United States.

Moore has informed this Court of his intent to seek review of his death sentence by the Supreme Court of the United States. A stay is therefore warranted if Moore can "demonstrate to this Court that there is 'a reasonable probability that four Members of the United States Supreme Court will consider the issue sufficiently meritorious to grant certiorari or note probable jurisdiction.'" *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 547, 471 S.E.2d 140, 142 (1996) (order) (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., sitting as Circuit Justice)). Moore has made that showing and a stay is therefore appropriate.

The State does not argue that Moore is unlikely to prevail in his petition for writ of certiorari. Instead, the State argues that Moore has failed to "show a jurisdictional basis for seeking certiorari" in the Supreme Court of the United States. *See* Response to Mot. for Stay at ¶ 16 (citing 28 U.S.C. § 1257(a)). This is incorrect.

As Moore argued in his briefing before this Court, his death sentence violates the Eighth Amendment to the United States Constitution because "there is no question death sentences must be proportionate to the offense and the offender and may not be imposed in an arbitrary and capricious manner." Reply Brief, *Moore v. Stirling*, No. 28088, at 1 (April 29, 2021) (citing *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976); *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008); *Atkins*

v. Virginia, 536 U.S. 304, 319 (2002)). Additionally, this Court's underlying determination—Moore's death sentence is not disproportionate—is a matter of federal law for two distinct reasons.

First, as this Court observed in *Moore*, the South Carolina death penalty statute is only constitutionally sound to the extent it meaningfully protects "against arbitrary or capricious sentencing." *Moore v. Stirling*, No. 28088, slip op. at 10 (April 6, 2022) (quoting *Pulley v. Harris*, 465 U.S. 37, 44-45 (1984)). Although this Court expanded the pool of cases in proportionality review to include "a comparison of death-eligible cases for which a record is available for our review," No. 28088, at 15, Moore contends, and will assert on certiorari review, that his death sentence is disproportionate as a matter of the Eighth Amendment. After all, if the death penalty is a legitimate and proportionate punishment for Moore—who entered the store unarmed, who was himself shot, and who surrendered himself to police custody nearly immediately after the shooting—there is no plausible scenario in which another death sentence imposed by a jury or judge in South Carolina could be disproportionate. *See Walker v. Georgia*, 555 U.S. 979, 981 (Stevens, J., statement respecting the denial of certiorari) (noting that a death sentence was disproportionate in a case involving "a black defendant and a white victim" where the defendant and an accomplice "drove to the victim's home," the defendant "drew the victim outside, the two engaged in a struggle and [the defendant] stabbed the victim 12 times," and the defendant then took "the victim's keys to try to gain access to [the victim's house], stating that he 'had one more to kill'"). Simply put, Moore's death sentence *is* disproportionate, and this Court's conclusion to the contrary draws into question the federal constitutional legitimacy of the South Carolina statute that provides for proportionality review.

Moreover, the question Moore intends to raise at the Supreme Court of the United States are substantially the same questions that the petitioner raised in *Walker v. Georgia*: whether the

South Carolina statute, as interpreted in *Moore*, fails to ensure "meaningful proportionality review" and what is required of a state statute in order to do so. 555 U.S. at 979. The Supreme Court of the United States denied certiorari on the question in *Walker*, but not because the Court lacked jurisdiction to consider it. *See id.* ("In its response to the petition, the State persuasively argues that petitioner did not raise and litigate these claims in state court. That argument provides a legitimate basis for this Court's decision to deny review.").

Second, *Moore* is a due process case, and just like the state constitution, the federal constitution prohibits a state from depriving its citizens of life without adequate process. *Compare Moore*, No. 28088, at 12 ("[A]n allegation concerning the failure to adequately protect the wrongful deprivation of life implicates that defendant's right to due process and, therefore, presents a constitutional issue.") *with, e.g.*, *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) ("The adoption of [a state] rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process.'" (quoting *Lisenba v. People, State of Cal.*, 314 U.S. 219, 236 (1941)). Moore, accordingly, has a federal claim that this Court's application of the rule it announced in *Moore* "works a deprivation of [his] life . . . without due process." *Lisenba*, 314 U.S. at 236.

