

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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STEVEN VERNON BIXBY,  
*Petitioner*

v.

STATE OF SOUTH CAROLINA,  
*Respondent*

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Appellate Case No. 2007-054161

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**REPLY IN SUPPORT OF  
MOTION TO STAY ISSUANCE OF EXECUTION NOTICE**

On November 26, 2024, Mr. Bixby filed a Motion to Stay Issuance of Execution Notice on the Ground of Incompetence to be Executed. Respondent submitted a response brief on December 6, 2024. Mr. Bixby, through undersigned counsel, offers the following in reply.

Respondent first contends this matter is premature because no notice of execution has been issued. The Court, however, has already instructed the Clerk that Mr. Bixby's execution notice "shall be issued" in the sequence established in the Court's Amended Order of August 30, 2024. *See Moore v. State*, No. 2024-001373. The Court reaffirmed Mr. Bixby's forthcoming execution notice in its order of November 14, 2024, briefly pausing executions until 2025. Because the Court has already said Mr. Bixby is execution eligible, and has established a timeline for issuance of his execution notice within the next several months, it would not make sense to defer his request for a competency review as premature. On the contrary, this is an instance where Mr. Bixby's interests align with those of the State and the justice system more generally. By starting the competency review process now, the Court will simultaneously protect

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Mr. Bixby's due process rights, avoid needless delay in a capital case, and ensure timely disposition of post-conviction matters.

Next, like Respondent's first argument, the suggestion that Mr. Bixby's PCR application is faulty due to the lack of verification elevates form over substance. As a textual matter, the verification requirement under S.C. Code § 17-27-40 is irrelevant because the incompetency application does not involve "[f]acts within the personal knowledge of the applicant" nor does it involve "documents and exhibits" that need to be authenticated by Mr. Bixby's sworn statement that they are "true and correct." Rather, the PCR application is based on the factual assertions and expert opinions of Dr. Richard DeMier, former clinical psychologist for the U.S. Medical Center for Federal Prisoners. As a practical matter, it would make no sense to require pleadings asserting a client's incompetency—and inability to understand the legal process and rationally communicate with counsel—to be verified by the very client who is alleged incompetent. The entire reason for competency review is because of counsel and their expert's opinion that the client is unable to participate in the legal process.

Beyond questions of timing and pleading requirements, Respondent suggests the Court should delve into an examination of the incompetency claim's merit prior to a PCR hearing. Respondent believes this Court should review a State expert's competing opinion, assess factual allegations, and decide the credibility of Dr. DeMier's opinion. But these suggestions are out of step with the process for evaluating issues of incompetency to be executed. This Court held in *Singleton v. State*, 313 S.C. 75, 87, 437 S.E.2d 53, 60 (1993), that the question of competency to be executed is addressed through the standard PCR procedure. The Court explained that an evidentiary hearing will be held where "the applicant, through competent evidence or expert testimony, must show by a preponderance of the evidence that he or she lacks the requisite

competency for execution.” *Id.* The *Singleton* Court went on to hold that after a PCR court finding of incompetency, it would conduct a “mandatory review.” *Id.* This process, of course, is consistent with other types of PCR matters, in which summary dismissal is only allowed where relief cannot be granted even if all alleged facts are assumed true and viewed in the light most favorable to the applicant. *See Mose v. State*, 420 S.C. 500, 505-06, 803 S.E.2d 718, 720 (2017); *see also* S.C. Code § 17-27-70(b) (“Disposition on the pleadings and record is not proper if there exists a material issue of fact.”). While Respondent’s counsel, and possibly his forthcoming mental health expert, may have a different view of the facts pertaining to Mr. Bixby’s mental state, these are evidentiary disputes to be explored in the first instance in the PCR court rather than on a cold appellate record.

The Court’s decision in *Hughes v. State*, 367 S.C. 389, 626 S.E.2d 805 (2006), although involving the slightly different context of competency to waive PCR proceedings, speaks to the need for evidentiary hearings in these types of matters. The Court explained its “practice to remand the matter to the circuit court for hearing and ruling on whether the appellant is mentally competent” to waive their right to PCR. The Court remands “when . . . necessary to further develop or explore the facts of a case.” “This procedure is necessary and appropriate because it provides the parties an opportunity to fully explore the issues and develop a record for [appellate] review.” 367 S.C. at 395, 626 S.E.2d at 808. Mr. Bixby seeks nothing more than the competency review procedures the Court has already established.

The Court’s recent disposition in *State v. Wood*, Appellate Case No. 2002-022661, is also instructive and addresses each of Respondent’s contentions. First, as here, the *Wood* PCR application raising incompetency to be executed was filed after Mr. Wood’s initial state and federal habeas litigation concluded, but before an execution notice issued. Second, as here, Mr.

Wood's application did not include a verification. And third, as here, Respondent argued that based on the appellate record Mr. Wood's factual allegations of incompetency were insufficient. No reply by the movant was even filed in *Wood* yet the Court rejected each of Respondent's arguments and assigned a PCR judge to conduct a hearing and resolve factual disputes. In its order, the Court explained that under *In re Stays* Mr. Wood was "entitled to a stay of execution while he pursues this PCR action." So too is Mr. Bixby.

Accordingly, undersigned counsel respectfully request that the Court grant the motion to stay issuance of a notice of execution, and assign a judge to hear the PCR action alleging Mr. Bixby's incompetency to be executed.

Submitted on December 11, 2024.

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