NO. 24-5603 & 24A284
CAPITAL CASE

In The Supreme Court of the United States

FREDDIE E. OWENS,

Petitioner,

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 DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT AND EMERGENCY MOTION FOR STAY OF EXECUTION

APPENDIX TO RESPONSE TO EMERGENCY MOTION FOR STAY OF EXECUTION AND PETITION FOR A WRIT OF CERTIORARI

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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

RECEIVED

AUG 28 2024

SC SUPREME COURT

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

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Sep 03 2024
S.C. 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]

[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

RECEIVED
Sep 03 2024
S.C. SUPREME COURT

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

On August 14, 2024, Appellant executed a Durable Power of Attorney (POA) authorizing one of his attorneys, Emily Paavola, to elect the method of his execution.[1] Paavola recorded the POA with the Richland County Register of Deeds on August 26, 2024.

Because an execution notice has been issued, Director Bryan Stirling of the South Carolina Department of Corrections (SCDC) now asks this Court for a judicial determination of the validity of the POA and instructions regarding service of the election form if the document is determined to be valid.

We hold the POA in this matter is valid and must be accepted by SCDC.

We deny the State's suggestion to hold a hearing on Appellant's understanding of the effect of his election.

John Kittredge C.J.

John Cannon Few J.

Jean Toal J.

---

[1] Appellant's legal name is now Khalil Divine Black Sun Allah, and this is the name on the power of attorney.

D. Hamilton J.

Verdin, J., not participating

Columbia, South Carolina
September 3, 2024

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

The Supreme Court of South Carolina

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

Appellate Case No. 2024-001397

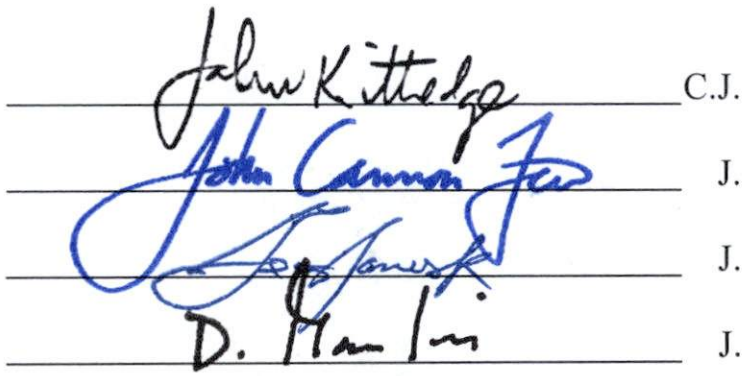
ORDER

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.

RECEIVED

Sep 06 2024

S.C. SUPREME COURT

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

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.]

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).

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.

[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 and for expedited briefing [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