No. 24A-

IN THE

Supreme Court of the United States

FREDDIE EUGENE OWENS,

Petitioner,

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; & HENRY MCMASTER, Governor of South Carolina,

Respondent.

CAPITAL CASE

EXECUTION OF APPELLANT OWENS SCHEDULED FOR SEPTEMBER 20, 2024, 6 P.M. ET

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

EMERGENCY MOTION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Unless this Court intervenes, at 6:00 p.m. today, Petitioner Freddie Eugene Owens will be the first prisoner executed by the South Carolina Department of Corrections in nearly 14 years. Owens seeks an emergency injunction pending his appeal of the United States District Court's denial of a preliminary injunction and temporary restraining order. See DE 19 (district court order). Owens needs immediate injunctive relief so that his death sentence is not carried out despite Respondents' denying him, in violation of due process, basic information about the lethal injection drugs and qualifications of the execution team.

Owens is likely to prevail on that appeal. In the district court, Owens, along with his co-Plaintiffs, presented an uncontroverted expert declaration demonstrating that the State has failed to provide the "basic facts" about the execution drugs that Owens requires to make an informed choice about whether lethal injection will be a less inhumane method of execution than other available methods, a right guaranteed by state law.

This Court should grant an injunction or, alternatively, certiorari because Owens will suffer irreparable harm absent an injunction, the balance of harm tips heavily in his favor, and the public interest weighs in favor of a decision on the merits. Any harm the State might suffer from the delay inherent in an expedited

appeal pales in comparison to the prospect of Owens being executed before he can vindicate his rights.[1]

STATEMENT OF JURISDICTION

This Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Because this Court has ultimate jurisdiction over the issues raised on appeal, it has the authority to protect its jurisdiction by staying an execution that would otherwise moot the case. *See, e.g.*, *Bucklew v. Lombardi*, No. 13A1153.

BACKGROUND

South Carolina's execution statute provides that a death-sentenced prisoner will be executed by electrocution unless they affirmatively elect another of two

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[1] Although Owens's guilt is not germane to the issues before the Court, Defendants raised it in their briefing below as an implicit basis for denying relief, *see* Fourth Circuit Doc. 20, pp. 10-11, and so Owens feels compelled to bring his strong claim of innocence to the Court's attention.

Over the course of the past three weeks, Owens has submitted to the state supreme court two affidavits from his co-defendant recanting his prior testimony. In the affidavits, the co-defendant states, under penalty of perjury, that at trial the prosecution offered him a deal for his testimony that was concealed from the defense; he further states that Owens was not involved in the murder and not present in the convenience store at the time of the offense. These statements vindicate Owens's long held position that he is innocent of the murder of Irene Graves. *See* Affidavits filed in *State v. Owens*, No. 2024-001397 on August 30 and September 18, 2024.

The South Carolina Supreme Court has denied Owens's requests to stay his execution based on the newly discovered evidence of his innocence. Counsel for Owens are currently in the process of seeking authorization from the Fourth Circuit to file a successive petition for a writ of habeas corpus in the district court, demonstrating his innocence of the crime for which he is scheduled to be executed today at 6 p.m.

statutorily authorized methods: the firing squad and lethal injection. S.C. Code § 24-3-530. The Supreme Court of South Carolina has held that the purpose of "the choice provisions of section § 24-3-530" is to ensure that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens v. Stirling*, 904 S.E.2d 580, 608 (S.C. 2024).

Another provision of South Carolina law establishes a veil of secrecy around certain aspects of the execution process, prohibiting the disclosure of identifying information of "any person or entity that participates in the planning or administration of the execution of a death sentence, including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence . . . . in any administrative, civil, or criminal proceeding in the courts, administrative agencies, boards, commissions, legislative bodies, or quasilegislative bodies of this State, or in any other similar body that exercises any part of the sovereignty of the State." S.C. Code § 24-3-580(A)(1), (B).

In advance of an execution, the South Carolina execution statute further states that, upon receiving a notice of execution, the director of the South Carolina Department of Corrections must "determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] provided" by

the state's capital punishment statute—electrocution, the firing squad, and lethal injection—"are available." S.C. Code § 24-3-530(B).

As to lethal injection, the state supreme court has held that the director's certification must set forth the "process that he decides is appropriate for satisfying himself that the drugs are capable of carrying out the death sentence according to law . . . in sufficient detail that a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Owens*, 904 S.E.2d. at 605. While ordering the director to comply with the secrecy statute described above, the court held that "the text of subsection 24-3-530(B) itself," the execution statute, requires the director to disclose "some basic facts about the drug's creation, quality, and reliability" and "the drugs' potency, purity, and stability." The court noted that there is also "a Due Process Clause component to our analysis of this claim[.]" *Id.* at 604.

On August 23, 2024, the South Carolina Supreme Court issued an execution notice, setting Owens's execution by the South Carolina Department of Corrections for September 20, 2024. On August 28, 2024, Corrections Director Stirling submitted a certification to that court, pursuant to S.C. Code § 24-3-530(B), stating that he had obtained pentobarbital for use in lethal injections. Defendant Stirling also stated in his certification that the pentobarbital is of sufficient potency, purity, and stability to carry out executions, claiming that the forensic laboratory of the S.C. Law Enforcement Division had tested and approved the pentobarbital. Stirling provided no information about the nature or results of those tests. DE 1-3.

Owens followed up on Stirling's limited certification by submitting an objection and request for additional information about the execution drugs to the state supreme court, attaching an affidavit from a pharmacy expert explaining why the information sought was needed for Owens to make an informed assessment about which method of execution would be the least inhumane. DE 1-5, 1-6. Importantly, and as addressed below, Owens only sought information about the testing and properties of the drugs. He did not ask for information that would identify any person involved in the execution process, or violate the plain terms of South Carolina's secrecy law prohibiting disclosure of such matters. The state supreme court denied Owens's request. DE 1-7.

Owens and five death-sentenced and warrant-eligible prisoners then filed suit in the district court, seeking protection of their federal constitutional rights to a reasonable degree of information about the manner in which the State of South Carolina intends to execute them. Owens separately moved for a preliminary injunction and temporary restraining order. On September 18, 2024, the district court denied his motion. DE 19. On September 20, 2024, the United States Court of Appeals for the Fourth Circuit denied Owens's emergency motion for an administrative injunction and injunction pending appeal. This emergency application follows.

REASONS FOR GRANTING THE INJUNCTION

The standard for granting an injunction is well-established. A federal court must consider the prisoner's likelihood of success on the merits, the relative harm to

the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). All of these factors weigh in favor of staying Mr. Owens's execution.

I. Owens is likely to succeed on the merits.

A. The district court erred in finding no liberty interest necessary to bring a procedural due process claim.

The procedural due process claim on which Owens's preliminary injunction motion rests requires the existence of a state-conferred liberty interest. If such an interest is present, then the federal courts may review a procedural due process claim that state authorities have arbitrarily revoked it or insufficiently protected the plaintiff's legitimate interest in the vindication of that right. *See Desper v. Clarke*, 1 F.4th 236 (4th Cir. 2021) (state rule creates a protected liberty interest when it establishes an "objective expectation . . . in such a way that an inmate could reasonably expect to enforce it against prison officials.") (quoting *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 465 (1989)).

The district court's principal basis for denying Owens an injunction was that it was "not persuaded that South Carolina has created a liberty interest as broad as Owens claims." DE 19, p. 13. The district court describes Owens's state-conferred right as "the right to choose his method of execution—period, not the right to discover what is, objectively, the best choice, nor the right to discover whether the execution methods are constitutional." *Id.* at 16. To see how this is an inaccurate

reading of the state court's decision in *Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024), explaining the execution statute, this Court should turn to what the state court actually said.

At the outset, it is evident that the state right is not, as the district court would have it, merely a right to choose the method of execution. The state supreme court made it clear it is also a right to be informed:

> [The Director] *must explain* to the condemned inmate and other parties legally entitled to the explanation the results of his efforts . . . . If the Director does obtain the drugs . . . the Director *must explain to those legally entitled to the explanation the basis of his determination* that the drugs are of sufficient "potency, purity, and stability" to carry out their intended purpose.

904 S.E.2d at 604 (emphasis added).

The state supreme court continued:

> The text of section 24-3-530 requires nothing more than that the Director set forth that process *in sufficient detail that a condemned inmate and his attorneys may understand* whether there is a basis for challenging the constitutionality of the impending execution.

Id. at 605 (emphasis added).

The court then concluded:

> [The Director] *must explain* in the affidavit how he determined the drugs were of sufficient "potency, purity, and stability" to carry out their intended purpose.

Id. (emphasis added).

It is impossible to reconcile these plain and explicit requirements with the district court's assertion that all Owens is entitled to under state law is "the right to choose his method of execution—period."

The district court next collapsed the question of whether a state right existed, and the question of whether the State's protection of that right comported with procedural due process, into a single inquiry. The district court stated that "the state supreme court determined what information the Death Penalty Statute requires the Director to provide regarding the drugs to be used in a lethal-injection execution . . . and then the court specifically decided—in overruling Owens's objections—that Stirling has provided Owens all of the information that the Statute requires . . . ." DE 19, p. 14.

This approach, if affirmed, would lead to absurd results. Imagine the SCDC director certified that he was satisfied that the drugs were lethal and would quickly bring about Owens's death but told him nothing more. If the state court accepted that certification, would that adequately protect Owens's right to "basic facts" about the drugs? Or what if the SCDC director certified that the drugs would do their job painlessly because he observed them being tested on an animal? As these examples illustrate, the question of whether a state is adequately, or arbitrarily, implementing its own legislatively or judicially-conferred rights is not wholly the province of state authorities to answer. It is also the province of federal courts who are asked to review whether states have established rights but arbitrarily failed to honor them. Were the district court's approach left standing, it would allow state authorities to completely foreclose the possibility of procedural due process protections simply by applying state-based rights in whatever manner they wish. That cannot be the law.

This Court itself has rejected the reasoning that the district court implicitly adopted. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), a defendant was given a mandatory sentence for habitual offenders that was found unconstitutional in another case, by a state appellate court, after his trial. Yet in the defendant's appeal, the state court declined to vacate his now-unconstitutional sentence, reasoning that the mandatory 40-year sentence was still within the range of punishment even If the sentence was not mandatory. This Court reversed, holding that this amounted to an arbitrary due process violation. The Court went on to squarely reject the notion adopted here by the district court, that state courts are the sole arbiters of the scope of state rights:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, *it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law . . . . that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.*

447 U.S. at 346 (emphasis added). Then, having clarified the role of federal review in policing a state's protection of its own rights, the Court concluded: "Such an arbitrary disregard of the petitioner's [state] right to liberty is a denial of due process of law." *Id.*

Thus, in this case, the state supreme court's approval of Director Stirling's superficial certification about the execution drugs does not answer the procedural due process question; it only begins it. It is now the federal courts' role to conduct

the procedural due process analysis, balance the competing equities, and determine what process (in this case, what information) was actually due to Owens.

B. Defendants' refusal to provide basic facts about the execution drugs undermines Plaintiff Owens's right to make an informed choice about his method of execution.

In support of his showing that Stirling and the state supreme court frustrated his state-based liberty interest in meaningful information about the execution drugs, Owens submitted an affidavit from a pharmacy expert—Dr. Michaela Almgren, Pharm.D., MS, a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcome Sciences at the University of South Carolina College of Pharmacy—that relevant information was omitted from Stirling's certification. DE 1-6.

The district court believed that Dr. Almgren's affidavit "do[es] not somehow create a *liberty interest* in Owens receiving the information." DE 19, p. 16 (emphasis in original). But here again, the district court conflated the question of whether a liberty interest *exists*, with the separate question of whether state authorities have arbitrarily abrogated that interest. At a minimum, Dr. Almgren's affidavit creates a factual dispute, requiring a hearing, as to whether Director Stirling's and the state supreme court's application of the certification requirement amounts to an arbitrary revocation of Owens's statutory right to an explanation about the execution drugs, an explanation that would allow him to meaningfully choose his execution method and assess potential Eighth Amendment problems.

Plaintiff Owens asked for the following information, which he needs to make an informed choice about whether lethal injection will be a less inhumane method of execution than other available methods:

a. The date on which the drugs were tested.

b. The Beyond Use Date, after which compounded drugs should not be used.

c. If the drugs were commercially manufactured, the expiration date.

d. The methods and procedures used to test the pentobarbital, including documentation of test method validation and details of quality control procedures and methodology.

e. The actual results obtained from the testing.

f. Where the drugs will be stored prior to their use, and how the storage conditions will be monitored, including temperature and humidity controls.

See DE 1-6 (Affidavit of Dr. Almgren).

Dr. Almgren explains in her affidavit that if the pentobarbital used during an execution is expired; past its Beyond Use Date; improperly tested in a way that fails to detect problems with the drug's potency, purity, or stability; or improperly stored in a way that degrades the drug's properties; then serious risks are posed to the person undergoing the execution process. In the absence of this information, there are risks of "extensive damage to the blood vessels and surrounding tissue," "intense pain upon injection," and potentially "a prisoner regaining consciousness, perhaps with organ or brain damage from oxygen deficits suffered during the attempt at execution." This information, from a highly qualified expert, is more than enough to demonstrate that Plaintiffs, and Owens at this juncture, have not

been given sufficient information to meaningfully decide which method of execution "will cause [them] the least pain," as state law requires. At a minimum, Owens has demonstrated that he is entitled to an evidentiary hearing on the question of whether state authorities have arbitrarily, and unconstitutionally, denied his liberty interest in meaningful information about the execution drugs.

C. Plaintiffs' due process claim is not barred by the *Rooker-Feldman* doctrine.

As an alternative ground for denying relief, the district court also believed that it lacked jurisdiction over Owens's procedural due process claim under the *Rooker-Feldman* doctrine. DE 19, pp. 14-15. This too was error.

There exists a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Under the *Rooker-Feldman* doctrine, federal courts only lack jurisdiction in the limited circumstance of "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). "Consistent with this narrow articulation of the *Rooker–Feldman* doctrine, [this Court] has also recognized that state administrative and executive actions are not covered by the doctrine." *Thana v. Bd. of License Commissioners for Charles Cnty., Maryland*, 827 F.3d 314, 320 (4th Cir. 2016). This doctrine has a "narrow scope" and "is confined to cases of the kind from which the doctrine acquired its name . . . ." *Hulsey v. Cisa*, 947 F.3d 246, 250 (4th Cir. 2020)

(internal citation omitted). Contrary to the district court's conclusion, *see* DE 19, pp. 14-15, the Defendants here did not thread that needle, and *Rooker-Feldman* does not apply.

1. The state action that Owens challenges was administrative, not a state court judgment.

Rooker-Feldman only applies when a state court renders a judgment. *Hulsey*, 947 F.3d at 250. ("the doctrine simply precludes federal district courts from exercising what would be, in substance, appellate jurisdiction over final state-court judgments."). A judgment is a "court or other tribunal's final determination of the rights and obligations of the parties in a case." JUDGMENT, Black's Law Dictionary (12th ed. 2024). What the state court issued here was not a judgment rendering it subject to appeal only under 28 U.S.C. § 1257(a), but merely an administrative function required under state law, rendering challenges to this function subject to broad federal question jurisdiction under 28 U.S.C. § 1331. The information Director Stirling provided to the state supreme court was not part of the issues litigated in the state trial court, nor was it part of the appeal resulting in the *Owens* decision. Instead, Stirling provided information pursuant to his duty under § 24-3-530(B) to "determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] are available." The fact that Owens submitted an objection to Stirling's certification did not somehow transform this administrative certification function into an adversarial proceeding resulting in a judgment. *See e.g. Van Hoven v. Buckles*, 947 F.3d 889, 892-93 (6th Cir. 2020) ("The writ that comes out of this ministerial process is not a state court

judgment [for *Rooker-Feldman* purposes] any more than a summons or complaint is a state court judgment."). "State administrative decisions, even those that are subject to judicial review by state courts, are beyond doubt subject to challenge in an independent federal action commenced under jurisdiction explicitly conferred by Congress." *Thana*, 827 F.3d at 321.

