STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

v.

STEVEN VERNON BIXBY

Appellate Case No. 2007-054161

RETURN TO STATE'S MOTION TO RECONSIDER ORDER FOR STAY OF EXECUTION

The Court recently granted a stay of the issuance of the execution notice for death-sentenced prisoner Steven Bixby and assigned a judge to conduct proceedings in the circuit court addressing whether Bixby is incompetent to be executed. Subsequently, the State filed a motion for reconsideration of the stay of execution, and requested a stay of the incompetency proceedings in the circuit court to permit further appellate briefing on the applicable legal standard for finding prisoners incompetent to be executed. The State's motion is based on the dissent from the order granting Mr. Bixby a stay, in which Justice Few expressed his view that the state law incompetency standard set forth in *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993), is dictum.

Even assuming the State's motion has substantive merit, it is saddled by numerous procedural flaws. First, the Court has a clear rule that it "will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Rule 240(i), SCACR. In *State v. Rucker*, 321 S.C. 552, 471 S.E.2d 145 (1996), the Court, applying the predecessor version of Rule 240,

summarily dismissed a petition for rehearing following the denial of a certiorari petition, explaining that rehearing "is not authorized by the South Carolina Appellate Court Rules," and that dismissal was warranted by the "longstanding policy of" the Court. So too here. The State has filed a petition that is unauthorized by this Court's rules and practices.

Second, even if the Court's rules allowed the State's petition in theory, in practice, the State already conceded the legal proposition on which it now seeks rehearing. In its response to Mr. Bixby's motion to stay the issuance of an execution notice, the State acknowledged that "*Singleton* is the controlling authority in this matter and it sets forth a two-prong test for determining competency for execution." *See* State's Response in Opposition to Motion for Stay of Execution, p. 3 That test, the State recognized, includes a requirement not found in federal constitutional decisions: that "the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel." Id. The Court should look with suspicion on the State's request for rehearing on a point of law that it already conceded. *See Maybank 2754, LLC v. Zurlo*, 444 S.C. 47, 73, 906 S.E.2d 94, 108 (Ct. App. 2024) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.") (citations omitted).

Third, the State long had an opportunity to argue that the *Singleton* assistance prong is dictum, and did not do so. As far back as 2022, responding to John Wood's request for a hearing to determine his competency to be executed, the State recited the *Singleton* assistance prong as part of the applicable standard and never questioned whether that aspect of *Singleton* is good law. *See State v. Wood*, Appellate Case No. 2002-022661, State's letter filed Nov. 2, 2022. Now, three years later and for the first time, the State has questioned the *Singleton* standard's relevance

to Mr. Wood. Three years of delay is three too many. Likewise, in this case, the State did not question *Singleton* four months ago when responding to Bixby's motion for a stay of execution. The State has only now raised the issue belatedly after failing to obtain the relief the State hoped for during its first bite at the apple. This "[n]eglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done," should give this Court pause. *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (explaining the doctrine of laches).

The final procedural infirmity in the State's request for reconsideration is that the State asks the Court to stay the circuit court incompetency proceedings in John Wood's case even though Wood is not a party to this matter. Nor has the State moved to join Wood as a party, or filed a companion stay motion in *Wood* itself.[1] The State's failure to adhere to the normal rules of procedure—designed to ensure parties' due process rights and the opportunity to be heard are protected—raises serious concerns, particularly in the death penalty context. While it's the State's prerogative to seek the execution of death sentenced prisoners, it should at least be expected to follow basic procedural rules while doing so.

Turning briefly to the merits of the State's position, its claim that the 3-2 stay order issued in *Bixby* "brings uncertainty" rests on a false premise. *See* State's Motion to Reconsider, p. 2. The fact that a numerical minority of judges on an appellate court dissented from a ruling does not make the ruling uncertain. It simply means the dissenting judges disagreed with the holding, nothing more. Decisions that are 3-2 have exactly the same precedential force as decisions that are 5-0.

[1] The State has, at least, provided a copy of the *Bixby* reconsideration motion to counsel for Wood.

Ultimately, though, Bixby does not object to the bottom-line relief the State requests, even though the manner in which the State made that request is flawed. To be clear, Bixby does not believe that *Singleton*'s legal standard is dictum. Bixby does agree, however, that with thorough briefing and oral argument from the relevant parties for the purpose of reaffirming or further elucidating *Singleton*, the Court will aid the parties and circuit court alike by establishing a clear legal framework to guide the evidentiary proceedings that are already ordered and will ensure an efficient and orderly resolution of this matter. On this narrow ground alone, Bixby joins the State's request for further appellate proceedings prior to the circuit court hearing the evidence of Bixby's incompetence to be executed.[2]

Submitted on March 25, 2025.

/s Joshua Snow Kendrick
Joshua Snow Kendrick (No. 70453)
KENDRICK & LEONARD, P.C.
P.O. Box 6938
Greenville, SC 29606

COUNSEL FOR STEVEN BIXBY

[2] In contrast, the State's alternative request to require that Bixby's incompetency hearing occur within 45 days is not reasonable in light of the challenges involved in coordinating the schedules of the circuit court, counsel for both parties, Dr. DeMier, and other necessary witnesses. The Court need not revisit the reasonable balance it already struck when it required that any hearing take place by September 1, barring an extraordinary change in circumstances.