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May 26 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

STEVEN VERNON BIXBY…………………………Petitioner,

v.

STATE OF SOUTH CAROLINA…………………Respondent.

Appellate Case No. 2007-054161

RETURN TO MOTION TO STAY THE SETTING OF AN EXECUTION DATE

On May 16, 2023, the State advised by letter addressed to the Clerk of Court that Petitioner had concluded his ordinarily available state and federal remedies, though he also had a separate post-judgment appeal in the Fourth Circuit. That same day, Petitioner moved for an order restraining the Clerk of Court from issuing an execution notice due to the "ongoing litigation challenging the constitutionality of South Carolina's methods of execution" and the amended statute. (Motion at p.1). See generally S.C. Code § 17-25-370 (clerk must issue the notice after judgment is affirmed and the prison official's receipt of the notice prompts setting of the date).

The State submits, consistent with the prior positions taken, Bixby's request to restrain the Clerk from issuing the notice is contrary to the ministerial nature of the act. Bixby's further suggestion that he has a federal stay is contrary to federal law (and, for that matter, moving for a stay in this Court). Bixby's last argument depends on ongoing litigation in *Owens v. Stirling*, Appellate Case No. 2022-001280. Bixby is not a party to that action, and there here is no certainty as to timing in that litigation.[1] Therefore, the State maintains opposition to any delay or departure

[1] Bixby notes that on May 17, 2023, a stay was requested to extend the prior stay until August 31, 2023. (Motion at p. 4). The docket shows that as of May 25, 2023, no order had been issued.

from ordinary set, process, but recognizes this Court's recent order of February 9, 2023, in *Mahdi v. State of South Carolina*, Appellate Case No. 2014-002131, which provided:

> While we recognize the duty of the Clerk of this Court to issue an execution notice is ministerial, [FN 1] due to the pendency of *Owens* and in order to conserve judicial, attorney, and Department of Corrections resources, we direct the Clerk of Court not to issue a notice of execution until this Court issues its decision in *Owens*.
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> [FN 1] *See Roberts v. Moore*, 332 S.C. 488, 488, 505 S.E.2d 593, 593 (1998) (holding it is a ministerial duty of the Clerk of the Supreme Court to issue an execution notice pursuant to S.C. Code Ann. § 17-25-370 (2014)).

Bixby, on page 5 of his motion, loosely references "judicial resources." To that extent, his argument appears consistent with the *Mahdi* order. This Court could choose to follow the *Mahdi* order which both recognized such request is not consistent with the ministerial nature of the issuance and resolved to prohibit further steps in the execution process in the unique circumstances presented. Bixby's remaining arguments are without merit and could not support a stay of execution.

ARGUMENT

On February 21, 2007, Petitioner, Steven Vernon Bixby, was sentenced to death for the murders of Abbeville County Deputy Sheriff Danny Wilson and Magistrate's Constable Donnie Ouzts. Bixby murdered the men because Bixby believed the State was wrongly taking a portion of his mother and father's property for a road widening project. After many threats and promises of violence, Bixby and his father took up arms, eventually hunkering down inside the Bixby home. When Deputy Wilson arrived in an attempt to diffuse the situation, he was shot and killed. He would later be found "face down on the floor of the Bixbys' living room with his hands cuffed behind him." *State v. Bixby*, 388 S.C. 528, 539, 698 S.E.2d 572, 578 (2010). When Constable Ouzts arrived and attempted to determine what was happening, he was shot and killed. *Id.* Other

law enforcement arrived. A standoff ensued eventually culminating in a fierce firefight and Bixby's surrender. *Id.*, at 539, 698 S.E.2d at 698 S.E.2d at 578. Bixby pursued a direct appeal, post-conviction relief, post-conviction relief appeal, and federal habeas review but failed to show any relief was due. *See generally State v. Bixby, supra; Bixby v. Stirling,* No. 4:17-CV-954-BHH, 2021 WL 783660 (D.S.C. Mar. 1, 2021), *appeal dismissed,* No. 21-5, 2022 WL 4494130 (4th Cir. Apr. 29, 2022), *reh'g denied* (Aug. 31, 2022), *cert. denied* 2023 WL 3440639 (U.S. May 15, 2023).