2. There was no state court decision on the federal due process issue that Owens has raised in his § 1983 suit.

Rooker-Feldman also does not apply because Owens did not lose his due process claim in state court. In fact, he did not raise such a claim in state court, and the state court did not address one. As the Supreme Court of South Carolina held in *Owens*, its finding that the director must "disclos[e] some basic facts about the drug's creation, quality, and reliability" has "a Due Process Clause component . . . but the point of law on which we primarily rely is the text of subsection 24-3-530(B) itself." *Owens*, 904 S.E.2d at 604. In his objection to Stirling's certification, Owens referenced the court's acknowledgment of this due process component, but he submitted no actual due process arguments to the state supreme court. DE 1-5. Instead, Owens's objection focused on the factual reasons why the information he sought was necessary for an informed decision about his preferred execution method. In its order overruling Owens's objection, the state supreme court made no reference whatsoever to due process, and focused solely on its view that the certification provided sufficient detail for Owens to make an informed choice. DE 1-7. As this Court has explained, *Rooker-Feldman* does not apply to "questions that were never litigated in the state court." *Del Webb Communities, Inc. v. Carlson*, 817

F.3d 867, 872 (4th Cir. 2016). Likewise, the doctrine has no application when the state court "said nothing about the issue" being raised in the federal suit. *Id.* at 872, n. 3.

Similarly, even if the references to due process in Owens's objection could be construed as a claim, it could not be confused with the claim that he raised in his federal complaint. Again, while Owens's objection notes the state supreme court's acknowledgment of his due process interests, it neither alleged a specific violation of due process nor identified in which due process rights–substantive or procedural–the claim was seated. In contrast, Owens's federal suit alleges and details a specific violation of his procedural due process rights. "That [Owens] previously may have presented to the state court some of the arguments in his federal complaint does not strip the district court of jurisdiction." *Hulsey*, 947 F.3d at 251-52. Because any state and federal claims are distinct, it is "not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court." *Id.* at 252 (citations omitted); *see also Exxon Mobil*, 544 U.S. at 293 ("If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction . . . .") (cleaned up; citation omitted).

3. The root of Owens's injury is not state court action, but Director Stirling's approach to his certification duties.

Next, the doctrine is inapposite because the injury for which Owens and the Plaintiffs seek federal redress was not caused by the South Carolina Supreme Court, it was caused by Defendant's failure to provide adequate information

concerning the drugs to be used in the execution. That the state court "ratified, acquiesced in or left unpunished" Director Stirling's actions did not produce the injury. *Hulsey*, 947 F.3d at 250 citing *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 88 (2d Cir. 2005). As already explained, it was Director Stirling's duty, not the state court's, to decide in the first instance how much information Owens would be given about the execution methods. The South Carolina Supreme Court itself emphasized this when it provided only "examples" to "illustrate the scope of" the certification requirement, but "decline[d] to offer further particulars on where between these [examples] the Director's explanation must fall; *that is initially for the Director to decide*." *Owens*, 904 S.E.2d at 605 (emphasis added). Even the state court, then, recognized that it was the Director's role, and not the court's, to decide what Owens would be told about how his execution might be carried out. And this Court has made clear that an "injury at the hands of a third party may be ratifIed, acquiesced in, or left unpunished by a state-court decision without being 'produced by' the state-court judgment" such that *Rooker-Feldman* strips federal jurisdiction. *Hulsey*, 947 F.3d at 250-51 (citation omitted). The fact that the Director's refusal to provide Owens with sufficient information "was merely enabled by the state court's . . . ruling," *id.*, does not change the fact that Director Stirling's certification is the source of Owens's constitutional injury, and thus, *Rooker-Feldman* is inapplicable.

4. The state action being challenged is a broadly applicable rule of state law, and not a case specific determination unique to Owens.

Finally, the district court's application of *Rooker-Feldman* runs afoul of this Court's decision in *Skinner v. Switzer*, 562 U.S. 521 (2011). There, a Texas prisoner sought post-conviction DNA testing of evidence under a state procedure, and was denied. The prisoner then turned to federal court, seeking to have the DNA tested in a § 1983 suit, alleging the state courts' refusal to conduct the tests violated due process. *Id.* at 527-29. This Court rejected the argument that *Rooker-Feldman* barred the § 1983 suit, explaining, "Skinner does not challenge the adverse [state court] decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed." *Id.* at 532. Because Skinner was only challenging the "statute or rule governing the [state court] decision" and not the decision itself, federal jurisdiction was proper. *Id.*

The Third Circuit's explication of *Skinner* in *Wade v. Monroe Country District Attorney*, 800 Fed. Appx. 114, 118 (3d. Cir. 2020), is instructive. In that case, the Third Circuit explained that Wade could not benefit from *Skinner* because it appropriately involved a prisoner's federal challenge to a "broad pronouncement about how the [state] statute should be construed in all cases," while Wade was inappropriately attempting to use a federal lawsuit to challenge the state court's "particular interpretation of the DNA statute and application of the statute to him, not to the statute as 'authoritatively construed' by [state] courts or as it applies to prisoners generally." 800 Fed. Appx. at 119. *See also LaMar v. Ebert*, 681 Fed.

Appx. 279, 288 (4th Cir. 2017) (holding *Rooker-Feldman* inapplicable where the plaintiff was "challenging the constitutionality of the DNA statute," and not "the merits of [a] state court decision.") (citations omitted).

Owens plainly falls under the former scenario, not the latter. He challenges Director Stirling's authoritative application—and the state supreme court's acquiescence to that application—of the execution certification requirement. This is not a challenge to a state court ruling about Owens's specific case. It is a challenge to the manner in which Stirling has authoritatively decided to apply the certification requirement to all condemned prisoners. Owens's suit thus falls well within the jurisdictional shoals set out in *Skinner*.[2]

A preliminary injunction is appropriate when the plaintiff establishes: (1) likelihood of success on the merits; (2) irreparable harm without the preliminary relief; (3) the balance of equities tips in the moving party's favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013). Where a plaintiff makes a strong showing of irreparable harm, the need to

[2] The district court believed *Wade v. Monroe Country District Attorney*, 800 Fed. Appx. 114, 118 (3d. Cir. 2020); *Durham v. Haslam*, 528 Fed. Appx. 559, 563-64 (6th Cir. 2013); and *Cooper v. Ramos*, 704 F.3d 772, 780 (9th Cir. 2012), supported its decision. DE 19, pp. 14-15. But each of these cases involved a case-specific state court decision, which is barred from federal review by *Rooker-Feldman*. Owens's case, in contrast, is a challenge to a broadly-applicable state court rule.

show a likelihood of success on the merits is lessened. *Rogers v. Comprehensive Rehab. Assocs., Inc.*, 808 F. Supp. 493, 498 (D.S.C. 1992).

Owens meets these criteria because of his clear right under state law to reasonable information; his tailored request for information, much of which is not even barred from disclosure by state secrecy rules concerning executions; and because the information he seeks poses no threat to South Carolina's ability to impose death sentences.

D. Owens is likely to succeed on the claim that South Carolina's failure to provide necessary information to choose between lethal injection, the firing squad, and electrocution violates his right to due process.[3]

Much like the preliminary injunction analysis itself, a claim of procedural due process involves a flexible inquiry and calls on courts to fashion remedies that balance the interest of those seeking additional procedural protections with the government's ability to implement its own interests without undue burden. *See Incumaa v. Stirling*, 791 F.3d 517, 532 (4th Cir. 2015) ("Particularly in the prison context, the requirements of due process are flexible and call for such procedural protections as the particular situation demands.") (citation and internal quotations omitted). As a general matter, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotations and citation omitted). When determining what process is due, a court must balance: (a) the

[3] The focus here on procedural due process is intended only to streamline the preliminary injunction inquiry, not to abandon the additional claims.

nature of the private interest that will be affected by the governmental action; (b) the risk of erroneous deprivation through the procedures used and the probable value of requiring additional procedural safeguards; and (c) the government's interest. *Id.* at 335. This balancing analysis favors disclosure of the limited information Plaintiffs seek about their executions.

1. Owens has a state-conferred right to choose the least inhumane method of execution available.

"The Supreme Court has long recognized that," in order to invoke procedural due process protections, there must be a "state statute, regulation, or policy [that] creates such a liberty interest . . . ." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). As already detailed, South Carolina law provides Owens the right to make an informed choice about their method of execution. The state-created interest here has its roots in a South Carolina statute, S.C. Code. § 24-3-530(A), which grants Plaintiffs "the right of election" to choose between the available methods of execution. The statute underscores the importance of this right by also requiring, in subsection I, that "[t]he Department of Corrections must provide written notice to a convicted person of his right to election under this section and the available methods." The South Carolina Supreme Court has recognized that S.C. Code. § 24-3-530(A) creates a right to choose between multiple methods of execution. In 2021, the state supreme court enjoined executions because "only a single method of

execution [was] available, and due to the statutory right of inmates to elect the manner of their execution . . . ."[4]

Then, when deciding the state constitutional challenges earlier this year, the state supreme court explained why the statutory right of choice exists and the interests it is designed to protect. It clarified that a "condemned inmate may elect to have the State employ the method he and his lawyers believe will cause him the least pain," and explained that "[u]nder the choice provisions of section 24-3-530, a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Owens v. Stirling*, 904 S.E.2d 580, 608 (S.C. 2024).

The state supreme court also clarified that the corrections director is required to provide the necessary information to effectuate the statutory right to choose the least inhumane method available. With regard to lethal objections, the state court held that the corrections director has an obligation to "explain . . . the basis of his determination that the drugs are of sufficient 'potency, purity, and stability' to carry out their intended purpose. *Id.* at 604. The court added that "[t]he text of section 24-3-530 requires" the corrections director to provide "sufficient detail" about the execution drugs such "that a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Id.* At 605. Leaving no ambiguity about the nature of this state-

[4] *State v. Owens*, No. 2006-038802 (S.C. June 16, 2021); *State v. Sigmon & Sigmon v. State*, Nos. 2002-024388, 2021-000584 (S.C. June 16, 2021). These orders are publicly available through South Carolina's C-Track online docketing system.

conferred right for purposes of procedural due process, the *Owens* court made clear, "[there] is a Due Process Clause component to our analysis" of the information required for disclosure under § 24-3-530. *Id.* at 604.

In light of the South Carolina court's robust interpretation of the election right conferred under state law—and in particular, the holding that this interpretation has a due process component—there can be little doubt that Owens can establish a liberty interest triggering procedural due process protections.

2. Defendants' refusal to provide basic information about the execution drugs undermines Owens's ability to make an informed choice about his method of execution.

Owens asked the South Carolina Supreme Court to order disclosure of information as detailed and laid out above in Dr. Almgren's affidavit. DE 1-6, which they need to make an informed choice about whether lethal injection will be a less inhumane method of execution than other available methods.

As Dr. Almgren explains, in the absence of this information, there are risks of "extensive damage to the blood vessels and surrounding tissue," "intense pain upon injection," and potentially "a prisoner regaining consciousness, perhaps with organ or brain damage from oxygen deficits suffered during the attempt at execution." This information, from a highly qualified expert, is more than enough to demonstrate that Owens cannot meaningfully decide which method of execution "will cause [them] the least pain" without knowing the risks inherent in the specific drugs Defendants plan to use for lethal injection.

In addition to the risks posed by the refusal to provide information about the execution drugs, Owens's facial challenge to the statutory prohibition on disclosing the "professional qualifications" of execution team members, *see* S.C. Code § 24-3-580(A)(2), creates an additional risk of depriving him of the right to choose the least inhumane execution method. The qualifications of those tasked with establishing IV lines are particularly important.

According to reports maintained by the Death Penalty Information Center, over the past decade, there have been 18 botched executions, five of which failed completely. A substantial portion of these botched executions involved protracted difficulty in setting up IV lines. In one case a prisoner even had to assist the execution team in bringing about his own death by suggesting a good spot to start an IV line.[5] Without question, in order to meaningfully exercise his state-granted right to choose between execution procedures, Plaintiff Owens needs to know the training and qualifications of the execution team so he can assess the risk of serious and painful IV-related errors.

3. Providing Owens with basic information about the execution drugs, and about the execution team's professional qualifications, will not significantly impair any state interest.

In refusing to provide basic information about the drugs, and when justifying the statutory prohibition on disclosure of professional qualifications, Defendants are likely to assert two state interests: the interest in shielding identifying information

[5] *See* https://deathpenaltyinfo.org/executions/botched-executions.

about individuals and entities involved in carrying out executions, and the interest in being able to carry out Plaintiffs' death sentences. Yet providing the information Owens seeks would compromise neither interest.

As for the first interest, confidentiality, Owens has made reasonable, limited requests for information about the execution drugs that can be addressed without violating or invalidating South Carolina's secrecy statute. The South Carolina Legislature enacted S.C. Code § 24-3-580(B) to protect the "identifying information of a person or entity that participates in the planning or administration of the execution of a death sentence . . . ." The law does so by establishing that "identifying information" must be "construed broadly" to protect numerous aspects of the identity of execution team members:

> to include any record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or professional qualifications. The term "identifying information" also includes any residential or business address; any residential, personal, or business telephone number; any residential, personal, or business facsimile number; any residential, personal, or business email address; and any residential, personal, or business social media account or username.

S.C. Code § 24-3-580(A)(2); *see also* § 24-3-580(I).

The secrecy law goes on to require that "[t]his section shall be broadly construed by the courts of this State so as to give effect to the General Assembly's intent," and specifies that intent as "the absolute confidentiality of the identifying information" of those involved with executions. S.C. Code § 24-3-580(I).

Beyond individuals' or entities' identifying information, the secrecy law addresses execution drugs by exempting their creation or dispensing for executions

from licensing and regulatory requirements. S.C. Code §§ 24-3-580(D), I, and (F). However, the secrecy law does not establish any provision governing or limiting disclosure of information about the transportation, storage, testing, or chemical composition of the drugs.

Given this statutory backdrop, Owens has not asked for any information that would lead to revealing the identities of the individuals or companies involved in creating, storing, or transporting the drugs. Owens has not tried to find out who those people were so their specific history, skills, or qualifications can be scrutinized. Instead, mindful of state law, Owens merely asked for information about the drugs' characteristics that are relevant to their efficacy, and about the specific testing performed and results obtained to confirm the pentobarbital will work as claimed. There is no basis in state law for Defendants or the state supreme court to refuse disclosure of this information.[6] Defendants can disclose the drug-related information to Owens without violating a single provision of the secrecy law.

Turning to the next State interest that Defendants are likely to advance, Defendants will undoubtedly protest that their chosen interpretation of the secrecy statute, and refusal to provide the requested information, is necessary to protect the State's ability to obtain the drugs and equipment needed to carry out lethal injections. Yet any such claim is undermined by the fact that other states have

[6] Owens acknowledges this argument only applies to his request for information about the execution drugs. In order to grant his further request for the professional qualifications of the execution team, the Court will ultimately need to find that aspect of the secrecy statute unconstitutional.

conducted executions while also permitting access to the same or similar information that Plaintiffs seek.

Since 2020, the Texas Attorney General has issued a series of public record request rulings requiring disclosure of information including execution-drug storage inventory logs, expiration dates, DEA forms, lab reports, and receipts, subject to redaction of identifying information of entities and persons involved in the execution process.[7] Yet in the same time period, since 2020, Texas has executed 22 prisoners, all with lethal injection.

In 2021, a Georgia federal district court ordered extensive disclosure of documents about lethal injection drugs, subject to limited redactions to protect the identity of those involved:

> Documents concerning the compounding or mixing of pharmaceutical ingredients for use in Georgia's Protocol, including documents showing chemical properties and the process by which the compound is manufactured and the length of that process (Request No. 15), can be redacted to provide that relevant information without disclosing pharmacies and pharmacist and thus threatening Georgia's ability to enforce its laws. This will allow Plaintiff the information he needs to assess the efficacy of the lethal Injection drug without jeopardizing the disclosure of critical information. So too, documents showing the inspection, supervision, oversight, and quality of any facility producing the lethal injection drug (Request No. 13) and documents related to the transportation and storage of pharmaceutical ingredients used in the Protocol (Request No. 14) can be redacted and produced so that Plaintiff obtains the information he seeks without jeopardizing

[7] Tex. Atty. Gen. Op. OR2022-10880, 2022 WL 1232223 (Apr. 13, 2022); Tex. Atty. Gen. Op. OR2021-25974, 2021 WL 4465070 (Sept. 21, 2021); Tex. Atty. Gen. Op. OR2021-11962, 2021 WL 2801824 (May 7, 2021); Tex. Atty. Gen. Op. OR2021-05915, 2021 WL 1411021 (Mar. 10, 2021); Tex. Atty. Gen. Op. OR2020-29881, 2020 WL 7629911 (Dec. 2, 2020); Tex. Atty. Gen. Op. OR2020-20270, 2020 WL 4890668 (Aug. 13, 2020).

