

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

STEVEN VERNON BIXBY,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

Appellate Case No. 2007-054161

RECEIVED
May 16 2023
S.C. SUPREME COURT

MOTION TO STAY THE SETTING OF AN EXECUTION DATE

In light of a letter submitted to this Court by the Attorney General earlier today, Petitioner Steven Bixby requests that the Court issue an order directing the Clerk of this Court to refrain from setting—and thus staying—any execution date. Mr. Bixby seeks that relief because his federal habeas corpus proceedings have not yet concluded; indeed, they are slated for argument in the U.S. Court of Appeals for the Fourth Circuit. Mr. Bixby also asserts that an execution date should not issue pending final resolution of *Owens, et al. v. Stirling*, No. 2022-001280, the ongoing litigation challenging the constitutionality of South Carolina’s methods of execution and the legality of the statute authorizing those methods. In support of this motion, Mr. Bixby states as follows.

Mr. Bixby was convicted and sentenced to death in Abbeville County Circuit Court for crimes occurring in 2003. This Court affirmed on direct appeal. *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010). Relief was denied on state post-conviction review; in the above-captioned case, this Court denied certiorari review in 2017.

Following the appointment of counsel in U.S. District Court for the District of South Carolina, that court stayed Mr. Bixby's execution to allow federal habeas matters to proceed. *Bixby v. Stirling*, No.4:17-00954-BHH. Relief was denied in that court. The Fourth Circuit subsequently affirmed the district court's denial of relief. *Bixby v. Stirling*, No. 21-5, 2022 WL 4494130 (4th Cir. April 29, 2022). On May 15, 2023, the U.S. Supreme Court denied certiorari review in *Bixby v. Stirling*, No. 22-6690.

However, Mr. Bixby's federal habeas proceedings have not yet concluded. During the pendency of his appeal to the Fourth Circuit, Mr. Bixby filed a motion pursuant to Fed. R. Civ. P. 60(b) to reopen his habeas petition. Although the district court denied the motion, it is now on appeal to the Fourth Circuit, and has been fully briefed. Moreover, upon review of Mr. Bixby's opening brief, the Fourth Circuit issued an order stating its intent to schedule the case for oral argument. *Bixby v. Stirling*, No. 22-4, Doc. 36. Mr. Bixby filed his reply brief on May 8, 2023, and is awaiting the setting of oral argument. In Mr. Bixby's view, the stay of execution issued in federal court remains in effect in light of his ongoing appeal in the Fourth Circuit. *See* 28 U.S.C. § 2251(a)(1).

The State has now submitted to the Clerk of this Court a letter describing the status of Mr. Bixby's federal habeas proceedings. The State's letter implies that the federally-issued stay of execution is no longer in place, but does not state that explicitly. Nor does the State's letter mention the issuance of an execution notice, let alone request or suggest that one should issue. *Compare State v. Mahdi*, No. 2014-002131 (State's letter filed January 9, 2023: "The State is not aware of any stay in place to prevent the issuance of the execution notice . . .").

Accordingly, because the State has not requested or suggested that the Clerk of this Court issue an execution notice, and because there are currently exceptional circumstances in place

which should lead the Court to stay Mr. Bixby’s execution, Mr. Bixby requests that the Court issue an order directing the Clerk to refrain from issuing a notice of execution. *See In re Stays of Executions in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (motion to stay an execution following denial of review by the U.S. Supreme Court “must demonstrate that there are exceptional circumstances warranting the issuance of the stay.”).

The exceptional circumstance that calls for a stay is the pendency before this Court of *Owens, et al. v. Stirling*, No. 2022-001280, a civil suit filed in May 2021 challenging the constitutionality of South Carolina’s newly adopted execution statute. At the outset of the litigation, this Court issued stays of execution for plaintiffs Owens and Sigmon because it determined that the execution statute required the S.C. Department of Corrections (SCDC) to provide inmates with at least two methods of execution from which they may choose. 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). After SCDC developed a firing squad execution protocol, which provided the required alternative to electrocution, the Court set new execution dates for plaintiffs Moore and Sigmon before staying those executions as well to allow the plaintiffs’ civil suit against the State’s methods of execution and statute to proceed.¹

In September 2022, following a bench trial, Richland County Circuit Court Judge Jocelyn Newman issued an order in *Owens, et al. v. Stirling*, holding that electrocution, the firing squad, and South Carolina’s methods of execution statute itself are unconstitutional, and enjoining SCDC from executing the plaintiffs. The State appealed. On January 26, 2023, this

¹ Although these stays of execution were related to the civil methods of execution lawsuit, they were sought and issued under the dockets of the plaintiffs’ post-conviction review cases. *State v. Owens*, No. 2006-038802; *State v. Sigmon*, No. 2002-024388; *State v. Moore*, No. 2001-021895; *State v. Mahdi*, No. 2014-002131.

