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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

Respondent/Movant,

v.

STEVEN V. BIXBY,

Appellant/Respondent.

Appellate Case No. 2007-054161

MOTION TO RECONSIDER ORDER FOR STAY OF EXECUTION AND TO STAY PROCEEDINGS IN CIRCUIT COURT AND ALLOW ADDITIONAL BRIEFING

Steven V. Bixby murdered Abbeville County Deputy Sheriff Danny Wilson and County Magistrate's Constable Donnie Ouzts in December 2003. He was sentenced to death in February 2007. Bixby exhausted his ordinary state and federal remedies on May 15, 2023, with his convictions and sentences being upheld. The State notified the Court of exhaustion on May 16, 2023. Bixby moved to stay the execution to litigate collateral matters in the federal court and in light of the pending civil action challenging the State's methods of execution and the amended statute setting out the methods of execution. On June 8, 2023, this Court stayed the issuance of a notice of execution pending resolution of the civil action regarding the methods of execution and the amended statute.

On July 31, 2024, this Court resolved the litigation finding the challenged methods constitutional and upholding the statute. By Order dated August 30, 2024, this Court set a schedule for issuing notices of execution since many inmates had completed their appeals and were waiting only on the methods litigation to resolve. According to the schedule, Bixby would have a notice

issued after Mikal Mahdi's execution. Mahdi's execution is presently scheduled for April 11, 2025. Thus, Bixby's execution should follow on May 16, 2025.

On November 26, 2024, Bixby filed another motion to stay the execution— this time claiming he is incompetent to be executed under *Singleton v. State,* 313 S.C. 75, 437 S.E.2d 53 (1993). (Motion, at ¶ 3). He offered an opinion by way of an expert report. (Motion, Exhibit 2). Bixby's expert admits Bixby "meets the criteria for competency for execution in the federal standard." (Motion, Exhibit 2, at 1). The expert asserts, however, that Bixby "lacks the ability to understand the nature of the proceedings as required under the South Carolina standard." (Motion Exhibit 2, at 1). In the opinion of two members of this Court, that is insufficient both factually and legally to stay the issuance of the notice. Critically, these members point out that the heightened standard Bixby relies upon from *Singleton* may actually not be the standard at issue for the question presented. That is a problem. This brings uncertainty not only to any additional proceedings in this matter in the circuit court, but also to another evaluation presently pending, *State v. John Richard Wood*, Appellate Case No. 2002-022661 (lower court C/A 2022-CP-23-06219). At a minimum, the issue of the controlling standard needs to be resolved or more (avoidable) delays are sure to follow. Thus, the State seeks reconsideration and additional order(s) to settle this critical question.

In further support of this position, the State respectfully submits:

1. Regarding the March 13, 2025 order, only a motion to stay the execution was before this Court for consideration. Whether the *Singleton* standard should be revisited, modified, or addressed in any way was not squarely before the Court by original jurisdiction or by appeal. Rather, the stay standard was at issue, specifically, the requirement that the inmate seeking the post-exhaustion stay "must demonstrate that there are exceptional circumstances warranting the

issuance of the stay." *In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 471 SE.2d 140 (1996). The majority allowing the stay may have considered the points made concerning *Singleton* in their brethren's well-reasoned conclusion to the contrary were not currently available for disposition. *See generally State v. Harrison*, 432 S.C. 448, 464, 854 S.E.2d 468, 476 (2021) ("Courts do not give advisory opinions or answer questions that are not asked.") (citing *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216 n.4, 734 S.E.2d 142, 145 n.4 (2012) ("We decline, as we must, to [rule on issues] not presented to us. Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." (internal alteration and quotation marks omitted) (citation omitted)). However, this matter is uniquely proper for this Court to consider before sending the issue to the circuit court. This Court must decide the appropriate standard to ensure that proceedings in circuit court are not overly inclusive or ultimately rendered infirm by use of an incorrect standard. *See Madison v. Alabama*, 586 U.S. 265, 283 (2019) (reversing and remanding having clarified the federal standard noting "the state court may not rely on any arguments or evidence tainted with the legal errors we have addressed" and recognizing "the court should consider whether it needs to supplement the existing record" given the "incorrect view" and "other evidence [that] might have implicitly rested on those same misjudgments"). That is a delay that could be, and should be avoided, given the posture of this case.

2. The members of the Court who would deny the stay quite correctly point out that *Singleton* with its more "stringent standard," though referenced in multiple cases, does not appear to have been used to grant a post-exhaustion stay because the inmate was competent under the federal standard, but not under the *Singleton* standard. (March 13, 2025 Order, at 3). To go a bit further, the cases that have referenced application of *Singleton* show the cases have not presented just the question of competency to be executed; rather, those cases additionally implicate *waiver*

of remedies *with* competency to be executed. *See, e.g., State v. Motts*, 391 S.C. 635, 707 S.E.2d 804 (2011); *Reed v. Ozmint*, 374 S.C. 19, 647 S.E.2d 209 (2007); *State v. Downs*, 369 S.C. 55, 631 S.E.2d 79 (2006); *Hughes v. State*, 367 S.C. 389, 626 S.E.2d 805 (2006); *State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002); *see also State v. Torrence*, 317 S.C. 45, 46–47, 451 S.E.2d 883, 884 (1994) (remanding expressly to determine competency to waive and directing application of *Singleton* standard). Bixby and Wood both stand in stark contrast to these waiver cases. The *only* issue is whether the State can execute. This, too, flows into a fault in the logic of a heightened standard in such circumstances.