Georgia's interests.

Martin v. Ward, No. 1:18-CV-4617-MLB, 2021 WL 1186749, at *9 (N.D. Ga. Mar. 30, 2021). Even with this disclosure, Georgia was still able to carry out a lethal injection execution in March 2024.

Utah has a regulation, Utah Admin. Code R251-107-7, that permits "press access to the execution and information concerning the execution," and "recognize[s] the need for the public to be informed concerning executions" and for the corrections department to "cooperate with the news media to inform the public concerning the execution in timely manner." Even with this general policy favoring transparency, Utah conducted a lethal injection execution in 2024.

In a South Dakota district court decision—*Moeller v. Weber*, No. CIV 04-4200, 2013 WL 5442392 (D.S.D. Sept. 30, 2013)—the court unsealed method of execution documents, subject to redactions, because it was "a continuing matter of public interest and concern both in South Dakota and elsewhere . . . ." The district court rejected the defendants' theory that even documents with identification redacted must remain sealed to prevent plaintiffs or the public from piecing together the identity of those involved:

> The Defendants have urged a mosaic theory with the idea being that by taking different pieces of unsealed information the identity of executioners, compounding pharmacist, and manufacturer could be deduced. The Court does not agree with that argument except to the extent that the qualifications of persons need not be so specific that they could result in identification of execution team members or the compounding pharmacist. The identity of the manufacturer will continue to be kept under seal.

Id. at *1. Even in the face of this expansive ruling, South Dakota carried out two lethal injection executions in 2018 and 2019.

If these other jurisdictions were able to strike a balance between providing important information about the drugs used when taking a prisoner's life, and protecting states' ability to conduct the executions, there is no reason why South Carolina cannot do the same.

Nor can Defendants show that Owens's facial challenge to the secrecy statute's prohibition on disclosure of "professional qualifications" will meaningfully impair their ability to find companies and personnel willing to assist with the process. As with the drug information, the Court should again consider that numerous states have been successful in conducting lethal injection in recent years while also disclosing at least some minimum degree of information about the training and qualifications of their execution and IV team members.

For example, since 2020, Florida has executed seven prisoners. Nonetheless, unlike South Carolina's execution protocol, Florida's protocol assures that the person injecting the lethal drugs has undergone a criminal background check, and further assures that only licensed medical professionals will be charged with maintaining and mixing the lethal chemicals, attaching and observing consciousness monitors, examining the inmate for relevant health issues prior to execution, and achieving and monitoring venous access.[8]

[8] Florida's execution procedures are publicly available.

Texas has executed over twenty prisoners by lethal injection since 2020, yet the execution protocol there requires that at least one member of the "drug team" be medically trained, have at least one year of experience in their medical field, and be certified or licensed as a medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman.[9]

Oklahoma, another active death penalty jurisdiction that has executed 13 prisoners since 2020, also requires that one or more members of their IV execution team be certified or licensed as a medical professional.[10]

These are only a few preliminary examples of the type of information and assurances that other states provide about the professional qualifications of their lethal injection teams. Given these disclosures in other executing jurisdictions, Defendants cannot credibly claim that this aspect of the secrecy law is necessary to satisfy State interest in imposing Owens's death sentence.

E. Plaintiff Owens will suffer irreparable injury without a preliminary injunction.

Having established that Owens has a strong procedural due process claim with a likelihood of prevailing on the merits, the Court must turn to the remainder of the preliminary injunction analysis.

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[9] Texas's execution protocol is available as an attachment to the petition for certiorari review in a recent U.S. Supreme Court case, *Renteria v. Texas*, No. 23-6036.

[10] Oklahoma's execution procedures are publicly available.

The next injunction factor the Court must consider is irreparable injury. Owens's execution is scheduled for 6:00 p.m. today. If his execution is not stayed, he faces the irreparable harm of being put to death without the state-granted right to choose, on a meaningful and appropriately-informed basis, the least inhumane method of execution available to him.[11] "In cases involving the death penalty when an execution date has been set, as here, it is a certainty that irreparable harm will result if the [execution] . . . is not stayed. *Beaver v. Netherland*, 101 F.3d 977, 979 (4th Cir. 1996). It is difficult to imagine a more irreparable, serious harm than a death inflicted through a painful method that could have been avoided had the state provided the basic information necessary to make an informed choice about Plaintiff Owens's manner of death; and a choice, no less, that Owens has a right to under state law. Because Owens has established a strong showing of irreparable harm, his need to show a likelihood of success on the merits is less stringent. *Rogers v. Comprehensive Rehab. Assocs., Inc.*, 808 F. Supp. 493, 498 (D.S.C. 1992).

F. The threatened injury to Owens outweighs any minimal harm injunctive relief might cause to Defendants, and an injunction services the public interest.

Finally, the balance of equities tips to the point of falling over in Owens's favor. As already discussed, much of the information sought has been provided in other states, and those states have still been able to vindicate their interests in

[11] As the District Court properly found, Owens' election of lethal injection, which was required by statute 14 days before his scheduled execution, does not moot his claim. DE 19, at 12 n.7 (citing S.C. Code § 24-3-530(A), (C)). As the District Court recognized, if Owens' execution is stayed, he will be entitled to a new election prior to which he could be provided with the additional information he requests. *Id.*

imposing death sentences. There is no reason why South Carolina should be any different. Moreover, the Court could require disclosure of the drug-related information without even having to reach or disturb the state secrecy law in any respect. Even Owens's facial challenge to the secrecy statute concerns only a narrow sliver of that law; granting Plaintiffs' relief on the facial claim would leave the vast majority of § 24-3-580 and its confidentiality protections intact.

As a result, giving Owens the critical information he needs to make an informed decision about his method of execution will pose no meaningful barrier to Defendants carrying out executions, nor will it meaningfully disrupt any other state interest or state law. There is very little if anything to place on Defendants' side of the scale. While Defendants certainly have an interest in the timely enforcement of death sentences, this interest should carry little weight in the preliminary injunction analysis since the relief Owens seeks in this suit will not cause any significant delay.

Finally, the public interest in disclosure and injunctive relief also favors Owens. As discussed, Defendants' secrecy policies about lethal injection are some of the most restrictive in the country, and in some respects conceal more information from Owens than other states that have carried out lethal injections during the time period that South Carolina officials claimed they were unable to. If South Carolina is indeed going to resume executions after a 13-year hiatus, it is undoubtedly in the public interest that Defendants provide sufficient information to permit South Carolinians residing on death row to choose the least inhumane

execution method that is available. "[C]onfidence in the humane application of the governing laws of the State must be in the public's interest." *Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004).

Indeed, carrying out executions in a humane and constitutional manner is vitally important to the public. The humanity recognized by Eighth Amendment jurisprudence requires the State to make every effort to humanely execute Owens. *See Hall v. Florida*, 572 U.S. 701, 708 (2014) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."). Moreover, the public interest calls for executions to be carried out cautiously and deliberately. *See Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (acknowledging that the "Constitution recognizes higher values than speed and efficiency"). The public interest thus favors the Court granting an injunction so that Owens's execution is not carried out before State officials provide him with basic information about the process that is readily available in other active death penalty jurisdictions.

Respectfully submitted,

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September 20, 2024

APPENDIX

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Steven V. Bixby; Marion Bowman, Jr.; Mikal D. Mahdi; Richard Bernard Moore; Freddie Eugene Owens[1]; Brad Keith Sigmon, Plaintiffs, v. Bryan P. Stirling, *in his official capacity as the Director of the South Carolina Department of Corrections*; South Carolina Department of Corrections, Defendants, v. Governor Henry Dargan McMaster, Intervenor.	Case No. 3:24-cv-05072-JDA **OPINION AND ORDER**

This matter is before the Court on Plaintiff Freddie Eugene Owens's motion for preliminary injunction and request for expedited consideration ("Owens's Motion"). [Doc. 5.] Owens is a prisoner under the control and supervision of Defendant South Carolina Department of Corrections ("SCDC"), having been convicted and sentenced for the 1997 murder of Irene Graves during an armed robbery of a convenience store where she worked. [Doc. 1 ¶ 4]; *see Owens v. Stirling*, 967 F.3d 396, 403 (4th Cir. 2020). Plaintiffs are all prisoners incarcerated under SCDC's control and supervision

[1] In 2015, Owens's legal name was changed to Khalil Divine Black Sun Allah. [*See* Doc. 1 at 1 n.1.] However, Plaintiffs in their Complaint note that because all of Owens's prior proceedings before the South Carolina state and federal courts were filed under the name Freddie Owens, the Complaint uses the name Owens for clarity [*id.*], and the Court does as well.

who have been sentenced to death, and they have filed an action under 42 U.S.C. § 1983 alleging that they have a constitutional right to particular information about the drugs SCDC has obtained for purposes of carrying out their deaths by lethal injection. [Doc. 1.] Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Owens asks the Court to preliminarily enjoin his execution so he is not put to death before the constitutional claims detailed in Plaintiffs' Complaint can be adjudicated. [Doc. 5 at 1.] The Court construes this motion for preliminary injunction as one for a temporary restraining order. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999) (explaining that "a preliminary injunction preserves the status quo pending a final trial on the merits, [while] a temporary restraining order is intended to preserve the status quo only until a preliminary injunction hearing can be held"); *see also Bothwell v. ExpressJet Airlines, LLC*, No. 1:20-cv-02079-WMR, 2020 WL 6931059, at *1 (N.D. Ga. Oct. 6, 2020) ("Although Plaintiff titles its Motion as a request for a Preliminary Injunction, the Court treats it as a Motion for a Temporary Restraining Order because of the emergency nature of the claim.").

BACKGROUND

The Complaint's Factual Allegations and the Litigation Concerning South Carolina's Death Penalty Statute

In 2021, the South Carolina Legislature (the "Legislature") amended South Carolina's death penalty statute (the "Death Penalty Statute" or the "Statute") to make electrocution the default method of execution but permitting the person sentenced to death to also choose "firing squad or lethal injection, if it is available at the time of election." S.C. Code § 24-3-530(A). South Carolina law further provides that, upon receiving a notice of execution, SCDC's director (the "Director") must "determine and

certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] provided" by the Death Penalty Statute—electrocution, firing squad, and lethal injection—"are available." *Id.* § 24-3-530(B).

Plaintiffs allege that from 1995 until 2021, lethal injection had been the primary means of execution in South Carolina but that South Carolina has not actually carried out executions since 2011, due in part to the reluctance of drug manufacturers and suppliers to provide drugs for executions in a manner that might publicly reveal their identities. [Doc. 1 ¶¶ 7–8.] In 2023, the Legislature enacted legislation amending an existing statute to provide protection from disclosure to drug suppliers and all other persons or entities associated with the "planning or administration" of an execution. [*Id.* ¶ 12]; 2023 S.C. Laws Act 16. As amended, the statute (the "Shield Statute") exempts the purchase of lethal injection drugs from South Carolina's procurement rules, Department of Health and Environmental Control regulations, and pharmacy guidelines. [Doc. 1 ¶ 12]; S.C. Code § 24-3-580(D)–(F). With the Shield Statute in place, Defendant Director Bryan P. Stirling was able to acquire—from an unidentified source—the drugs needed to carry out lethal injection executions, and he so informed the state supreme court in September 2023. [Doc. 1 ¶ 14.]

Three of the Plaintiffs herein were among those who recently litigated a lawsuit alleging that the Death Penalty Statute violates the state constitution in several respects. *See Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024) ("*Owens*"). On July 31, 2024, the state supreme court issued a decision in that case holding that the Statute is not impermissibly retroactive; that neither death by electrocution, death by firing squad, nor the provision allowing the condemned to choose his execution method violates the

South Carolina constitutional mandate "nor shall cruel, nor corporal, nor unusual punishment be inflicted"; that the term "available" in the Statute allowing inmates to elect either firing squad or lethal injection as an alternative to electrocution "if available," is not unconstitutionally vague; and that the provision requiring the Director to determine the drug protocol to use to carry out the death sentence by lethal injection does not violate separation of powers. *Id.* Regarding the constitutionality of the provision allowing condemned inmates to choose among the different execution methods, the court emphasized that the provision represented "the General Assembly's sincere effort to make the death penalty less inhumane while enabling the State to carry out its laws." *Id.* at 608. The court also held that the provision requiring the Director to "determine and certify by affidavit . . . whether the methods . . . are available" mandates that if the Director is able to obtain the necessary drugs, he "must explain to those legally entitled to the explanation the basis of his determination that the drugs are of sufficient potency, purity, and stability to carry out their intended purpose," which "requires nothing more than that the Director set forth that process in sufficient detail that a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Id.* at 604–05 (internal quotation marks omitted).

After issuing *Owens*, on August 23, 2024, the state supreme court issued an execution notice directing SCDC to set Owens's execution for September 20, 2024.[2]

[2] On August 30, 2024, the state supreme court issued an order establishing a regular interval of at least 35 days between the issuance of death notices and determined that after the issuance of Owens's death notice, the court would issue notices for inmates with exhausted appeals in the following order: (1) Richard Moore, (2) Marion Bowman, Jr., (3) Brad Sigmon, (4) Mikal Mahdi, (5) Steven Bixby. [Docs. 1 ¶ 20; 1-4.] Plaintiffs

[Docs. 1 ¶ 17; 1-2.] Five days later, Stirling submitted a certification to that court, pursuant to S.C. Code § 24-3-530(B), stating, among other things, that SCDC had obtained pentobarbital for use in a lethal injection; that the pentobarbital is of sufficient potency, purity, and stability to carry out an execution successfully; and that the forensic laboratory of the South Carolina Law Enforcement Division had tested and approved the pentobarbital.[3] [Docs. 1 ¶¶ 18, 19; 1-3.]

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allege that unless the state supreme court finds that circumstances justify deviating from the 35-day interval, Plaintiffs' executions will be scheduled as follows: Owens, September 20, 2024; Moore, October 25, 2024; Bowman, November 29, 2024; Sigmon, January 3, 2025; Mahdi, February 7, 2025; and Bixby, March 14, 2025. [*Id.* ¶ 21.]

[3] In his affidavit, Stirling stated, in relevant part, as follows:

> I am certifying that lethal injection is available via a single dose of pentobarbital. I have confirmed that the pentobarbital in [SCDC's] possession is of sufficient potency, purity, and stability to carry out an execution successfully using [SCDC's] lethal injection protocol. [SCDC] provided pentobarbital to the S.C. Law Enforcement Division ("SLED") for testing by its Forensic Services Laboratory. SLED confirmed that its Forensic Services Laboratory is an internationally accredited forensic laboratory and that it used widely accepted testing protocols and methodologies in this matter. SLED reported to me that experienced, qualified, and duly authorized personnel tested two vials and confirmed the concentration of the solution provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter, and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible [SCDC] staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by other States and the federal government, the dosage called for by [SCDC's] lethal injection protocol is sufficiently potent such that administration in accordance with the protocol will result in death.

[Doc. 1-3 ¶ 10.]

Owens subsequently filed an objection in the state supreme court to Stirling's certification, asserting that his affidavit was insufficient and requesting additional information about the testing and properties of the execution drugs SCDC had obtained (the "Additional Information").[4] [Doc. 1-5; *see* Doc. 1 ¶¶ 22, 24, 26.] To his objection, Owens attached an affidavit from Dr. Michaela Almgren, Pharm.D. M.S., explaining why Owens needed the Additional Information to make an informed decision as to which execution method would pose the least risk of harm. [Docs. 1 ¶ 24; 1-5; 1-6.] On September 5, the state supreme court overruled Owens's objection and denied his request, ruling that Stirling had provided all the information that the Death Penalty Statute required. [Docs. 1 ¶ 22; 1-7.] On September 6, 14 days before his execution date, Owens made his election regarding the method of execution, choosing death by lethal injection. [Doc. 1-8]; *see* S.C. Code § 24-3-530(A) (providing that the election "must be made in writing fourteen days before each execution date or it is waived").