As members of the Supreme Court of the United States have, in the past, shown an interest in addressing the Eighth Amendment question raised in *Walker*, and the due process issue is a novel question of federal constitutional law, the Supreme Court of the United States is also reasonably likely to grant certiorari on one or both issues.

II. Judge Newman's ruling that Moore's civil action deserves additional development and review in the Richland County Circuit Court warrants a stay.

The State asserts that Moore merely has "civil litigation . . . now pending" and that the claims raised there do not appear meritorious. Response to Mot. for Stay at ¶ 17, n.5. These

assertions fail to acknowledge the significance of Judge Jocelyn Newman's ruling denying the Defendants' Motion to Dismiss as to all claims on April 14, 2022.[1] Following argument, Judge Newman ruled from the bench that the suit raised novel issues that had not been decided by any other South Carolina court and "to grant a motion to dismiss, and dismiss the case at this juncture, would be inappropriate." Kathryn Casteel, *Judge denies motion to dismiss civil case for SC death penalty inmates*, GOUPSTATE (Apr. 14, 2022), https://www.goupstate.com/story/news/2022/04/14/judge-denies-motion-dismiss-civil-case-south-carolina-death-penalty-cases-inmates/7310981001/. She went on to state that "for me to dismiss this matter at this time would be to tell Mr. Owens, Mr. Sigmon, Mr. Moore, and Mr. Terry, that you're not entitled for a court to decide it." *Id.* Instead, she found that Moore and the other plaintiffs are entitled to factual development and further court consideration.

The State bases its statement that "[n]one of the claims appear meritorious" on Judge Newman's June 2021 order denying a preliminary injunction on some of the claims raised in the currently pending suit. Reliance on Judge Newman's previous order is improper because the current suit contains a new claim that both electrocution and the firing squad are unconstitutional under the South Carolina constitutional ban on cruel, corporal, or unusual punishments. S.C. Const. art. I § 15. This claim was not before the circuit court when it ruled on the preliminary injunction, so the only judicial decision on that claim is that it is deserving of further development prior to the

[1] The pending litigation raises seven claims for relief (as relevant here) based on the new execution methods statute, S.C. Code § 24-3-530 (2021): (1) the statute violates due process as retroactive legislation, (2) the statute violates the state and federal ex post facto clause, (3) the statute violates due process because it is unconstitutionally vague, (4) Defendants have violated the statute by failing to make sufficient efforts to make lethal injection available as a method of execution, (5) the statute violates the state constitutional non-delegation doctrine, (6) electrocution and firing squad are prohibited by the South Carolina constitution, and (7) the right to elect an execution method requires the availability of two constitutional methods of execution to choose between.

rendering of a decision on the merits.

Additionally, since the circuit court issued its order denying the preliminary injunction based, in part, on a finding that the term "available" in the statute "can be clearly understood," this Court issued orders staying June 2021 execution dates interpreting "available" differently than the South Carolina Department of Corrections (SCDC) and in a manner inconsistent with Judge Newman's June 2021 order. Order, *State v. Sigmon* & *Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021); Order, *State v. Owens*, No. 2006-038802 (June 16, 2021). Specifically, this Court rejected SCDC's contention (which Judge Newman accepted) that the firing squad was not "available" because it had not yet developed and implemented protocols and policies to carry out executions by firing squad. Thus, the meaning of available was not settled by the circuit court's preliminary injunction order, and the operative ruling on the claims related to that issue is the circuit court's denial of the motion to dismiss.