The "rational communication with counsel" prong, essentially, is to ensure a defendant can "assist," *i.e.,* may "convey any knowledge of a fact which would make his punishment unjust or unlawful to his attorney." *Singleton*, 313 S.C. at 82, 437 S.E.2d at 57 (collecting cases where "similar views" were adopted in other jurisdictions). While this may go to a knowing and intelligent waiver of remedies, it has little logical relevance for the basic competency to be executed standard. *Ergo*, the first conclusion in *Singleton* was the only necessary one: "Singleton is completely unaware that he is capable of dying in the electric chair. His reliance on protective 'genes' and his inability to respond to his counsel's questions with anything other than a yes-no *are indicative of Singleton's failure to understand either the reason or the nature of his punishment.*"). 313 S.C. at 84, 437 S.E.2d at 58 (emphasis added). The remainder, consequently, is merely dicta. *See also Madison*, 586 U.S., at 283 ("The sole question on which Madison's competency depends is whether he can reach a "rational understanding" of why the State wants to execute him.") (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)).[1]

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[1] In *Panetti,* the Supreme Court acknowledged:

3. Further, in the Wood post-conviction relief action, which this Court has allowed to go forward, the applicant asserts his "death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution," and relying on these authorities: "U.S. Const, amnd. VIII; S.C. Const, art. I, § 15; *Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Singleton v. State*, 313 S.C. 75, 84, 437 S.E.2d 53, 58 (1993)." (C/A 2022-CP-23-06219, Application, at 2-3). Again, as the two members of this Court who would deny the stay point out, the *Singleton* "assistance prong" appears

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> ...the fact that a concept like rational understanding is difficult to define. And we must not ignore the concern that some prisoners, whose cases are not implicated by this decision, will fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness. The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

551 U.S. at 959–60. *Madison* did not expand *Panetti*; it applied *Panetti* to include other *mental conditions* that negatively affect rational understanding. Nothing in either case anticipates a non-mainstream belief system meeting this standard. Bixby has long been identified as holding non-mainstream beliefs, but, as Dr. Frierson found, in prior proceedings, Bixby's "belief system is clear, rationally expressed, and shared by many of his friends and other people throughout the country..." (Return Attachment, at 2007 evaluation at 10). The *Panetti* caution is applicable in such situations. There are many "beliefs" that are repugnant to society in general such as those that spark hate crimes and terrorist activities. That alone cannot and should not prevent carrying out "the harshest penalty that a just society can impose." *United States v. Roof*, 10 F.4th 314, 405 (4th Cir. 2021) (describing the death penalty when affirming the conviction and sentence in that case).

based on the common law, not the Constitution. (March 13, 2025 Order, at 3 n. 1); *see also Singleton*, 313 S.C. at 83, 437 S.E.2d at 58 ("The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment. The General Assembly has not addressed the level of competency required for execution, nor has there been any legislation concerning the test for incompetency in the execution context. Absent such legislation, the common law must apply.") (citations omitted). The allegation in Wood underscores the confusion of the appropriate standard and basis for that standard. And, again like Bixby, to litigate the "assistance prong" that is wholly unnecessary both fosters delay (in the additional question and arguments thereon) and also assures appeal and the very real danger of remand where an incorrect standard may taint the relevant decision as it did in *Madison*.

4. Alternatively, if the Court should decline to reconsider the order, stay the lower court proceedings allowed, and order additional briefing on this critical issue, the State respectfully asks the Court to reconsider the delay imposed by the present schedule and anticipated appeal. As it stands, the Court has ordered a hearing to be *held* no later than September 1, 2025. The order is to be issued no later than 30 days after. Further, an appeal is anticipated no matter how the circuit court rules. This guarantees over a year's delay, and most likely many additional months more if the appeal is not expedited. To place this schedule in context, as noted above, Bixby's notice of execution should follow the week after Mikal Mahdi's execution.[2] Mahdi's execution is scheduled

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[2] The attorneys for the inmates are for the most part different. Mahdi is primarily represented by Assistant Federal Public Defenders Teresa Norris and David Weiss, with local attorneys Charles Grose, Esq., and John Warren, Esq. also appearing as counsel. Bixby is currently represented only by Josh Kendrick, Esq., but Respondent notes the PCR filed will prompt the appointment of two qualified attorneys. *See* S.C. Code Ann. § 17-27-160. Dr. DeMier does not reference local counsel in his report, but noted the matter was "Referred by: Gretchen Swift and David Weiss." (Motion, Exhibit 2, at 1). It is possible Mr. Weiss, who also represented Mr. Mahdi, may be appointed or involved.

for April 11, 2025. Bixby's execution would likely be scheduled for May 16, 2025. To avoid unnecessary delay, and in light of the fact that Bixby has already been evaluated by the defense expert, and the concession that Bixby meets the federal standard, the State requests expedited proceedings and suggests a schedule of 45 to the hearing with an order to be issued within 30 days thereafter.

THEREFORE, based on the foregoing, the State respectfully requests reconsideration and the following relief:

1. Staying the circuit court proceedings allowed under the Order of March 13, 2025, and order additional briefing to consider and determine the controlling standard for competency to be executed. Upon that determination, the Court could revisit the motion to stay in light of the expert report attached in support of the motion;
2. Stay the circuit court proceedings in John Richard Wood's case, (C/A 2022-CP-23-06219), to allow this Court to consider the additional briefing and make its determination on the controlling standard for competency to be executed;
3. In the alternative of granting briefing on the motion, to grant a petition for writ of certiorari in this Court's original jurisdiction to consider and determine the controlling standard the circuit court should apply, and grant a stay of circuit court proceedings in the PCR actions filed by Bixby (2024-CP-01-00375), and Wood, (C/A 2022-CP-23-06219), or,
4. In the alternative, grant expedited proceedings allowing 45 days to hold the hearing and 30 days thereafter to issue an order, with the anticipation of an expedited appeal.

Respectfully submitted,

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