Court reversed and remanded for discovery of information relating to the availability of lethal injection, holding the remainder of the appeal in abeyance. In March 2023, this Court stayed discovery while the legislature considered a secrecy bill to protect the identities of manufacturers of lethal injection drugs, which was signed by the Governor on May 12, 2023. And just yesterday, the State asked this Court to continue to stay the appeal until August 2023 while the State attempts to obtain lethal injection drugs.

Considering these exceptional circumstances, the Court should order the Clerk to refrain from setting an execution date for Mr. Bixby during the pendency of *Owens, et al. v. Stirling*. This is warranted for several reasons.

First, the Court has already stayed executions for the civil plaintiffs in order to resolve the constitutionality of South Carolina's execution statute and the methods it authorizes. It would be extraordinarily arbitrary to stay the executions of the civil plaintiffs to address such weighty questions, and to ensure they are not put to death in unconstitutional circumstances, but to set an execution date for Mr. Bixby, who is identically situated. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (“[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”).

Second, the Court has indicated that issuing an order preventing the setting of an execution date is an appropriate way of addressing the present situation. In the methods of execution case, the Court issued an administrative order that prior stays of execution for plaintiffs Sigmon, Moore, and Terry should remain in effect, and that the “Clerk of the Supreme Court is directed not to issue a notice of execution for Freddie Eugene Owens prior to the resolution of this action.” *Owens, et al. v. Stirling*, Civil Action No. 2021-CP-40-02306 (May 5,

2022). Similarly, in *State v. John Wood*, No. 2002-022661, the Court issued an order on November 17, 2022, “recogniz[ing] the duty of the Clerk of this Court to issue an execution notice” but nonetheless “direct[ing] the Clerk of Court not to issue a notice of execution” in light of Wood’s filing of a second PCR application alleging incompetence to be executed.² Most recently, in Mikal Mahdi’s case, this Court similarly directed the Clerk of Court not to issue a notice of execution “until this Court issues its decision in Owens.” *Mahdi v. State*, No. 2014-002131 (Feb. 9, 2023). Especially where the circumstances are identical to *Owens*, *Woods*, and *Mahdi*, the Court should issue the same preemptive order in Mr. Bixby’s case.

Third, this Court has inherent authority to manage its own docket and judicial resources efficiently. It would be manifestly inefficient, and would generate needless uncertainty, for the Court to allow the Clerk to issue an execution notice, thereby creating a public appearance of a potential execution, when the Court has already made clear that it has no intention of permitting any executions to proceed during the pendency of its review of the methods of execution matter. The more efficient and straightforward course would be for the Court to ensure that no execution date is set at all at the present time.

Similarly, the issuance of an execution warrant has instant and significant consequences for this Court, SCDC, and state attorneys, defense attorneys, SCDC security officers, and inmates. Once SCDC receives an execution warrant, it immediately places the condemned inmate on “execution status,” which requires assignment to Level III (normally reserved for those deemed a serious security risk) and confinement in a different wing of the prison, in an isolation cell with constant video surveillance and lights that cannot be turned off. He is not

² Wood’s request for this order was also premised on the pendency of the methods of execution lawsuit, but the Court’s order relied solely on the second PCR application and did not comment on the effect of the methods suit on Mr. Wood.

permitted to speak with other inmates. Security officers must make a physical visit to his cell every 15 minutes. In addition, SCDC must place the entire death row unit on lock down, eliminating all recreation and prohibiting inmate interaction until a stay is entered or the inmate is executed; during that time, the death row psychiatrist must conduct a mental health evaluation of each inmate. Additionally, SCDC must initiate other execution procedures, which include scheduling the inmate's final visits with family and spiritual advisors, planning for the disposal of the inmate's property, and, with the inmate's family, determining the disposition of the corpse and funeral arrangements. These processes place substantial stress and anxiety on both SCDC staff and inmates – an unnecessary toll when an execution cannot be carried out.

Furthermore, so long as a warrant is in place, undersigned counsel cannot assume that the execution will not go forward. We must treat any execution date as “real” and initiate any litigation necessary to obtain information about SCDC's intended method and means of execution and other ancillary matters. The Attorney General's Office and counsel for SCDC will have to respond to those actions, and the courts will have to adjudicate them – an unnecessary expenditure of resources by counsel and the courts. Thus, considerations of efficiency and preservation of resources weigh heavily in favor of staying ahead of time an execution notice that is merely a temporary formality.

Finally, the State has indicated that ongoing civil litigation may form a proper basis for the Court to prevent the Clerk from issuing an execution date. In *Wood*, No. 2002-022661 (the same matter noted above), the State filed a letter with the Court on November 2, 2022, noting “that separate [methods of execution] litigation may be a basis for a motion for a stay ...”

In view of the foregoing, Mr. Bixby respectfully requests that the Court issue an order directing the Clerk of Court not to issue a notice of execution in his case prior to the final resolution of *Owens, et al. v. Stirling*, No. 2022-001280.

Respectfully submitted,

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May 16, 2023