On September 13, 2024, Plaintiffs brought the present action under 42 U.S.C. § 1983. [Doc. 1.] Plaintiffs allege that the Shield Statute, on its face, does not restrict access to the Additional Information. [*Id*. ¶ 25.] Plaintiffs also allege that the need for sufficient information about the integrity of the lethal injection drugs is heightened

[4] Specifically, Owens argued that the affidavit did not provide information about the date the drugs were tested; their Beyond Use Date or expiration date; the methods and procedures used to test the drugs, including documentation of test method validation and details of quality control procedures and methodology; the actual results of the testing; and where the drugs were to be stored prior to their use and how the storage considerations would be monitored, including temperature and humidity controls. [Docs. 1-5; 1-6.] Accordingly, Owens requested "the actual report and results from the testing of the lethal injection drugs intended for use in [Owens's] execution (with the identity of the analyst redacted) and documentation of the drugs' beyond use date and storage conditions." [Doc. 1-5.]

because of the circumstances under which they were obtained, namely, that Stirling admitted to making over 1,300 contacts before he was successful in obtaining pentobarbital. [*Id.* ¶ 27.] Plaintiffs contend that the difficulty Defendants faced in acquiring the drugs from standard sources raises legitimate questions about the quality of the materials they eventually obtained. [*Id.*] Additionally, they maintain that the need for information concerning the drugs is greater due to the absolute restrictions the Shield Statute places on disclosure of information relating to the source of the drugs and the circumstances surrounding their creation, and due to the exemptions from licensing and regulatory requirements that the Shield Statute grants to those involved in manufacturing and procuring the drugs. [*Id.* ¶ 28.] Plaintiffs complain that they are also unable to obtain information regarding the "professional qualifications" of the people who will set up, prepare, and administer the lethal injection process. [*Id.* ¶ 30 (internal quotation marks omitted).] Consequently, Plaintiffs claim they "cannot make an informed choice about their method of execution in the absence of information about whether the lethal injection team is appropriately trained and qualified." [*Id.* ¶ 31.]

Plaintiffs further contend the Shield Statute requires SCDC to "comply with federal regulations regarding the importation of any execution drugs," yet the Shield Statute prevents Plaintiffs, or any member of the public, or even South Carolina officials outside of SCDC, from knowing whether federal compliance is taking place. [*Id.* ¶ 32 (internal quotation marks omitted).] Thus, Plaintiffs contend the Shield Statute creates a federal compliance requirement but arbitrarily prohibits any mechanism for ensuring that compliance is happening. [*Id.*]

Plaintiffs' Claims and Remedies Sought

Plaintiffs' Complaint asserts four claims. Plaintiffs first allege that South Carolina's death penalty laws, as applied to them, deprived them of their rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution (the "First Claim"). [*Id.* ¶¶ 33–43.] Plaintiffs allege that South Carolina's refusal to provide them with the Additional Information deprives them, without due process, of their "state-created rights to information and to choose their method of execution." [*Id.* ¶¶ 38–39.] They also allege a constitutional liberty interest in being free from cruel and unusual punishment that causes needless suffering and claim that without the Additional Information, they cannot determine whether there is a basis for challenging the constitutionality of the lethal injection option, nor could they meaningfully litigate any such claim. [*Id.* ¶ 37.]

Plaintiffs' second claim is a facial procedural due process claim, asserted under both the federal and state Constitutions regarding the Shield Statute. [*Id.* ¶¶ 44–58.] Plaintiffs allege that the Shield Statute deprives condemned inmates of their state-created right to certain information about execution drugs and to choose a method of execution that is less inhumane than other options. [*Id.*] Plaintiffs' third and fourth claims allege that depriving them of the Additional Information violates their right to access the courts by depriving them of information necessary to litigate an Eighth Amendment claim and infringes on their right to assistance of counsel as well. [*Id.* ¶¶ 59–73.]

Plaintiffs ask this Court to grant a preliminary and ultimately permanent injunction prohibiting Defendants from carrying out Plaintiffs' executions without providing the

Additional Information at least 23 days before the dates of their scheduled executions; a preliminary and permanent injunction prohibiting Plaintiffs' executions until Defendants have complied with applicable licensing and regulatory requirements; a declaration, pursuant to 28 U.S.C. § 2201, that Plaintiffs' constitutional and statutory rights have been violated; and any other relief the Court deems just and proper. [*Id*. ¶ 74.]

Owens's Motion

In Owens's Motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, Owens asks the Court to preliminarily enjoin his execution so that he is not executed before Plaintiffs' constitutional claims can be adjudicated. [Doc. 5 at 1.] He contends that, without the Additional Information, it is impossible for Plaintiffs "to meaningfully exercise their state-conferred right to choose the method of execution they consider least inhumane, or to plausibly assess whether South Carolina's procedures for imposing death by lethal injection will pose an unconstitutional risk of cruel and unusual punishment." [*Id*.] Owens argues that he satisfies the criteria for issuance of a preliminary injunction because of "his clear right under state law to reasonable information; his tailored request for information, much of which is not even barred from disclosure by [the Shield Statute]; and because the information he seeks poses no threat to South Carolina's ability to impose death sentences." [*Id*. at 5.]

At a minimum, Owens contends the Court should temporarily stay his execution, scheduled for September 20, 2024, to permit full briefing and consideration of this motion for a preliminary injunction. [*Id*. at 17.] He also contends that following briefing and any argument or hearing that the Court requires, the Court should enter a

preliminary injunction staying Owens's execution until this suit has been fully adjudicated.[5] [*Id.*]

APPLICABLE LAW

Section 1983

Section 42 U.S.C. § 1983 provides a private cause of action for constitutional violations by persons acting under color of state law. Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). Accordingly, a civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999). The Supreme Court has held that prisoners can bring method-of-execution claims under § 1983. *See Nance v. Ward*, 597 U.S. 159, 168–75 (2022).

Injunctive Relief

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* "It is not enough

[5] South Carolina Governor Henry McMaster filed a motion on September 14 to intervene in this case, and this Court granted the motion. [Docs. 6; 17.] Governor McMaster and Defendants filed a memorandum on September 16 opposing Owens's Motion. [Doc. 10.] Owens filed a reply. [Doc. 13.] The Court has considered the arguments outlined in those filings.

merely to file [a § 1983 action]." *Johnson v. Lombardi*, 809 F.3d 388, 390 (8th Cir. 2015); *see Hill*, 547 U.S. at 583–84.

"The substantive standard for granting either a temporary restraining order or a preliminary injunction is the same." *Collins v. Durant*, No. 2:23-05273-RMG, 2024 WL 4143347, at *1 (D.S.C. Sept. 11, 2024) (internal quotation marks omitted). The current standard for granting preliminary injunctive relief is set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under *Winter*, to obtain a preliminary injunction, the moving party must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. at 20; *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). The party seeking a preliminary injunction bears the burden of establishing each of the four requirements. *The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010), *reinstated in relevant part*, 607 F.3d 355 (4th Cir. 2010) (per curiam).

DISCUSSION

In Owens's Motion, Owens argues only that he is likely to succeed on the portion of his First Claim that alleges that South Carolina law creates a liberty interest in his being able to make an informed decision about which execution method is the least inhumane and about whether the three execution methods are constitutional, and that South Carolina's failure to provide the information necessary to make that decision

violates his due process rights under the Fourteenth Amendment.[6] [Doc. 5 at 5–15; *see* Doc. 1 ¶¶ 33–43.] The Court disagrees.[7]

Under the Due Process Clause of the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "To state a procedural due process violation [under the Fourteenth Amendment], a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (internal citation omitted).

In Owens's Motion, Owens does not argue that he is likely to succeed in proving that any liberty interest in having the Additional Information arises from the Constitution

[6] Owens also argues that he will suffer irreparable harm without a preliminary injunction, that the threatened injury to him outweighs any minimal harm injunctive relief might cause Defendants, and that an injunction is in the public interest. [Doc. 5 at 15–17.] Because the Court concludes that Owens has shown no likelihood of success on the merits, the Court does not address the other *Winter* requirements.

[7] The Court notes that Owens's claims are not mooted by the fact that he has already elected the method by which he will be executed. Owens was required by Statute to make his election by September 6, 2024—14 days prior to the date set for his execution. *See* S.C. Code § 24-3-530(A), (C). Were he successful in obtaining the requested injunctive relief, he would become entitled to receive the Additional Information and use it to make a different election. [Doc. 1 ¶ 74]; *see* S.C. Code § 24-3-530(A) (providing that "[i]f the convicted person receives a stay of execution . . ., then the election expires and must be renewed in writing fourteen days before a new execution date").

itself or by reason of guarantees implicit in the word "liberty."[8] Rather, Owens argues that the Death Penalty Statute and the state supreme court's interpretation of it create the relevant liberty interest by requiring the Director to share certain information regarding drugs that have been obtained for use in the lethal injection process and by allowing condemned inmates to elect one of three execution methods. [Doc. 5 at 6–7.] The Court is not persuaded that South Carolina has created a liberty interest as broad as Owens claims.

To establish the existence of a state-created liberty interest, a prison inmate must show, first, that a state statute, regulation, or policy "creates an objective expectation in

[8] Although Owens does not argue in his motion that the Constitution itself provides him a right to receive the Additional Information that is separate and apart from any liberty interest that South Carolina has created, the Court nonetheless notes that "[t]he United States Court of Appeals for the Fourth Circuit has never decided whether a death row inmate has a right to discover information pertaining to his execution[,] . . . [b]ut every other circuit to address a prisoner's procedural due process challenge to a secrecy statute has squarely rejected it." *Gray v. McAuliffe*, No. 3:16CV989-HEH, 2017 WL 102970, at *19 (E.D. Va. 2017). Specifically, the Eleventh Circuit has held that a prisoner has no procedural due process right "to know where, how, and by whom the lethal injection drugs will be manufactured, as well as the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters." *Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1292–93 (11th Cir. 2016) (internal quotation marks omitted). The Fifth, Sixth, and Eighth Circuits have reached similar conclusions. *See Phillips v. DeWine*, 841 F.3d 405, 420 (6th Cir. 2016) ("Plaintiffs argue that HB 663 prevents them from bringing an effective challenge to Ohio's execution procedures. Specifically, they maintain that HB 663 denies [them] an opportunity to discovery and litigate non-frivolous claims. But no constitutional right exists to discover grievances or to litigate effectively once in court." (alteration in original) (internal quotation marks omitted)); *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015) (en banc) (concluding that the Constitution does not require detailed disclosure about a state's execution protocol and that a "prisoner's assertion of necessity—that [the State] must disclose its protocol so he can challenge its conformity with the Eighth Amendment—does not substitute for the identification of a cognizable liberty interest" (internal quotation marks omitted) (citations omitted)); *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir. 2014) ("A due process right to disclosure requires an inmate to show a cognizable liberty interest in obtaining information about execution protocols . . . . However, we have held that an uncertainty as to the method of execution is not a cognizable liberty interest.").

the liberty interest in such a way that an inmate could reasonably expect to enforce [it] against prison officials." *Desper v. Clarke*, 1 F.4th 236, 247 (4th Cir. 2021) (alteration in original) (internal quotation marks omitted). In *Owens*, the state supreme court determined what information the Death Penalty Statute requires the Director to provide regarding the drugs to be used in a lethal-injection execution, *see Owens*, 904 S.E.2d at 604–05, and then the court specifically decided—in overruling Owens's objections—that Stirling has provided Owens all of the information that the Statute requires, including that the affidavit "adequately explains 'how [Stirling] determined the drugs were of sufficient potency, purity, and stability to carry out their intended purpose'" and that it "provides sufficient detail for [Owens] to make an informed election of his method of execution and for [Owens] and his attorneys to 'understand whether there is a basis for challenging the constitutionality of the impending execution.'"[9] [Doc. 1-7 (quoting

[9] To the extent that Owens contends that the state supreme court erred in determining—when it overruled his objection to Stirling's certification—that the Death Penalty Statute does not entitle Owens to the Additional information, that argument is barred by the *Rooker-Feldman* doctrine. "Under the *Rooker-Feldman* doctrine, a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court." *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 316 (4th Cir. 2003) (internal quotation marks omitted). For the *Rooker-Feldman* doctrine to apply, divesting a federal court of jurisdiction, the following four elements must be met: "(1) the federal plaintiff lost in state court; (2) the plaintiff complains of 'injuries caused by state-court judgments;' (3) the state court judgment became final before the proceedings in federal court commenced; and (4) the federal plaintiff 'invit[es] district court review and rejection of those judgments.'" *Willner v. Frey*, 243 F. App'x 744, 746 (4th Cir. 2007) (citations omitted) (alteration in original). Here, all four elements would be met as to the argument that the state supreme court erred. First, the court rejected Owens's objection to Stirling's certification and request for the Additional Information. Second, he complains of injuries from that ruling insofar as he claims he has been denied access to the Additional Information. Third, the state court judgment became final before the present case was filed. And fourth, an argument that the state supreme court erred would be inviting district court review and rejection of the state supreme court's decision. *See Wade v. Monroe Cnty. Dist. Att'y*, 800 F. App'x 114, 117–19 (3d Cir. 2020) (holding that *Rooker-Feldman* barred a prisoner's claim that

Owens, 904 S.E.2d at 604–05) (internal quotation marks omitted).] And Owens has been permitted to select his method of execution. [Doc. 1-8.] Accordingly, to the extent that South Carolina creates interests in the form of a right to receive particular information and to select an execution method, the State has not deprived Owens of those interests. *See Woods v. Dunn*, No. 2:20-cv-58-ECM, 2020 WL 1015763, at *12 (M.D. Ala. Mar. 2, 2020) (holding that Alabama's death penalty laws, which allow condemned prisoners to choose between death by lethal injection, electrocution, or nitrogen hypoxia, did not confer upon the prisoners the right to know, when making their election, that the Alabama Department of Corrections had not yet developed a protocol for performing nitrogen hypoxia executions; explaining that the only interest that Alabama's death penalty laws conferred was the opportunity to choose the execution method), *stay of execution denied*, 951 F.3d 1288 (11th Cir. 2020).

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state courts had wrongly ruled that a state statute did not entitle him to post-conviction DNA testing); *Durham v. Haslam*, 528 F. App'x 559, 564 (6th Cir. 2013) ("Where the plaintiff alleges that a state court interpreted and applied a state statute to her in an unconstitutional manner, her complaint is an as-applied constitutional challenge and is prohibited under the *Rooker-Feldman* doctrine."); *Cooper v. Ramos*, 704 F.3d 772, 780–81 (9th Cir. 2012) (holding that the *Rooker-Feldman* doctrine barred the plaintiff's constitutional challenge requesting additional DNA testing pursuant to a state statute because it was at least in part a forbidden de facto appeal of a state court judgment).

Owens argues that the *Rooker-Feldman* doctrine does not apply here because he is not in fact challenging the state supreme court's decision, but rather, is "complaining of Defendants' refusal to provide information that they believe to be prohibited from disclosure by the [Shield Law]." [Doc. 13 at 7.] The Court disagrees [*see* Doc. 1 ¶ 39 ("Defendants' *and the state supreme court's* refusal to provide the material requested implicates Plaintiffs' state-created rights to information and to choose their method of execution.")]; however, even assuming Owens is not challenging the state supreme court's decision, his argument fails to come to terms with the fact that his Due Process claim depends upon the state having created a liberty interest that he was allegedly deprived of. Regardless of the scope of the Shield Statute, if South Carolina has not created a liberty interest in his entitlement to the Additional Information, his Due Process claim based on the existence of such an interest cannot succeed.

It appears to the Court that, in an attempt to avoid this conclusion, Owens frames the alleged state-conferred rights as the "right to choose the least inhumane method of execution available" and the right to "understand whether there is a basis for challenging the constitutionality of the impending execution." [Doc. 5 at 6–7 (internal quotation marks omitted).] But, in the Court's view, Owens overstates the rights the Statute gives him. The Statute gives him the right to choose his method of execution—period, not the right to discover what is, objectively,[10] the best choice, nor the right to discover whether the execution methods are constitutional. *See Woods*, 2020 WL 1015763, at *12.

Because Owens has been given all of the information that the Death Penalty Statute entitled him to and he was allowed to make the choice that the Statute entitled him to make, he cannot show any deprivation of a State-created interest. Inasmuch as Owens has not demonstrated any likelihood of success, he is not entitled to the injunctive relief that he seeks.

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[10] In adjudicating the state constitutionality of South Carolina's election provision, the *Owens* court noted that one benefit of being allowed to choose is that the inmate "may elect to have the State employ the method *he and his lawyers believe* will cause him the least pain." 904 S.E.2d at 608 (emphasis added). The court noted that this ability to choose assures that "a condemned inmate in South Carolina will never be subjected to execution by a method *he contends* is more inhumane than another method." *Id.* (emphasis added). In this case, Owens was allowed to do both of those things. He was allowed to choose the execution method that he and his lawyers believe is best for him, using whatever criteria he preferred, based on what was available to him.

