

No. 25-1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

MARION BOWMAN, JR.,

Appellant-Plaintiff,

v.

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; & HENRY
MCMASTER, Governor of South Carolina,

Appellees-Defendants.

CAPITAL CASE

Execution of Appellant Bowman scheduled for
January 31, 2025, 6:00 p.m.

**EMERGENCY MOTION FOR ADMINISTRATIVE INJUNCTION, AND
INJUNCTION PENDING APPEAL**

Plaintiff-Appellant Marion Bowman seeks an emergency injunction pending appeal of the district court's denial of a preliminary injunction and temporary restraining order. *See* DE 21 (district court order).¹ Because Defendants plan to execute Bowman in two days on January 31, 2025, he needs immediate injunctive relief so that his death sentence is not carried out despite Defendants' denying him, in violation of due process, basic information about the lethal injection

¹ "DE" references the docket entries in the district court. For the Court's convenience, Bowman has also filed with this Court all exhibits submitted in the district court, and the district court's order.

drugs. Bowman also requests an immediate administrative injunction so this Court may decide this matter before the State executes him.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over appeals from “interlocutory orders of the district courts of the United States . . . refusing . . . injunctions.” 28 U.S.C. § 1292. This motion is brought under Fed. R. App. P. 8(a)(2) because the district court erred in denying Bowman’s request for a preliminary injunction and declaratory judgment, and moreover, seeking any additional relief in the district court would be impracticable at this time given the impending execution date.

BACKGROUND

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

This Court has previously reviewed the denial of injunctive relief that was sought on the basis of a procedural due process challenge to Director Stirling’s execution certification. On August 23, 2024, the South Carolina Supreme Court issued an execution notice, setting death row prisoner Freddie Owens’s execution for September 20, 2024. Corrections Director Stirling then submitted a certification to the state supreme 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 was 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. *See* DE 1-4. After the South Carolina Supreme Court rejected Owens's objections and requests for additional information, *see* DE 1-6, 1-7, 1-8 (state court objection, supporting affidavit, and state court denial), Owens filed suit and sought injunctive relief in the South Carolina federal district court. The district court denied a preliminary injunction or temporary restraining order on the ground that Owens was given all the information he was entitled to under state law, and he had not shown any deprivation of a state-created liberty interest. *Bixby v. Stirling*, No. 3:24-cv-05072-JDA (opinion and order issued Sept. 18, 2024), p. 16. In an unexplained order, a panel of this Court also denied an injunction. *Owens v. Stirling*, No. 24-3 (order issued Sept. 20, 2024). The U.S. Supreme Court then denied an application for a stay of execution, although Justice Sotomayor would have granted the stay of execution. *Owens v. Stirling*, No. 24-5603. Freddie Owens was executed on September 20, 2024.

The state supreme court next issued a notice of execution for Richard Moore, scheduling his execution for November 1, 2024. On October 8, 2024, Director Stirling filed a certification in the state supreme court describing the availability and testing of pentobarbital for Mr. Moore's execution. DE 1-9. In the *Moore* and *Owens* cases, Stirling provided identical information about the testing conducted on the execution drugs.

Meanwhile, in the case initially brought in the district court seeking additional information about the execution drugs, *Bixby v. Stirling*, No. 3:24-cv-05072-JDA, the district court issued an opinion and order on October 30, 2024, granting the Defendants' motion to dismiss. Plaintiffs in that suit, including Bowman, did not appeal. Additionally, following

Owens's execution, this Court dismissed the appeal as moot. *Owens v. Stirling*, 24-3 (order issued Oct. 8, 2024).

In the district court's order, it denied all claims with prejudice except one. The claim the district court denied without prejudice was the procedural due process challenge to "Defendants' refusal to provide information about Owens' execution that the Shield Statute does not protect (the 'Owens Certification Challenges')." *Bixby v. Stirling*, No. 3:24-cv-05072-JDA (DE 31, p. 21). The court explained that it lacked jurisdiction based on standing and ripeness doctrines because "[m]uch could change from one execution to the next . . . [and] of primary importance to each condemned prisoner are the facts relating to his own execution, the determinations the Director makes based on those facts, and the level of detail he provides in that prisoner's individual certification." *Id.* at 24. The court also explained that it would "withhold[] court consideration of these claims until each of [the Plaintiffs'] execution notices is issued and the Director issues his certification as to the available execution methods . . . [T]he Court will be prepared to issue a prompt decision at the appropriate time should any of the Remaining Plaintiffs raise similar challenges once their claims ripen." *Id.* at 25, n.10. On November 1, 2024, the State of South Carolina executed Richard Moore with a lethal injection of pentobarbital.