Ministerial Duty Should Not Be Converted to a Discretionary Act

Consistent with its prior position, which the Court acknowledged was correct in the *Mahdi* order, the State maintains that the issuance is ministerial. Therefore, it is not appropriate to ask for the issuance to be converted into a discretionary act. Indeed, the duty is ministerial because it is prompted by "fixed and designated facts" and does not provide any "discretion in determining how or whether the act shall be done or the course pursued." *See Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008) (defining ministerial duty).[2] Bixby's sentence has not been overturned and he has now exhausted his remedies. Thus, the provision of the statute should apply.

Bixby's Federal Habeas Judgment is Closed and No Application Is Pending to Secure a Stay

Even while arguing this Court should restrain the Clerk from issuing the notice, Bixby also asserts that his federal proceedings have not concluded, suggesting a stay exists under 28 U.S.C. § 2251(a)(1). Apparently, Bixby bases this on his "on going appeal" from a Rule 60(b), Fed.R.Civ.P., motion. (Motion at p. 2). Again, Bixby's position is not supported by law.

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[2] Bixby appears to fault the State for not requesting issuance, (see Motion at p. 2), but in doing so, he simply misapprehends the statutory provision and this Court's precedent. This Court has already set out the correct "procedure and standards to be followed regarding stays of the death sentence" and issuance of the notice. *See In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 544, 471 S.E.2d 140 (1996). The Court did not include the direction for the State to request the issuance because the statute makes that a ministerial duty resting with the Clerk of Court.

Bixby is appealing the *denial* of his motion to reopen the federal judgment. Consequently, the judgment is still closed. Bixby's only remaining appeal is separate and apart from his prior proceedings. *Banister v. Davis*, 590 U.S. ___, 140 S. Ct. 1698, 1710 (2020) ("the appeal of a Rule 60(b) denial is independent of the appeal of the original petition"); *id*. ("a Rule 60(b) motion 'does not affect the [original] judgment's finality or suspend its operation.' Fed. Rule Civ. Proc. 60(c)(2)."). Apart from an initial 90 days in state capital cases to seek counsel, 28 U.S.C. § 2251 requires an application to be filed and pending to support a stay. Even Bixby does not suggest there is an application pending. Nothing in the statute provides that a prior litigation stay is revived upon filing a Rule 60 motion. Other courts, if considering a stay, do not suggest such a revival. *See Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018) (analyzing whether to grant a stay for Rule 60(b) proceedings). Again, to the State's knowledge no stay exists.[3]

Owens v. Stirling Litigation

Bixby concedes that at this point, after so many levels of review without relief, he must show "exceptional circumstances warranting the issuance of [a] stay" of execution. *In re Stays*, at 548, 471 S.E.2d at 142. (Motion at p. 3). Bixby primarily depends upon *Owens* as his exceptional circumstance. (Motion at p. 3) Like Mahdi, Bixby is not a party to that action, and he has not separately challenged the statute.[4] Bixby has not yet elected a method of execution. S.C. Code

[3] Attached and incorporated by reference is the status report filed in the Fourth Circuit giving notice of exhaustion of remedies and the possibility that a notice may issue. (Attachment 1). "Any request for a stay pending federal habeas corpus proceedings should be made to the federal court." *In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996). If Bixby has attempted to obtain a stay from the Fourth Circuit, the State has not been noticed of such action.

[4] Attempting to create an inference of support, Bixby notes the State's response in *State v. John Wood*, No. 2002-022661, referencing the assertion the *Owens* litigation may be argued by motion. (Motion at p. 6). Bixby fails to advise the issue was whether Wood's letter was a substitute for a formal motion. Bixby has filed a formal motion. The assertion does not help Bixby at all.

Ann. § 24-3-530 (A) (election of method "must be made in writing fourteen days before each execution date or it is waived"). Selection of a method though, will "waive[] any objection he might have to it." *Stewart v. LaGrand,* 526 U.S. 115, 119 (1999). Further, election of one method renders moot complaints as to other methods that will not be used. 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.").

Whether the Court will follow *Mahdi* is a decision for this Court based on unique circumstances presently existing – an anomaly in general South Carolina procedure in this area. In this return, the State seeks to preserve the statutory procedure and the narrow basis for a stay generally, limiting impact of "preservation of resources" arguments apart from these discrete circumstances. But for these unique circumstances, Bixby's motion should not be considered at all. His remaining arguments are without merit.

Respectfully Submitted,

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