The Court notes that Owens also argues that his pharmacy expert's affidavit supports the proposition that the Additional Information could be of critical importance to him in deciding which execution method would be expected to be the least painful and that providing the information would not significantly impair any State interest. [Doc. 5 at 8–14.] Even assuming Owens is correct, those factors do not somehow create a *liberty interest* in Owens in receiving the information.

CONCLUSION

Wherefore, based upon the foregoing, Plaintiff Owens's motion for a temporary restraining order [Doc. 5] is DENIED.[11]

IT IS SO ORDERED.

s/ Jacquelyn D. Austin
United States District Judge

September 18, 2024
Columbia, South Carolina

[11] In Owens's Motion, Owens requests that the Court establish expedited briefing and hearing schedules to address the matters in that motion and in the Complaint. Because the Court concludes that Owens has not made a showing that he is likely to succeed on the merits of his claims, the Court requires no further briefing regarding Owens's Motion.

FILED: September 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-3
(3:24-cv-05072-JDA)

FREDDIE EUGENE OWENS

Plaintiff - Appellant

and

STEVEN V. BIXBY; MARION BOWMAN, JR.; MIKAL D. MAHDI; RICHARD BERNARD MOORE; BRAD KEITH SIGMON

Plaintiffs

v.

BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Defendants - Appellees

and

GOVERNOR HENRY DARGAN MCMASTER

Intervenor/Defendant - Appellee

O R D E R

Upon review of submissions relative to Appellant Owens's emergency motion for an administrative injunction and injunction pending appeal, the court denies the motion.

Entered at the direction of Chief Judge Diaz with the concurrence of Judge Wilkinson and Senior Judge Keenan.

For the Court

/s/ Nwamaka Anowi, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

STEVEN V. BIXBY, MARION BOWMAN, JR., MIKAL D. MAHDI, RICHARD BERNARD MOORE, FREDDIE EUGENE OWENS,[1] BRAD KEITH SIGMON Plaintiffs, v. BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, Defendants.	)	COMPLAINT No. 3:24-cv-5072-JDA

Plaintiffs, through counsel, bring this action to ensure that their executions by the State of South Carolina are not carried out behind a veil of secrecy that violates their constitutional rights and operates in the absence of reasonable regulatory oversight. Plaintiffs also seek sufficient information to be able to choose an execution procedure that poses the least risk of torture, a right conferred by the state legislature. South Carolina has created an unconstitutional situation by granting Plaintiffs a statutory and due process right to basic facts about the lethal injection drug's creation, quality, and reliability, but denying Plaintiffs, through a secrecy statute, access to the very facts they are entitled to know when choosing their method of execution.

[1] In 2015, by order of the Dorchester County Family Court, Mr. Owens's legal name was changed to Khalil Divine Black Sun Allah. However, because all of his prior proceedings before the South Carolina state courts and federal courts have been filed under the name Freddie Owens, this complaint uses the name Owens for clarity.

This lawsuit's purpose is not to permanently halt executions. Plaintiffs' aim is only to require State officials to carry out executions with the transparency and access to information about critically-important government functions that the Constitution requires.

NATURE OF THE ACTION

1. This action is brought under 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202, for violations and threatened violations of Plaintiffs' state and federal constitutional rights to procedural due process, access to the courts, and their statutory right to the assistance of counsel, as outlined in the claims below.

JURISDICTION AND VENUE

2. Jurisdiction is conferred by 28 U.S.C. § 1331 in that this is a civil action arising under the Constitution and laws of the United States, by 28 U.S.C. §§ 2201 and 2202, and by 42 U.S.C. §§ 1983 and 1988, in that this is an action for declaratory judgment and equitable relief to redress deprivations of constitutional rights caused by Defendants under color of state law.

3. Venue is proper under 28 U.S.C. § 1391(b) in that all Defendants reside in the District of South Carolina, and all events giving rise to this action occurred in this federal district.

PARTIES

4. Plaintiffs are citizens of the United States, currently incarcerated under state-imposed sentences of death at Broad River Correctional Institution in Columbia, South Carolina. Plaintiffs are under the control and supervision of the S.C. Department of Corrections, or SCDC.

5. Defendant SCDC is a division of the State of South Carolina, which is charged with overseeing individuals incarcerated by South Carolina, and charged with providing

equipment for and carrying out executions. S.C. Code § 24-3-520, § 24-3-540. SCDC's headquarters are in Columbia, South Carolina.

6. Defendant Bryan Stirling is the Director of SCDC. He is charged under state law with overseeing and carrying out executions in South Carolina. S.C. Code § 24-3-510. He is a citizen and resident of South Carolina. Director Stirling is being sued in his official capacity.

FACTUAL BACKGROUND

7. From 1995 until 2021, lethal injection was the primary means of execution in South Carolina, and during that time, 36 men elected to die by lethal injection. Only three men opted for electrocution.

8. The State of South Carolina has not carried out executions since 2011. According to State officials, this period without executions was due, in part, to the reluctance of drug manufacturers and suppliers to provide drugs for executions in a manner that might publicly reveal their identities.

9. In an initial attempt to address this situation, in 2021, the South Carolina Legislature amended S.C. Code § 24-3-530, making electrocution the default method of execution, but permitting the person sentenced to death to also choose "firing squad or lethal injection, if it is available at the time of election."

10. Plaintiffs Owens, Sigmon, and Moore filed suit in state court, challenging electrocution, firing squad, and the amendments to S.C. Code § 24-3-530 as unconstitutional under the state constitution. Plaintiffs filed discovery requests seeking information on steps that SCDC had taken to procure lethal injection drugs, and Defendants sought a protective order allowing them to withhold that information, which the circuit court granted.

11. Following a trial and state circuit court ruling that the methods of execution and related statutes violated the South Carolina Constitution, the Defendants appealed. In January 2023, the South Carolina Supreme Court remanded the case, finding that the trial court abused its discretion by denying discovery. *Owens v. Stirling*, 438 S.C. 352, 360 (2023) ("We find the Inmates' requests for information regarding lethal injection are relevant and necessary for the proper adjudication in this matter."). The lower court was instructed to oversee the completion of discovery, and the remainder of the appeal was held in abeyance.

12. No additional discovery took place. Instead, Defendants requested an emergency stay of the proceedings while the Legislature considered, and ultimately passed, amendments to S.C. Code § 24-3-580. Prior to its amendment, this statute prohibited disclosure of "the identity of a current or former member of an execution team" absent a "court order under seal for the proper adjudication of pending litigation." S.C. Code § 24-3-580 (Supp. 2022). The new and expanded version of the secrecy law extended this protection to drug suppliers and all other persons or entities associated with the "planning or administration" of an execution. It eliminated the "court order" provision and exempted the purchase of lethal injection drugs from South Carolina's procurement rules, Department of Health and Environmental Control regulations, and pharmacy guidelines. The statute now provides that lethal injection drugs need not be provided by a licensed pharmacist, nor is a prescription from a qualified physician required for anyone to "supply, manufacture, or compound any drug intended for use in the administration of the death penalty."

13. As amended, S.C. Code § 24-3-580 now provides, in full:

> SECTION 24-3-580. Nondisclosure of identity of members of an execution team and the acquisition of drugs to administer a death sentence.
>
> (A) As used in this section, the term:

(1) “Execution team” shall be construed broadly to include any person or entity that participates in the planning or administration of the execution of a death sentence, **including any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence.**

(2) “Identifying information” shall be construed broadly to include any record or information that reveals a name, date of birth, social security number, personal identifying information, personal or business contact information, or **professional qualifications**. The term "identifying information" also includes any residential or business address; any residential, personal, or business telephone number; any residential, personal, or business facsimile number; any residential, personal, or business email address; and any residential, personal, or business social media account or username.

(3) “De-identified condition” means data, records, or information from which identifying information is omitted or has been removed.

(B) Notwithstanding any other provision of law, any identifying information of a person or entity that participates in the planning or administration of the execution of a death sentence shall be confidential. For all members of the execution team, identifying information **shall not be subject to discovery, subpoena, or any other means of legal compulsion or process for disclosure to any person or entity in any administrative, civil, or criminal proceeding in the courts, administrative agencies, boards, commissions, legislative bodies, or quasilegislative bodies of this State, or in any other similar body that exercises any part of the sovereignty of the State.**

(C) A person shall not knowingly disclose the identifying information of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team. Any person and his immediate family, or entity whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a wilful violation of this section, punitive damages. **A person who violates the provisions of this subsection also must be imprisoned not more than three years.**

(D) **Any purchase or acquisition of drugs, medical supplies, and medical equipment necessary to execute a death sentence shall be exempt from the entirety of the South Carolina Procurement Code and all of its attendant regulations.**

(E) The out-of-state acquisition of any drug intended for use by the department in the administration of the death penalty **shall be exempt from all licensing processes and requirements administered by the Department of Health and Environmental Control or by any other department or agency of the State of South Carolina.** Furthermore, the out-of-state acquisition of any drug intended for use by the department in the administration of the death penalty **shall be exempt from all regulations promulgated by the Board of Pharmacy.**

(F) Any pharmacy or pharmacist, whether located within or without the State, that is involved in the supplying, manufacturing, or compounding of any drug intended for use by the department in the administration of the death penalty **shall be exempt from all licensing, dispensing, and possession laws, processes, regulations, and requirements of or administered by the Department of Labor, Licensing and Regulation, the Board of Pharmacy, or any other state agency or entity, found anywhere in the South Carolina Code of Laws or South Carolina Code of Regulations,** only to the extent that the licensing, dispensing, and possession laws, processes, regulations, and requirements pertain to the drugs intended for use in the administration of the death penalty, and no prescription from any physician shall be required for any pharmacy or pharmacist to supply, manufacture, or compound any drug intended for use in the administration of the death penalty. This exemption shall not apply to any licensure or permitting requirements for the supply, manufacture, or compounding of any other legend drug or pharmaceutical device.

(G) Notwithstanding any other provision of law, including the South Carolina Freedom of Information Act, Section 30-4-10, et seq., no department or agency of this State, no political subdivision, and no other government or quasigovernment entity shall disclose the identifying information of any member of an execution team or any details regarding the procurement and administrative processes referenced in subsections (D) through (F).

(H) The Office of the Comptroller General and the Office of the State Treasurer shall work with the South Carolina Department of Corrections to develop a means to ensure that the state's accounting and financial records related to any transaction for the purchase, delivery, invoicing, etc. of or for supplies, compounds, drugs, medical supplies, or medical equipment utilized in the execution of a death sentence are kept in a de-identified condition.

(I) **This section shall be broadly construed by the courts of this State so as to give effect to the General Assembly's intent to ensure the absolute confidentiality of the identifying information of any person or entity directly or indirectly involved in the planning or execution of a death sentence within this State.**

(J) The Department of Corrections shall comply with federal regulations regarding the importation of any execution drugs.

> (K) A member of the General Assembly, a member's immediate family, or any business with which a member or the member's immediate family member has a controlling interest as an owner, director, officer or majority shareholder that has voting rights regarding the business' financial decisions must not offer nor provide drugs, medical supplies, or medical equipment necessary to execute a death sentence.

(emphasis added to pertinent portions of the statute).

14. Armed with this new secrecy law, in September 2023, Director Stirling informed the state supreme court that the Department of Corrections was able to acquire the drugs needed to carry out lethal injection executions from an unidentified source. Exhibit 1.

15. In July 2024, the South Carolina Supreme Court issued *Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024), rejecting state constitutional challenges to the methods of execution. The South Carolina Supreme Court reversed the circuit court's merits determination, holding instead that the methods of execution and their enabling statutes did not violate the state constitution. No issue of federal law was raised in *Owens*.

16. The *Owens* decision also addressed Plaintiffs' statutory and due process rights to choose their method of execution under § 24-3-530. Per the South Carolina Supreme Court, the statutory choice provision guarantees that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Id.* at 608. The state supreme court explained that the Corrections director, as part of the duty to certify the available methods of execution, "must explain to the condemned inmate . . . the results of his efforts" to obtain execution drugs. The director must also explain "the basis of his determination that the drugs are of sufficient potency, purity, and stability to carry out their intended purpose." *Id.* at 604. The court clarified that the director must provide

"sufficient detail that a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution." *Id.* at 605.

17. After *Owens* was issued, on August 23, 2024, the Clerk of the South Carolina Supreme Court issued an execution notice to Director Stirling to carry out the execution of Plaintiff Owens. Exhibit 2. Owens' execution is currently scheduled for September 20, 2024.

18. On August 28, 2024, Director Stirling, pursuant to his statutory duty, served an affidavit on counsel for Plaintiff Owens certifying that all three approved methods of execution are available, and further certifying that lethal injection is available with a single dose of pentobarbital that has been tested by the forensic laboratory of the S.C. Law Enforcement Division, or SLED. Exhibit 3.

19. In his affidavit, Director Stirling stated that the SLED forensic lab is accredited, used accepted protocols when testing the pentobarbital, and that qualified personnel conducted the tests. Stirling also stated that it was reported to him by SLED that the pentobarbital's concentration, purity, and stability was confirmed. The affidavit, however, does not provide any additional details about SLED's testing, the tests conducted or their results, or about the specific pentobarbital intended for use during Plaintiff Owens' execution.

20. On August 30, 2024, the state supreme court issued an order establishing a regular interval of at least thirty-five days between the issuance of death notices, and determined that after the issuance of Plaintiff Owens' death notice, the court would issue notices for inmates with exhausted appeals in the following order: (1) Richard Moore, (2) Marion Bowman, Jr., (3) Brad Sigmon, (4) Mikal Mahdi, (5) Steven Bixby. Exhibit 4. These five individuals, along with Mr. Owens, are the Plaintiffs in this suit.

21. Unless the state supreme court finds that circumstances warrant deviating from the thirty-five day interval, Plaintiffs' executions will be scheduled as follows: Freddie Eugene Owens, September 20, 2024; Richard Bernard Moore, October 25, 2024; Marion Bowman, Jr., November 29, 2024; Brad Keith Sigmon, January 3, 2025; Mikal Deen Mahdi, February 7, 2025; and Steven Vernon Bixby, March 14, 2025.

22. On September 5, 2024, the South Carolina Supreme Court overruled objections, filed by Plaintiff Owens, to Director Stirling's certification and limited description of the SLED testing performed on the lethal injection drugs, and declined to require Stirling to provide any further information to Owens. Exhibit 5 (Owens's objection); Exhibit 6 (affidavit supporting objection, from pharmacy expert Dr. Michaela Almgren); Exhibit 7 (order denying objections to certification).

23. On September 6, 2024, with his attempt to obtain additional information having been rejected by the state supreme court, Plaintiff Owens submitted the statutorily-required notice of election, selecting lethal injection as his method of execution. Exhibit 8.

24. Dr. Michaela Almgren, Pharm.D., MS, is a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcome Sciences at the University of South Carolina College of Pharmacy. Dr. Almgren submitted an affidavit in support of Mr. Owens's objection to Director Stirling's certification. She opined that the limited information about the lethal injection drugs that was offered by Stirling, and approved by the state supreme court, omits critical information for Plaintiffs to be able to make an informed choice about which method of execution poses the least risk of harm:

a. The date on which the drugs were tested.

b. The Beyond Use Date, after which compounded drugs should not be used.

c. If the drugs were commercially manufactured, the expiration date.

d. The methods and procedures used to test the pentobarbital, including documentation of test method validation and details of quality control procedures and methodology.

e. The actual results obtained from the testing.

f. Where the drugs will be stored prior to their use, and how the storage conditions will be monitored, including temperature and humidity controls.

25. The secrecy statute, S.C. Code § 24-3-580, on its face, does not restrict access to any of this information.

26. Dr. Almgren explains in her affidavit that if the pentobarbital used during an execution is expired; past its Beyond Use Date; improperly tested in a way that fails to detect problems with the drug's potency, purity, or stability; or improperly stored in a way that degrades the drug's properties; then serious risks are posed to the person undergoing the execution process. Those risks include intense pain upon injection, regaining consciousness during the execution, or sustaining organ or brain damage from oxygen deficits suffered during an attempted execution.

27. The need for sufficient information about the integrity of the lethal injection drugs is heightened because of the circumstances under which they were obtained. During the prior state court litigation in *Owens*, Defendants admitted they had to make over 1,300 contacts before obtaining pentobarbital. Exhibit 1 (Affidavit of Defendant Stirling). The difficulty Defendants faced in obtaining the drugs from standard sources raises legitimate questions about the quality of the materials they ultimately were able to acquire.