In sum, Moore has litigation pending, asking for review of the novel statute in South Carolina, which changed the default method of execution to electrocution, created an option of death by firing squad, and has the impact of eliminating the most humane method of execution (lethal injection). A circuit judge considered and rejected extensive arguments for dismissal of the case. According to that judge, the claims are novel, have never been decided by a South Carolina court, and are deserving of more review.[2] Because that review cannot be completed in the eleven

[2] Indeed, the Legislature in passing the amended statute contemplated that its legality would be determined by the courts before an execution was carried out. In the course of promoting the bill, one of its sponsors argued:

> [O]ur statute will be considered, and if the Supreme Court finds that either electrocution, or lethal injection, or a firing squad is a violation of the Eighth Amendment, that case and that conviction is going to be overturned. They're going to find our statute unconstitutional. And we'll be right back here. That's the way the system's built, and it's going to be challenged.

days between now and Moore's scheduled execution, exceptional circumstances warrant a stay in this case.[3]

III. Moore did not waive his challenges to the execution method statute by making an election pursuant to the statute.

As this Court is aware, South Carolina Code section 24-3-530 provides a "right of election" of execution method, subject to the Director of SCDC's certification of available methods. The statute provides that the election must be made fourteen days prior to the execution date, and if it is not, "the penalty must be administered by electrocution." *Id.* On Friday, April 15, 2022, the deadline for Moore to make an election of execution method, SCDC presented Moore with the option to be executed by electrocution or firing squad following a certification that lethal injection is not available. Moore has challenged both firing squad and electrocution as unconstitutional.

Prior to Moore's election, he provided SCDC officials with a sworn statement expressing the following:

> I, Richard Bernard Moore, am challenging the legality and constitutionality of the firing squad and electric chair in an ongoing action in the Richland County Court of Common Pleas. *Owens, et al. v. Stirling, et al.*, No. 2021-CP-40-02306. By operation of the state's method-of-execution statute, which is also challenged in that action, the Department of Corrections is today forcing me to elect my method of execution. The Department is presenting only the firing squad and electrocution as the available methods from which I can choose. If I decline to make a choice, the Department intends to execute me by electrocution.
>
> I do not believe or concede that either the firing squad or electrocution is legal or constitutional. I do not believe the Department should be allowed to certify that a statutorily prescribed method, such as lethal injection, is unavailable without

(Sen Hembree; May 15, 2021 at approx. 40:19).

[3] Other courts facing a similar situation—where an execution would moot litigation on the constitutionality of a method of execution—courts have entered stays of execution to allow the litigation to proceed and avoid a potentially unconstitutional execution. *See, e.g.*, *Floyd v. Daniels*, No. 3:21-cv-00176-RFB-CLB, 2021 WL 2827291 (D. Nev. July 6, 2021) (staying execution pending hearing on constitutionality of Nevada's execution methods); *Glossip v. Chandler*, No. 5:14-cv-00665-F (W.D. Okla. Dec. 23, 2021) (staying execution pending trial on constitutionality of Oklahoma's execution methods.

> demonstrating a good faith effort to make it available. However, I more strongly oppose death by electrocution. Because the Department says I must choose between firing squad or electrocution or be executed by electrocution I will elect firing squad.
>
> I believe this election is forcing me to choose between two unconstitutional methods of execution, and I do not intend to waive any challenges to electrocution or firing squad by making an election.

Statement of Mr. Richard Bernard Moore Regarding Election of Execution Method Pursuant to S.C. Code § 24-3-530, attached as Exhibit A.

As his statement makes clear, Moore did not "choose" the firing squad or waive the opportunity to challenge the methods of execution the state put before him. Moore has consistently maintained that lethal injection is, in fact, "available" but that SCDC has done little or nothing to obtain the lethal injection drugs. However, because no court has yet interpreted the statute, Moore cannot risk formally electing lethal injection and having SCDC interpret that election as a voluntary "choice" (which it clearly is not; it is the quintessential Hobson's choice[4]) because doing so would likely result in his unwilling execution by electrocution. This fact highlights two important things.