28. Likewise, the need for information about the drugs is heightened because of the absolute restrictions the secrecy statute places on disclosure of information relating to the drugs'

source and the circumstances surrounding its creation, *see* § 24-3-580(A)(1), and the exemptions from licensing and regulatory requirements that the secrecy statute grants to those involved in the manufacture and procurement of the drugs, *see* § 24-3-580(D) through (H). If these provisions withstand constitutional challenge, it will become even more essential that Defendants provide adequate information about testing and storage procedures to ensure the drugs are what Defendants claim they are, and also to ensure they will not degrade prior to their use in an execution.

29. It has also been over a decade since South Carolina corrections officials have performed an execution. This lack of experience creates a higher risk of error and correspondingly greater need for information to demonstrate that the execution planning process is occurring with appropriate safeguards.

30. In addition to withholding information about the lethal injection drugs, Plaintiffs are unable to access information about the "professional qualifications" of members of the execution team who will set up, prepare, and administer the lethal injection process. Disclosure of this information is expressly prohibited by the secrecy statute. *See* S.C. Code. § 24-3-580(A)(2).

31. Plaintiffs cannot make an informed choice about their method of execution in the absence of information about whether the lethal injection team is appropriately trained and qualified. According to reports maintained by the Death Penalty Information Center, over the past decade, there have been 18 botched executions, five of which failed completely. A substantial portion of these botched executions involved protracted difficulty in setting up IV lines. In one case a prisoner even had to assist the execution team in bringing about his own

death by suggesting a good spot to start an IV line.[2] Without question, in order to meaningfully exercise their state-granted right to choose between execution procedures, Plaintiffs need to know the training and qualifications of the execution team so they can assess the risk of serious and painful IV-related errors. Yet the secrecy statute bars Plaintiffs from finding out whether the execution team members who are setting up their IV access are properly trained and qualified.

32. Finally, in § 24-3-580(J), the secrecy statute requires the Department of Corrections to "comply with federal regulations regarding the importation of any execution drugs." Yet the secrecy statute prevents Plaintiffs, or any member of the public, or even South Carolina officials outside SCDC, from knowing whether federal compliance is taking place. Subsection (A)(1) of the statute defines "Execution team" to include any person or entity who "imports" the drugs. Subsection (C) prohibits the disclosure of "a record that would identify a person as being a current or former member of an execution team," which, as noted, includes those importing the drugs. And under subsection (G), "no department or agency" of South Carolina "shall disclose . . . any details regarding the procurement and administrative processes" relating to the execution drugs. Thus, the secrecy statute creates a federal compliance requirement, but arbitrarily prohibits any mechanism for ensuring that compliance is actually happening.

[2] *See* https://deathpenaltyinfo.org/executions/botched-executions.

CLAIMS FOR RELIEF

CLAIM ONE
Deprivation of Procedural Due Process
As-Applied Challenge to Refusal to Provide Necessary Information

33. Plaintiffs incorporate by reference all statements and allegations in this complaint.

34. Plaintiffs are entitled to due process of law under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 3 of the S.C. Constitution.

35. The procedural protections that due process provides may be invoked when there is "[a] liberty interest [that] arise[s] from the Constitution itself . . . or it may arise from an expectation or interest created by state law or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Both types of interests are present here.

36. As alleged above, Plaintiffs requested certain information about the potency, purity, and stability of the drugs that may be used for their executions. Defendants refused to provide that information, and the South Carolina Supreme Court overruled Plaintiffs' objections to Director Stirling's sparse description of the testing conducted on the execution drugs.

37. Defendants' and the state supreme court's refusal to provide the requested material implicates Plaintiffs' constitutional liberty interest in being free from cruel and unusual punishment that causes needless suffering. Without adequate information, Plaintiffs have no way of determining whether there is a basis for challenging the constitutionality of lethal injection, nor are they able to meaningfully litigate any such claim. Plaintiffs must be provided with the information Dr. Almgren has identified in order to know whether Defendants' lethal injection procedures meet Eighth Amendment standards. As Dr. Almgren explains, if the drugs and their storage conditions do not meet certain criteria, there is a risk they will cause Plaintiffs serious pain during their executions.

38. In addition to the constitutional liberty interest, Plaintiffs have a state-created right to information about the methods of execution. *See Owens*, 904 S.E.2d at 605 (holding that S.C. Code § 24-3-530(B) "requires . . . that the Director set forth that process in sufficient detail that a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of the impending execution," and explaining "[t]here is a Due Process Clause component to [this] analysis . . . ."). Similarly, Plaintiffs have a statutory right to choose among the available methods of execution. *Id.* at 608 (explaining that under S.C. Code § 24-3-530, "the condemned inmate may elect to have the State employ the method he and his lawyers believe will cause him the least pain."). The state supreme court guaranteed in *Owens* that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Id.* at 608.

39. Defendants' and the state supreme court's refusal to provide the material requested implicates Plaintiffs' state-created rights to information and to choose their method of execution. In the absence of adequate information, the statutory right to elect a method of execution is functionally meaningless, and in effect, arbitrarily revoked. *See D.A.'s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (explaining that a "state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.") (internal quotations and citations omitted); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (holding that "an arbitrary disregard of the petitioner's [state-created procedural] right to liberty is a denial of due process of law.").

40. Because both constitutional and state-created liberty interests are at stake, Plaintiffs are entitled to procedural due process protections.

41. As a general matter, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotations and citation omitted). When implementing this guarantee, the question becomes: "what process is due prior to the" deprivation of the liberty interest at stake? *Id.* Because due process is not a legal rule with "fixed content," the inquiry "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. The Court must balance three factors: the private interest affected by official actions; the risk of an erroneous deprivation of that interest through the procedures used and the value of additional safeguards; and third, the state interest involved and any burdens that additional procedural safeguards might impose. *Id.* at 334-35.

42. Each of these factors weighs in favor of requiring Defendants to provide the information Plaintiffs seek about the lethal injection drugs. There can be no doubt the private interest—the right not to suffer a torturous death—carries great weight. *See Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."). Likewise, as Plaintiffs have alleged, if the lethal injection drugs do not meet certain specifications, there is a substantial risk their executions by lethal injection could deprive them of the right to be free from cruel and unusual punishment; and without adequate knowledge of lethal injection's risks, Plaintiffs will be deprived of their state-granted right to make an informed choice among the available execution methods. Third and finally, because all that Plaintiffs seek is information about drugs that Defendants have already obtained—and presumably have already taken steps to assure those drugs are adequate to carry out executions

without violating constitutional guarantees—there is virtually no burden imposed on the State in simply asking it to share that information.

43. Accordingly, Defendants' and the state supreme court's refusal to provide the information that Plaintiffs seek about lethal injection drugs is a violation of Plaintiffs' state and federal rights to procedural due process. To the extent Defendants claim their refusal to provide information is required by the secrecy statute, S.C. Code § 24-3-580, Defendants' interpretation of that statute also violates Plaintiffs' procedural due process rights.

CLAIM TWO
Deprivation of Procedural Due Process
Facial Challenge to the Secrecy Statute's Prohibition on Critical Safeguards

44. Plaintiffs incorporate by reference all statements and allegations in this complaint, including the procedural due process framework explained in Claim One.

45. S.C. Code § 24-3-580 imposes an absolute prohibition on the disclosure of critical information that affects whether Plaintiffs' executions will pose a substantial risk of serious pain. The denial of this information also impairs Plaintiffs' ability to make an informed and meaningful choice about their method of execution, a right conferred on Plaintiffs by state law.

46. In addition to a state-created right to certain information about the execution drugs, § 24-3-580(J) establishes Plaintiffs' interest in Defendant SCDC "comply[ing] with federal regulations regarding the importation of any execution drugs." As explained below, the very same statute impairs that interest by preventing Plaintiffs from finding out the information needed to confirm that actual compliance has occurred.

47. Denial of information about the manufacturing or compounding process: The secrecy statute prohibits disclosure of the professional qualifications of any person or entity that compounds or manufactures execution drugs. *See* S.C. Code § 24-3-580(A)(1), (A)(2), and (B).

On information and belief, the qualifications of those involved in producing the execution drugs is relevant to whether there is a risk those drugs will lack the potency, purity, and stability needed to bring about death without inflicting serious pain. In other words, an unqualified or unreliable drug manufacturer is far more likely to produce ineffectual or dangerous pentobarbital. For example, if the drug manufacturing or compounding process is not followed properly, there is a risk the drug will be a heterogeneous mixture with undissolved solids, which in turn would pose a risk of extreme pain and suffering if injected.

48. Denial of information about the execution team's professional qualifications: In subsections (A)(1), (A)(2), and (B), the secrecy statute forbids access to the professional qualifications of members of the execution team. Plaintiffs are particularly concerned with their inability to obtain information about the training and qualifications of those who prepare and administer the execution drugs, as numerous executions around the country were botched when corrections staff engaged in prolonged, painful, and sometimes unsuccessful attempts to establish IV lines for injection.

49. Exemption from regulatory and licensing requirements: The secrecy statute exempts the execution process from a range of regulatory and licensing safeguards. For example, under subsection (D), the purchase or acquisition of drugs or any other supplies is exempt from the South Carolina Procurement Code.[3] Under subsection (E) of the secrecy statute, out-of-state acquisitions of execution drugs are exempt from oversight by the Department of Health and Environmental Control and from the Board of Pharmacy. Under subsection (F), any pharmacist

[3] *See also* S.C. Code § 11-35-20(2)(g) (explaining that an underlying purpose of the Procurement Code is "to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process.").

involved in the creation of the execution drugs is exempt from licensing and regulatory oversight.

50. On information and belief, regulation of the manufacture of pharmaceuticals ensures that a drug is what it purports to be and will function as it is supposed to. These regulations also ensure that facilities producing these drugs are doing so safely and according to the proper pharmaceutical recipes. Not requiring producers to abide by regulations creates risks of insufficient potency, contamination, or being an entirely different substance than indicated on the label. These risks may lead to a failed or torturous execution.

51. Denial of information about compliance with federal regulations regarding importation of execution drugs: In subsection (J), the secrecy statute requires compliance with federal regulation of drug importation, but in subsections (A)(1), (C), and (G), prohibits disclosure of the information necessary to determine whether federal compliance has actually occurred. For example, subsection (G) prohibits disclosure of "details regarding the procurement and administrative processes . . . ."

52. On information and belief, the absence of each of the foregoing four types of safeguards increases the risk that execution drugs will lack the potency, purity, and stability needed to bring about death without inflicting serious pain.

53. Each of the procedural due process factors weighs in favor of requiring Defendants to provide the foregoing information, and to follow licensing and regulatory requirements. The Court should hold that the secrecy statute's provisions to the contrary violate procedural due process.

54. The first and second procedural due process factors weigh heavily in Plaintiffs' favor. By denying critical information and lifting key licensing and regulatory safeguards, the

secrecy statute impairs Plaintiffs' constitutional interest in their right to be free from a substantial risk of serious pain. The denial of information about the manufacturing or compounding process, and about the execution team's qualifications, also limits Plaintiffs' ability to exercise their state-granted right to choose a method of execution that is less inhumane than other options. Without knowing the risk that each method poses, Plaintiffs cannot meaningfully exercise their right to choose the manner of death that poses the least risk of torture or serious pain.

55. The chances these constitutional and statutory interests will be impaired is not theoretical. One study of botched executions showed that lethal injection had the highest risk of error, with about 7% of lethal injections resulting in an error of some kind.[4] Another analysis of more than 200 autopsies of people executed by lethal injection found that 84% had evidence of pulmonary edema, a condition in which the lungs fill with fluid and create a feeling of suffocation or drowning akin to waterboarding.[5] In 2022 alone, there were seven lethal injection procedures across the country where serious errors occurred, or at a minimum, evidence strongly suggested error and the infliction of serious pain.[6]

56. The final procedural due process factor—burdens imposed on the State's interest—supports Plaintiffs' position as well. Of course, the State has a legitimate interest in carrying out sentences that are authorized by law. The State has a corresponding interest in obtaining the equipment and materials needed to carry out those sentences, an interest that the

[4] https://deathpenaltyinfo.org/executions/botched-executions (describing Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (Stanford Univ. Press 2014)).

[5] https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection.

[6] This information is compiled on the Death Penalty Information Center page on botched executions, linked above.

secrecy statute is designed to protect. However, the secrecy statute sweeps far more broadly than is necessary to effectuate those interests. Plaintiffs are not objecting to the confidentiality of the identity of those involved in executions, or those who provide execution drugs. Plaintiffs are not objecting to appropriately redacted documents. Nor would Plaintiffs object to protective orders allowing information to be provided subject to strictly enforced limitations on public disclosure. The information Plaintiffs seek can be provided without disclosing any person or entity's identity.

57. Moreover, the lifting of all licensing and regulatory requirements appears to relate more to the convenience of carrying out executions rather than Defendants' ability to do so. The State's interest in administrative ease and convenience should not be given much weight, particularly when balanced against Plaintiffs' liberty interest in being free from a risk of serious pain and statutory interest in being able to select a less inhumane method of execution.

58. Accordingly, the provisions of S.C. Code § 24-3-580 discussed here, on their face, violate Plaintiffs' state and federal rights to procedural due process.

CLAIM THREE
Deprivation of Access to the Courts
Challenge to Denial of Access to Necessary Information to Litigate Eighth Amendment Claim

59. Plaintiffs incorporate by reference all statements and allegations in this complaint.

60. As alleged above in Claim One, Plaintiffs requested of Defendants certain information about the potency, purity, and stability of the drugs that may be used for their executions; Defendants refused to provide that information, and the state supreme court refused to compel its disclosure.

61. As alleged above in Claim Two, the secrecy statute, on its face, prohibits disclosure of certain categories of information that are essential to Plaintiffs' ability to make a

meaningful choice about which method of execution will pose a lesser risk of torture than other methods.

62. Defendants' refusal to provide relevant information to Plaintiffs, and the secrecy statute's categorical ban on disclosure of certain information, violates Plaintiffs' fundamental constitutional right to petition the government for redress of grievances and meaningful access to the courts in violation of the First and Fourteenth Amendments to the U.S. Constitution, *Bounds v. Smith*, 430 U.S. 817, 821 (1977), and the S.C. Constitution, art. I, § 22.

63. In *Bounds*, the Supreme Court held that prisoners must be afforded "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825. "Prisoners have a constitutional right to 'adequate, effective, and meaningful' access to the courts." *Pronin v. Johnson*, 628 Fed. Appx. 160, 161, (4th Cir. 2015) (quoting *Bounds*, 430 U.S. at 42).

64. This right of access to courts, thus, advances the due process notion that the aggrieved have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (quoting *Bounds*, 430 U.S. at 825); *see also Murray v. Giarratano*, 492 U.S. 1, 11, n. 6 (1989) (plurality opinion) (holding that access to courts is a due process right).

65. Though they are prisoners, Plaintiffs are "individual citizen[s]" with First Amendment rights of access to governmental proceedings. A prisoner retains those First Amendment rights as long as they are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. As explained above in Claims One and Two, the potential State interests at stake here are either outweighed by Plaintiffs' interests,

or the ways in which Defendants and the secrecy statute seek to protect State interests are far broader than is necessary to effectuate the State's goals.

66. The right of access to the courts is especially critical where a prisoner's access to other remedies is limited. State action that denies a plaintiff the opportunity to litigate gives rise to a claim that the State is violating the plaintiff's right of access to the courts. The right of access to the courts is an ancillary claim, which is necessary for the vindication of underlying rights.

67. To establish a claim of denial of access to courts, a prisoner must allege an actual injury or a specific harm which has resulted from the denial. *Strickler v. Waters*, 989 F.2d 1375, 1383 (4th Cir. 1995). Here, by refusing to provide critical information about their executions, Defendants and the secrecy statute are depriving Plaintiffs of a meaningful opportunity to litigate claims that their executions may be torturous.

68. By deliberately concealing information about the potency, purity and stability of the pentobarbital that Defendants plan to use to execute Plaintiffs, Defendants are actively preventing Plaintiffs from vindicating their Eighth Amendment rights. As a result, Defendants are interfering with Plaintiffs' First and Fourteenth Amendment rights to "adequate, effective, and meaningful" access to the courts. *See Bounds* at 822-823.

69. Defendants' refusal to provide the information that Plaintiffs seek, and the secrecy statute's ban on disclosure of certain types of information, violates Plaintiffs' state and federal rights of meaningful access to the courts. To the extent Defendants claim their refusal to provide information is required by S.C. Code § 24-3-580, Defendants' interpretation of that statute also violates Plaintiffs' constitutional right of access to the courts.

CLAIM FOUR
Deprivation of the Right to Counsel
Challenge to Denial of Necessary Information to Meaningfully Provide Counsel

70. Plaintiffs incorporate by reference all statements and allegations in this complaint.

71. The Criminal Justice Act, or CJA, and its policies, require that a district court appoint counsel for a financially eligible person who is seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254. *See* 18 U.S.C. § 3006A(a)(1). Counsel appointed to represent prisoners sentenced to death in state court, in those prisoners' federal habeas corpus proceedings, are also required to continue the representation through the conclusion of state clemency proceedings. *Harbison v. Bell*, 556 U.S. 180 (2009).

72. Plaintiffs' counsel in their federal habeas proceedings were all appointed pursuant to the CJA, as well as 18 U.S.C. § 3599, which authorized appointment of counsel in capital cases.

73. By denying Plaintiffs and their counsel access to the information needed to make a fully informed decision about Plaintiffs' chosen method of execution, Defendants and the secrecy statute have constructively denied Plaintiffs their statutory right to the assistance of counsel.

REQUESTS FOR RELIEF

74. In light of the constitutional and statutory violations outlined above, Plaintiffs request that the Court grant the following relief:

a. A preliminary and ultimately permanent injunction prohibiting Defendants from carrying out Plaintiffs' executions without providing the information they have requested with sufficient notice of at least 23 days ahead of their

executions.[7] As explained above, Plaintiffs seek the professional qualifications of the execution team, as well as the following information about the execution drugs:

i. The date on which the drugs were tested.

ii. The Beyond Use Date, after which compounded drugs should not be used.

iii. If the drugs were commercially manufactured, the expiration date.

iv. The methods and procedures used to test the pentobarbital, including documentation of test method validation and details of quality control procedures and methodology.

v. The actual results obtained from the testing.

vi. Where the drugs will be stored prior to their use, and how the storage conditions will be monitored, including temperature and humidity controls.

b. A preliminary and permanent injunction prohibiting Plaintiffs' executions until Defendants have complied with the licensing and regulatory requirements addressed in Claim Two.

c. Declaratory relief, pursuant to 28 U.S.C. § 2201, that Plaintiffs' constitutional and statutory rights have been violated as described in this complaint.

d. Any other relief the Court deems just and proper.

[7] This proposed timing accounts for the fact that South Carolina law provides for a maximum of 28 days between an execution notice issuing and the actual execution date, and also requires the corrections director to certify the available methods of execution within five days of the execution notice issuing. *See Owens*, 904 S.E.2d at 604, n.23 (setting forth the timing of events relating to executions).

Respectfully submitted,

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COUNSEL FOR PLAINTIFFS

September 13, 2024

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-001280

Case No. 2021-CP-40-02306

FREDDIE EUGENE OWENS, BRAD KEITH SIGMON, GARY DUBOSE TERRY, and RICHARD BERNARD MOORE, ...Respondents-Appellants,

v.

BRYAN P. STIRLING, in his official capacity as the Director of the South Carolina Department of Corrections; SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; and HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, ...Appellants-Respondents.

AFFIDAVIT OF BRYAN P. STIRLING

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen, of sound mind, and competent to give this testimony.

2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, until I was confirmed by the Senate as the Director on February 19, 2014. I have served as the Director of the Department since my confirmation.

3. During my tenure as the Director, the Department has been consistently and diligently attempting to obtain drugs for carrying out executions by lethal injection. Such measures have included efforts to obtain lethal injection drugs from manufacturers, compounding pharmacies, and other States' departments of corrections and to educate the General Assembly that a shield statute was needed for the Department to potentially be able to obtain lethal injection drugs. Until recently, these efforts have been universally unsuccessful. Part of what has made these efforts unsuccessful are the repeated attempts by anti-death penalty advocates to lobby manufacturers and sellers of these drugs not to provide the drugs for use in executions and to oppose enactment of a shield statute. I therefore have previously certified to this Court under S.C. Code Ann. § 24-3-530(B) that the Department did not have in its possession the drugs necessary for lethal injection to be an available method for carrying out executions after certain notices of execution had been issued.

4. While S. 120 ("Shield Statute") was progressing through the General Assembly, the Department continued asking potential providers if they would supply drugs to the Department for carrying out executions by lethal injection if S. 120 became law. The Department determined that there were suppliers which may be willing to provide drugs to the Department for carrying out executions by lethal injection if S. 120 were signed into law.

5. On May 12, 2023, the Governor signed into law the Shield Statute, *see* 2023 S.C. Acts No. 16, which "applies to persons sentenced to death as provided by law prior to and after the effective date of this act," *id.* § 3.

6. With the benefit of the Shield Statute, the Department continued its efforts to obtain lethal injection drugs. Since the Shield Statute went into effect, the Department has made more than 1,300 contacts in search of lethal injection drugs, including manufacturers, suppliers, compounding pharmacies, other States' departments of corrections, and potential sources that the Department learned about from the relationships that Department employees have with other individuals in penological institutions. The Department inquired about obtaining drugs that had been used in lethal injections in South Carolina and other jurisdictions that had withstood judicial challenges. Many of these contacts immediately refused to entertain the idea of selling lethal injection drugs to the Department, and many other contacts never responded to the Department's inquiries. Some contacts were willing to discuss selling lethal injection drugs to the Department, but for various reasons, they ultimately were unwilling or unable to supply lethal injection drugs to the Department.

7. As a result of these efforts and the Shield Statute, the Department was eventually able to secure pentobarbital for carrying out an execution by lethal injection of a one-drug protocol.

8. The Department's lethal injection policy has been revised to provide for the use of one-drug protocol. This new protocol is essentially identical to the protocol used by the Federal Bureau of Prisons and at least six other States. The Department's lethal injection policy was revised based on discussions with medical professionals and corrections officials with experience carrying out executions; the knowledge that the federal government and other States have successfully used pentobarbital to carry out executions by lethal injection; the fact that courts have upheld the use of this drug against constitutional challenges; and the Department's ability to obtain pentobarbital.

9. All three statutorily authorized methods of execution—lethal injection, electrocution, and the firing squad—are currently available for carrying out a death sentence, so a condemned inmate may elect any of these methods. *See* S.C. Code Ann. § 24-3-530.

10. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling

Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 11TH DAY OF September, 2023

M Dayne Howell (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 3/12/2024

The Supreme Court of South Carolina

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

Appellate Case No. 1999-011364

The Honorable Alexander S. Macaulay, Greenville County
Trial Court Case No. 1998GS235218, 1998GS235220, 1998GS235222

EXECUTION NOTICE

TO THE HONORABLE BRYAN PETER STIRLING, DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the above case from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court of South Carolina and the remittitur has been sent to the Clerk of the Court of General Sessions.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the defendant.

Pat C. Howard
CLERK

Columbia, South Carolina
August 23, 2024

cc: Emily Paavola
Lindsey Sterling Vann
Alan McCrory Wilson
Donald J. Zelenka
Melody Jane Brown
Bryan Peter Stirling
Salley W. Elliott

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

v.

Freddie Eugene Owens,

Appellant.

Appellate Case No. 1999-011364

The Honorable Alexander S. Macaulay
Greenville County
Trial Court Case No. 1998GS235218, 1998GS235220, 1998GS235222

AFFIDAVIT OF BRYAN P. STIRLING

PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

1. I am over the age of eighteen, of sound mind, and competent to give this testimony.

2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, and February 19, 2014, when I was confirmed by the Senate as the Director. I have served as the Director of the Department since my confirmation.

3. According to S.C. Code Ann. § 24-3-530, there are three statutorily approved methods of execution: electrocution, the firing squad, and lethal injection.

4. Pursuant to S.C. Code Ann. § 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receipt of a notice of execution from this Court.

5. On August 23, 2024, in accordance with S.C. Code Ann. §§ 17-25-370–380, the Department received an Execution Notice issued by the Clerk of this Court for Freddie Eugene Owens.

6. According to the Execution Notice for Freddie Eugene Owens, the Department is required "to execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service . . . or receipt of this notice," which is September 20, 2024.

7. I hereby certify that all three statutorily approved methods of execution—electrocution, the firing squad, and lethal injection—are available for carrying out Owens's execution.

8. I am certifying that electrocution is available because the appropriate and responsible Department staff informed me that the electric chair and system were tested on June 25, 2024, and all aspects performed as intended.

9. I am certifying that the firing squad is available because the appropriate and responsible Department staff informed me that the Department has in its possession the necessary firearms and ammunition and that members of the firing squad have completed all required training.

10. I am certifying that lethal injection is available via a single dose of pentobarbital. I have confirmed that the pentobarbital in the Department's possession is of sufficient potency, purity, and stability to carry out an execution successfully using the Department's lethal injection protocol. The Department provided pentobarbital to the S.C. Law Enforcement Division ("SLED") for testing by its Forensic Services Laboratory. SLED confirmed that its Forensic Services Laboratory is an internationally accredited forensic laboratory and that it used widely accepted testing protocols and methodologies in this matter. SLED reported to me that experienced, qualified, and duly authorized personnel tested two vials and confirmed the concentration of the solution provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter,

and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible Department staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by other States and the federal government, the dosage called for by the Department's lethal injection protocol is sufficiently potent such that administration in accordance with the protocol will result in death.

11. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Bryan P. Stirling

Bryan P. Stirling

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 28 DAY OF August, 2024

Jessica Wallace (SEAL)
NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 04/05/2026

The Supreme Court of South Carolina

Richard Bernard Moore, Brad Keith Sigmon, Freddie Eugene Owens, Mikal D. Mahdi, and Marion Bowman, Jr., Petitioners,

v.

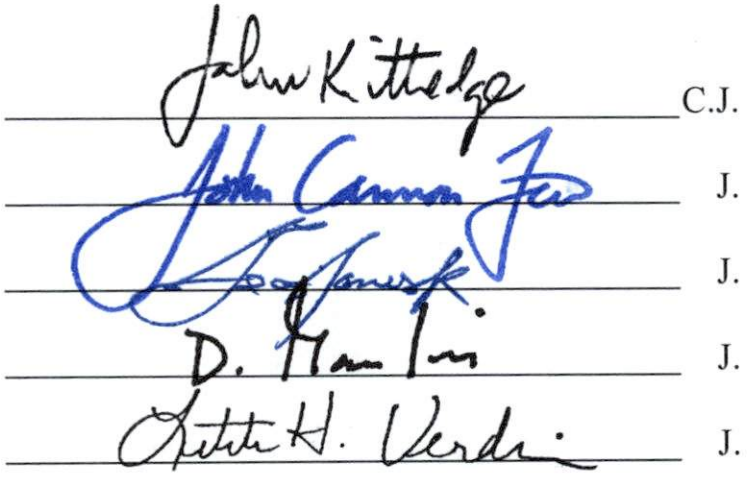
State of South Carolina, Respondent.

Appellate Case No. 2024-001373

AMENDED ORDER

Petitioners are death-sentenced inmates whose executions were stayed pending this Court's decision in *Owens v. Stirling*, Op. No. 28222 (S.C. Sup. Ct. filed July 31, 2024) (Howard Advance Sheet No. 29 at 18). Petitioners filed a motion to direct or stay the issuance of execution notices to a minimum interval of thirteen weeks between death notices. By order dated August 23, 2024, this Court stayed the issuance of execution notices for all eligible death-sentenced inmates, except Petitioner Freddie Eugene Owens for whom an execution notice has already been issued, pending resolution of this motion.

We deny Petitioners' specific request. We nevertheless recognize that a reasonable interval between the issuance of death notices is warranted. Accordingly, we direct the Clerk of this Court to issue death notices in a manner to ensure an interval of at least thirty-five days between notices, provided we may alter the thirty-five day interval should circumstances warrant. We direct that the order of future notices shall be determined in the same manner as Petitioner Owens, that is, by the oldest conviction that is not subject to a hold based on a pending collateral proceeding, a finding of incompetency, or otherwise. Based on this criteria, the following is the order in which subsequent notices shall be issued: (1) Richard Bernard Moore; (2) Marion Bowman, Jr.; (3) Brad Keith Sigmon; (4) Mikal D. Mahdi; (5) Steven V. Bixby.



C.J.

J.

J.

J.

J.

Columbia, South Carolina
August 30, 2024

cc:
Lindsey Sterling Vann
Joshua Snow Kendrick
Gabrielle Amber Pittman
Alan McCrory Wilson
Melody Jane Brown
Donald J. Zelenka
Gerald W. King, Jr.

RECEIVED
Sep 03 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

STATE OF SOUTH CAROLINA,
Respondent,

v.

FREDDIE EUGENE OWENS,
Appellant.

Appellate Case No. 1999-011364

OBJECTION TO AFFIDAVIT AND CERTIFICATION OF BRYAN P. STIRLING, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Khalil Allah, also known as Freddie Eugene Owens, objects to the sufficiency of the August 28, 2024, affidavit of Bryan P. Stirling certifying the methods of execution available for his execution on September 20, 2024, as it does not provide the "basic facts about the drug's creation, quality, and reliability" that this Court has held South Carolina law and the Due Process Clause require. *Owens et al. v. Stirling*, No. 2022-001280 (S.C. July 31, 2024) ("Op.") at 50. In support of his objection, Mr. Owens shows as follows:

Upon receiving a notice of execution, the director of the South Carolina Department of Corrections must "determine and certify by affidavit under penalty of perjury to the Supreme Court whether the methods [of execution] provided" by the state's capital punishment statute—electrocution, the firing squad, and lethal injection—"are available." § 24-3-530(B). As to lethal injection, this Court held in *Owens* that the director must set forth the "process that he decides is appropriate for satisfying himself that the drugs are capable of carrying out the death sentence according to law…. in sufficient detail that a condemned inmate and his attorneys may understand

whether there is a basis for challenging the constitutionality of the impending execution." Op. at 51. While ordering the director to comply with the shield law, this Court further held that the statute requires the director to disclose "some basic facts about the drug's creation, quality, and reliability" and "the drugs' potency, purity, and stability." Op. at 50.[1] This Court illustrated this requirement with the following example:

> [I]f the Director certified in the affidavit that scientists at the Forensic Services Lab of the South Carolina Law Enforcement Division (SLED), whose experience and qualifications were verified by the Director and the Chief of SLED, recently performed testing according to widely accepted testing protocols and found the drugs were not only stable, but of a clearly acceptable degree of purity, then we doubt there could be any legitimate legal basis on which to mount a challenge.

Id.

Director Stirling has now submitted his affidavit. Although the affidavit hews somewhat to the example provided by the Court, it does not provide the basic facts that the statute or due process require, as it still requires a condemned prisoner to accept the good-faith word of the Director without any affirmative proof of findings on the part of SCDC or SLED. Mr. Owens has consulted with Dr. Michaela Almgren, a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcomes Sciences at the University of South Carolina College of Pharmacy. *See* Affidavit of Dr. Michaela Almgren, Attachment 1. As Dr. Almgren details, the director's affidavit does not provide the basic facts needed "to assess the qualities and reliability of the lethal injection drugs the department has obtained for use in [Mr. Owens's] execution."

Not only does the affidavit lack "basic facts about the drug's creation," Op. at 50, it provides no facts whatsoever. Most critically, the affidavit provides neither "the date when the

[1] This Court noted that there is also "a Due Process Clause component to our analysis of this claim[.]"

drugs were tested" or their "'Beyond Use Date,' or BUD"—the basic facts needed to assess whether "the drugs will still be effective on September 20, when the department intends to use them." *Id.* at ¶ 5. That concern is amplified here because the drugs appear to be compounded. *Id.* Compounded drugs "are typically made in smaller batches and do not go through the same level of testing [as commercially manufactured drugs], so their stability over time is less certain." *Id.* As Dr. Almgren notes, "[e]ven if a compounded drug passes all USP-required quality tests today, it is still important to know its BUD to ensure that the testing accurately reflects the drug's properties on September 20, provided that the BUD extends beyond that date." *Id.* [2]

The affidavit also provides no facts about the "quality[] and reliability" or the "potency, purity, and stability" of the drugs. Op. at 50. While the affidavit "describes reports the director received from SLED personnel concerning the testing of the drugs," it "does not specify the test methods used, the testing procedures followed, or the actual results obtained from those tests." *Id.* at ¶ 6.[3] As a result, the affidavit does not establish that "the SLED laboratory followed all established steps for pharmaceutical drug quality analysis as specified in the USP compendium, which usually differ from typical forensic practice." *Id.* The absence of these basic facts could be corrected by the provision of "the actual analytical reports from the testing of the drugs," which are "standard records produced during this type of laboratory analysis." *Id.*[4]

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[2] The United States Pharmacopeia ("USP") "sets standards for the identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements in the United States." *Id.* at ¶ 2, n. 1.