First, the litigation pending in Richland County must be permitted to come to a conclusion before any executions by firing squad or electrocution take place. There is no clear answer as to the meaning of the statute, and the only reason Moore signed the election form was because he could not risk the possibility that a refusal to sign it as SCDC demanded would result in his execution by electrocution. Unless this Court stays Moore's execution, and until a court offers a clear interpretation of the statute, condemned people will be forced to make an impossible

[4] "[T]he necessity of accepting one of two or more equally objectionable alternatives." *Hobson's choice*, Merriam-Webster Dictionary (available at https://www.merriam-webster.com/dictionary/Hobson%27s%20choice#:~:text=1%20%3A%20an%20apparently%20free%20choice,or%20more%20equally%20objectionable%20alternatives).

decision: waive their right to challenge the statute or risk death in the electric chair.

Second, Moore's signature on the election form did not waive his challenge to the methods SCDC offered him. "A waiver is a voluntary and intelligent abandonment or relinquishment of a known right." *Osbey v. State*, 425 S.C. 615, 619-20, 825 S.E.2d 48, 50 (2019) (internal quotation marks omitted). "Waiver requires a party to have known of a right and known that right was being abandoned." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009). Moore's signature on the election form expressly did not "abandon[] or relinquish[]" his right to pursue litigation challenging firing squad and electrocution. To the contrary, Moore signed the form only to avoid the possibility that SCDC would attempt to kill him by electrocution, even though electrocution is his least preferred method of execution authorized by state law.

Unlike the condemned individuals in the cases the State cites, Moore did not forfeit an opportunity to choose a preferred method of execution (lethal injection) in order to stage a challenge to a less preferred method (electrocution or hanging)—that conduct involves the "voluntary and intentional abandonment or relinquishment" of the right to be executed by the preferred method. *See id*. In each of those cases, lethal injection was an available method of execution, which the inmates could have elected and did not challenge as unconstitutional.[5]

[5] *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (finding the condemned elected lethal gas despite lethal injection being an available alternative under the statute and without any objection to the constitutionality of lethal injection); *State v. Langford*, 833 P.2d 1127, 1129 (Mont. 1992) (finding the condemned elected hanging despite lethal injection being an available alternative under the statute and without any objection to the constitutionality of lethal injection); *Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (finding the condemned would be subject to electrocution instead of lethal injection only if he affirmatively chose electrocution and that he did not challenge the constitutionality of lethal injection). The State also cites *Woods v. Comm'r, Alabama Dep't of Corr.*, 951 F.3d 1288, 1291 (11th Cir. 2020), which does not apply here because it found only that a constitutional challenge to lethal injection was moot after the state adopted the condemned individual's proposed alternative method (nitrogen hypoxia) and allowed the condemned to elect that alternative, which was not challenged as unconstitutional. Here, SCDC has not offered a method of execution that is not subject to ongoing litigation challenging its constitutionality.

However, the inmates forwent the opportunity to die by lethal injection and it follows, logically, that they could not later attack the methods they did choose. Moore, however, was presented with two methods he argues are unconstitutional and was not given the option to elect lethal injection. Thus, he did the opposite of the inmates in the cases cited by the State: he filed a lawsuit challenging both methods the State ultimately offered, then he picked the least bad of those two methods so that he would not be executed by the worst possible method. Doing so, cannot legitimately be deemed a waiver.

Further, a statutorily mandated selection of a method of execution cannot turn an unconstitutional method into one that is constitutional. *See Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) ("Certainly a defendant's consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments."). This Court has previously reviewed and deemed unconstitutional the punishment of castration, even where the defendant affirmatively chose that punishment over an alternative sentence of imprisonment. *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985). Thus, the State improperly asks this Court to allow a potentially unconstitutional execution by firing squad simply because Moore had no choice but to sign the election form in what was effectively a Hobson's choice between torturous deaths.

CONCLUSION

For the reasons stated above and in Moore's Motion to Stay, Moore has demonstrated extraordinary circumstances warrant staying his execution scheduled for **April 29, 2022.** 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.

Respectfully submitted,

s/ Lindsey S. Vann

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