[3]Dr. Almgren also observes that the affidavit's language describing the testing results—such as its conclusory statement that SLED personnel "'acknowledged the substance's concentration in terms of its purity and stability" —"lacks clarity." *Id.* at ¶ 6.

[4]To comply with South Carolina's shield statute, any identifying information for the SLED analysts who conducted the testing could be readily redacted from the analytical reports.

The affidavit provides no facts about "how the storage conditions [of the drugs] will be monitored between now and September 20"—a nearly three-week timeframe that would provide "ample opportunity for quality issues to arise with these drugs if they are not stored correctly, as medications—especially compounded drugs—are sensitive to moisture, light, and temperature." *Id.* at ¶ 7. As Dr. Almgren notes, "simple measures can be implemented to assure that the drug quality is preserved." *Id.* The USP clearly defines the proper storage conditions for drugs, which can be assured by a daily check that the storage location is within the established range of temperature or humidity. *Id.*

As Dr. Almgren confirms, all of these basic facts can be established through the provision of the actual testing results, along with confirmation that the drugs are not beyond their BUD and are being maintained through these well-established and straightforward measures. These are not abstract concerns. Were "the department's drugs degraded" or "their testing . . . improperly conducted or incomplete, they would pose serious risks," including "extensive damage to the blood vessels and surrounding tissue," the infliction of "intense pain upon injection," or even that the execution would fail, leaving Mr. Owens "with organ or brain damage from the oxygen deficits suffered during the attempt at execution." *Id.* at ¶ 8.

Without the basic facts detailed above, Mr. Owens and his counsel cannot assess or "understand whether there is a basis for challenging the constitutionality of the impending execution." Op. at 51. Nor can Mr. Owens or his counsel make an adequately informed election—which undermines the purpose of "the choice provisions of section § 24-3-530" to ensure that "a condemned inmate in South Carolina will *never* be subjected to execution by a method he contends is more inhumane than another method that is available." Op. at 39 (emphasis added). Accordingly, the affidavit's omission of these basic facts implicates his statutory and due process rights.

Mr. Owens accordingly objects to the adequacy of the director's affidavit and certification. As Mr. Owens's method of execution must be elected by September 6, 2024—in less than one week—he requests that this Court enter an order instructing Director Stirling to provide the actual report and results from the testing of the lethal injection drugs intended for use in Mr. Owens's execution (with the identity of the analyst redacted) and documentation of the drugs' beyond use date and storage conditions.

August 31, 2024.

Respectfully submitted,

Gerald W. King, Jr.
Chief, Capital Habeas Unit
for the Fourth Circuit
Gerald_King@fd.org

s/ Gabrielle Amber Pittman
Gabrielle Amber Pittman (No. 71771)
Deputy Chief, Capital Habeas Unit
for the Fourth Circuit
G_Amber_Pittman@fd.org

129 West Trade Street, Suite 300
Charlotte, NC 28202
(704) 688-6946
August 31, 2024

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

AFFIDAVIT OF DR. MICHAELA ALMGREN

I. Background and Qualifications

1. My name is Michaela Almgren, Pharm.D., M.S. I am over the age of eighteen and competent to testify to the truth of the matters contained herein. The factual statements I make here are true and correct to the best of my knowledge.

2. I am a Clinical Associate Professor in the Department of Clinical Pharmacy and Outcomes Sciences at the University of South Carolina College of Pharmacy. I teach principles of sterile compounding per United States Pharmacopeia ("USP")[1] Chapters 797 and 800, aseptic technique and pharmacy regulations applicable in sterile compounding environment[2] under 503a guidance and section 503b of the Drug Quality and Security Act of 2013, as well as pharmacokinetics, pharmacotherapy, pharmacy law, and biopharmaceutics courses. I specialize in sterile compounding, medication safety and pharmacy laws and regulations that relate to pharmacy compounding practices. I also provide continuing education courses for pharmacists in those topics. I received my Doctor of Pharmacy degree from the University of South Carolina College of Pharmacy in 2010. Additionally, I have a Master's Degree in Pharmaceutical Chemistry from the University of Florida.

3. In conjunction with my academic appointment, I currently maintain a practice site at a 503b[3] outsourcing pharmacy where I perform duties of an outsourcing pharmacist, clinical

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[1] USP sets standards for the identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements in the United States. The USP publishes the United States Pharmacopeia-National Formulary (USP-NF), which contains a compendium of quality standards and specifications for a wide range of pharmaceuticals and related products. USP Chapters 797 and 800 are part of the USP-NF compendium.

[2] Aseptic technique in drug compounding refers to specific practices to avoid physical and microbial contamination when preparing sterile medications that are to be used for parenteral applications, such as IV infusion, injection, etc.

[3] 503b Outsourcing Pharmacy is a compounding pharmacy that produces large batches of sterile products and distributes them directly to health systems pharmacies to address drug shortages, as specified in Section 503B of the FD&C Act.

advisor and pharmacy student preceptor. Previously, I worked in pharmacy operations at a large local teaching hospital as a pharmacist. I have over fifteen years of experience in sterile compounding and aseptic technique. Prior to joining the faculty at the University of South Carolina I worked for several years in pharmaceutical manufacturing where I was involved in drug formulation, quality assurance, quality control and analytical method development and validation. My professional qualifications are Doctor of Pharmacy and Master of Science in Pharmacy with focus on Pharmaceutical Chemistry. A copy of my CV is attached as Exhibit A.

4. I have been asked by attorneys who represent Khalil Allah (or Freddie Owens) whether the August 28, 2024, affidavit provided by the director of the South Carolina Department of Corrections contains adequate information to assess the quality and reliability of the lethal injection drugs the department has obtained for use in his execution, which is scheduled for September 20, 2024. In my expert scientific and pharmaceutical opinion, it does not.

5. The director's affidavit does not provide the date when the drugs were tested. The affidavit also does not include the drugs' "Beyond Use Date," or BUD. BUD refers to the date after which a compounded preparation should not be used, as it may no longer be effective or safe. You need to know these facts to know that the drugs will still be effective on September 20, when the department intends to use them. This is particularly important because the affidavit makes no reference to a Certificate of Analysis from the manufacturer, which suggests to me that the drugs were compounded, not manufactured. Manufactured drugs have a Certificate of Analysis that includes the drug's expiration date. This differs from the BUD, as the expiration date is determined by the manufacturer. The expiration date for commercially manufactured drugs is generally much longer than the BUD for a compounded drug. Commercially manufactured drugs undergo rigorous stability testing under controlled conditions to establish their expiration dates, which can extend

for years. In contrast, compounded drugs are typically made in smaller batches and do not go through the same level of testing, so their stability over time is less certain. Even if a compounded drug passes all USP-required quality tests today, it is still important to know its BUD to ensure that the testing accurately reflects the drug's properties on September 20, provided that the BUD extends beyond that date.

6. The affidavit describes reports the director received from SLED personnel concerning the testing of the drugs. The statement "…acknowledged the substance's concentration in terms of its purity and stability" lacks clarity. The affidavit does not specify the test methods used, the testing procedures followed, or the actual results obtained from those tests. This information is vital to assessing the quality and reliability of the drugs. You would need to know that the SLED laboratory followed all established steps for pharmaceutical drug quality analysis as specified in the USP compendium, which usually differ from typical forensic practice. Documentation of test method validation, calibration curves, details of quality control procedures and methodology used should all be available for review as these are all standard records produced during this type of laboratory analysis. The easiest way to address this concern would be to share the actual analytical reports from the testing of the drugs.

7. The affidavit does not address where the drugs will be stored and how the storage conditions will be monitored between now and September 20th. The nearly three weeks leading up to September 20 provides ample opportunity for quality issues to arise with these drugs if they are not stored correctly, as medications—especially compounded drugs—are sensitive to moisture, light, and temperature. Generally, drugs degrade more rapidly when stored outside their recommended temperature and humidity range. However, simple measures can be implemented to assure that the drug quality is preserved. According to USP Chapter 659 titled "Packaging

Temperature and Storage Requirements", room temperature is generally defined as a range of 20°C to 25°C (68°F to 77°F). This range allows for a variability of 2°C (4°F) above or below the specified range, meaning that the temperature could be between 15°C and 30°C (59°F and 86°F) and still be considered acceptable for room temperature storage. The acceptable humidity level for a pharmacy typically falls within the range of 30% to 60% relative humidity. Pentobarbital sodium injection drug vials should be stored in the conditions described above, as defined by the USP. According to USP Chapter 1079 titled "Risks and Mitigation Strategies for the Storage and Transportation of Finished Drug Products", storage temperature of medications should be checked daily. Without daily monitoring, temperature excursions may occur, leading to reduced potency and effectiveness of the drug. Once daily temperature measurements should be recorded to document that medications are stored under optimal conditions, safeguarding their quality and effectiveness while complying with regulatory requirements.

8. If the department's drugs degraded, or if their testing was improperly conducted or incomplete, they would pose serious risks to Mr. Allah. As I detailed in my earlier affidavit to this Court, if the drug has an improper pH, it could cause extensive damage to the blood vessels and surrounding tissue. If the drug falls out of solution, the resulting solids, or precipitates, would cause intense pain upon injection. If the potency of the drug is insufficient, the injection could result in a prisoner regaining consciousness, perhaps with organ or brain damage from the oxygen deficits suffered during the attempt at execution.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 31st day of August, 2024.

Michaela M. Almgren

Dr. Michaela M. Almgren

Acknowledgment Notary Certificate (Only for use in AR, AZ, CO, CT, DC, DE, GA, ID, IA, IL, KS, KY, MA, MD, ME, MN, MO, MT, NH, NJ, NM, NY, NV, NC, OH, OK, OR, PA, RI, SC, TX, UT, VA, WA)

Document Name: Affidavit of Dr. Michaela Almgren

STATE OF South Carolina
COUNTY OF Lexington
(County where notarization occurred)

This record was acknowledged before me on 31 day of August, 2024, by _____ (name(s) of signer(s)), who personally appeared before me and (is personally known to me or whose identity was proved on the basis of satisfactory evidence) to be the person whose name is subscribed to in this document.

KENNETH R. BERG
Notary Public - State of South Carolina
My Commission Expires June 26, 2028

_____
(Signature of notary public)

Kenneth R. Berg, Notary Public
(Name of notary public)

My commission expires: 26 June 2028

Official Seal

Personally known _____ OR
Produced identification ✓ Type of identification produced: SCDL

The Supreme Court of South Carolina

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

Appellate Case No. 2024-001397

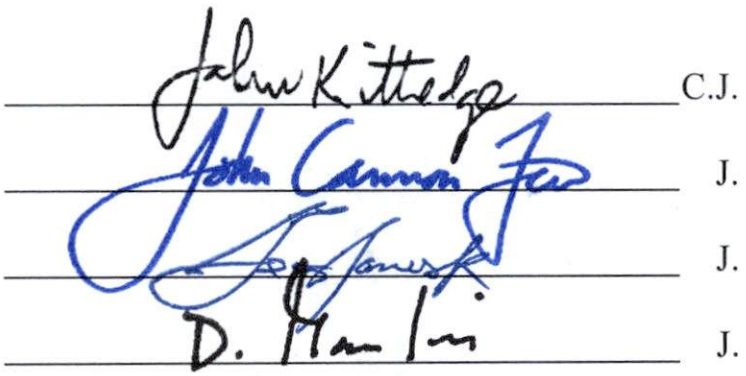
ORDER

Pursuant to section 24-3-530(B) of the South Carolina Code (Supp. 2023), Director Bryan Stirling of the South Carolina Department of Corrections (SCDC) has issued an affidavit stating electrocution, firing squad, and lethal injection are all available methods of execution from which Appellant may elect. Appellant objects to the sufficiency of the affidavit as to the availability of lethal injection, claiming it fails to provide the basic facts needed to assess the quality, reliability, potency, purity, and stability of the lethal injection drugs. He asks this Court to order Director Stirling to provide him with the actual report of the testing of the drugs and documentation of the drugs' beyond use date (BUD) and storage conditions.

The affidavit states the pentobarbital was tested by experienced, qualified, and duly authorized personnel at the Forensic Services Laboratory of the South Carolina Law Enforcement Division (SLED), which is internationally accredited, using widely accepted protocols and methodologies. That testing confirmed the concentration of the drugs and their purity and stability. A review by SCDC staff of the test results, along with data from the National Institutes of Health and information regarding lethal injection executions from other states and the federal government, revealed the dosage to be used by SCDC for lethal injection is sufficiently potent to result in death when administered in accordance with SCDC's protocol.

We deny Appellant's request to require Director Sterling to provide Appellant with SLED's testing report and documentation of the BUD and storage conditions of the drugs. The affidavit adequately explains "how [Director Stirling] determined the

drugs were of sufficient 'potency, purity, and stability' to carry out their intended purpose." *See Owens v. Stirling*, Op. No. 29222 (S.C. Sup. Ct. filed July 31, 2024) (Howard Adv. Sh. No. 29 at 18, 52). Further, the affidavit provides sufficient detail for Appellant to make an informed election of his method of execution and for Appellant and his attorneys to "understand whether there is a basis for challenging the constitutionality of the impending execution." *See id.* at 51.



C.J.

J.

J.

J.

Verdin, J., not participating

Columbia, South Carolina
September 5, 2024

cc:
Alan McCrory Wilson
Melody Jane Brown
Donald J. Zelenka
Salley Wood Elliott
Gabrielle Amber Pittman
Joshua Snow Kendrick
Emily C. Paavola
Bryan Peter Stirling
Gerald W. King, Jr.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

NOTICE OF ELECTION

In accordance with Section 24-3-530(A), S.C. Code of Laws, 1976, as amended, "[a] person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election, under the direction of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date, or it is waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution."

Methods of Execution

I, Emily Paavola, pursuant to a valid Durable Power of Attorney and Section 24-3-530, South Carolina Code of Laws, 1976 as amended, hereby elect electrocution as the method for execution. By my signature below I select electrocution as the method of execution for Freddie Eugene Owens.

S/_____ _____
Emily Paavola Date

I, Emily Paavola, pursuant to a valid Durable Power of Attorney and Section 24-3-530, South Carolina Code of Laws, 1976 as amended, hereby elect firing squad as the method for execution. By my signature below I select firing squad as the method of execution for Freddie Eugene Owens.

S/_____ _____
Emily Paavola Date

I, Emily Paavola, pursuant to a valid Durable Power of Attorney and Section 24-3-530, South Carolina Code of Laws, 1976 as amended, hereby elect lethal injection as the method for execution. By my signature below I select lethal injection as the method of execution for Freddie Eugene Owens.

S/Emily C. Paavola 9/6/2024
Emily Paavola Date

WITNESSES:

M [illegible] 9/6/2024
Witness Signature Date

Joseph A. Stan 9/6/2024
Witness Signature Date

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787, Columbia, South Carolina 29221

Pursuant to Code Section 24-3-530, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated Willie Davis as his duly authorized agent for the purpose of making service of the Notice of Election on the below named individual.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF RICHLAND)

On the 6th day of September 2024, I served the Notice of Election on Emily Paavola, Power of Attorney for Freddie Eugene Owens, by delivering personally and leaving a copy of the same at SCDC Headquarters' Cafeteria Conference Room, 4444 Broad River Road, Columbia, South Carolina. Deponent is not a party to this action.

S/ Willie Davis
Willie Davis

SWORN TO AND SUBSCRIBED before
me this 6th day of September 2024

Wanda J Hawkins (L.S.)
Notary Public for South Carolina

My Commission Expires: 2-5-2028

ACCEPTANCE OF SERVICE

Service of a copy of the within Notice of Election is accepted at SCDC Headquarters' Cafeteria Conference Room, 4444 Broad River Road, Columbia, South Carolina, this 6th day of September 2024.

S/ Emily C. Paavola
Emily Paavola, Power of Attorney for Freddie Eugene Owens