On January 3, 2025, the state supreme court issued a notice of execution for Plaintiff Bowman, setting his execution for January 31, 2024. DE 1-14. As required by state law, *see Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024), Director Stirling filed his certification with the state supreme court on January 8, 2024, providing information nearly identical to that provided for Owens and Moore about the available methods of execution and the pentobarbital to be used for lethal injection. DE 1-15.

Next, Bowman filed a new lawsuit in the district court seeking additional information about the execution drugs, and raising the procedural due process claim that the district court dismissed in *Bixby* without prejudice as unripe. Specifically, Bowman contended that, taken together, his statutory rights to elect a method of execution and to a certification about the available methods from the SCDC director, and to further information in the certification as detailed in the *Owens* decision, create a liberty interest in receiving meaningful information about the efficacy of the execution drugs. In his complaint, Bowman contended that the limited certification provided by Director Stirling did not provide the meaningful information to which he is entitled under state law, and therefore violated his federal constitutional right to procedural due process. DE 1. Alongside this claim, Bowman also filed a motion for injunctive relief in an attempt to prevent Defendants from executing him without first providing adequate information about the potency, purity, and stability of the execution drugs. DE 6.

As in the prior *Bixby* and *Owens* litigation, Bowman's suit is based in part on the expert opinion of 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—who explains why Director Stirling's certification omits critical information about the execution drugs, including:

- The date on which the drugs were tested.
- The Beyond Use Date, after which compounded drugs should not be used.
- If the drugs were commercially manufactured, the expiration date.
- The methods and procedures used to test the pentobarbital, including documentation of test method validation and details of quality control procedures and methodology.
- The actual results obtained from the testing.

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

DE 1.²

Dr. Almgren explains in her affidavit that the failure to provide this information leaves Plaintiff Bowman unable to make an informed choice about which method of execution poses the least risk of harm. This is because serious risks are posed to the person undergoing the execution process 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. As Dr. Almgren explains, 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. DE 1-7.

In the wake of Richard Moore's execution in November 2024, Bowman's lawsuit also includes information raising questions about the efficacy of the pentobarbital during the Moore execution process, thereby heightening the need here for transparency. Upon review of information pertaining to the execution of Moore, Dr. David Waisel, a practicing anesthesiologist concluded "to a reasonable degree of medical certainty that South Carolina failed to administer five grams of effective pentobarbital during the execution of Richard Moore" resulting in the "substantial risk that he experienced needless and extensive suffering during his

² As already explained, South Carolina's execution secrecy protections in S.C. Code § 24-3-580 are expressly aimed at concealing the identities of individuals and entities involved in the execution process and providing materials for that process. At no point in this or the prior litigation have any of the death row inmates sought any person or company's identity as part of their procedural due process claims. And in fact, Bowman has affirmatively offered to receive information pursuant to a protective order even though the information he seeks is not even covered by the state secrecy law. DE 1, p. 18.

execution.” Dr. Waisel’s conclusion was based on the fact that the autopsy of Moore revealed that two doses of pentobarbital were given to Moore despite the fact that a single 5 gram dose should have been more than sufficient to bring about his death; the fact that Moore was not declared dead until more than twenty minutes elapsed, even though 5 grams of pentobarbital should cause death within ten minutes; and the fact that if Moore was sensate, he would have felt as if he were drowning from the pulmonary edema that the pentobarbital induced. Additionally, Dr. Waisel raised concerns about Bowman’s unusually large body size (about 6’4” and 389 pounds, according to SCDC’s inmate profile website), which could cause IV access difficulties, and will require a different pentobarbital dosage than the average person to ensure the execution occurs without the problems seen in Moore’s execution. DE 1-10.³

On January 28, 2025, the district court denied Bowman injunctive relief. DE 21. This emergency motion follows.

ARGUMENT

This matter comes to the Court on review of the district court’s denial of a motion for injunctive relief, which the district court construed as a request for a temporary restraining order. Appellate review of such a denial is conducted under an abuse of discretion standard. The Court reviews legal conclusions de novo and factual findings for clear error. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). The district court issued only legal conclusions, and did not hold a hearing or make any factual findings. As such, the Court’s review in this case is de novo, under which the Court may consider the issues anew and reach its own conclusions independent from those of the district court. *See Stone v. Instrumentation*

³ In response to Dr. Waisel, Defendants filed a declaration from their own anesthesiologist, Dr. Joseph Antognini, disputing Dr. Waisel’s conclusions. DE 18-1.

Laboratory Co., 591 F.3d 239, 246 (4th Cir. 2009) (“de novo review entails consideration of an issue as if it had not been decided previously.”) (citation omitted).

There are two separate but interrelated legal frameworks that underlie this appeal. The first is that a temporary restraining order or 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 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).

The second framework is the one governing procedural due process claims. “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). To establish the existence of a state-created liberty interest, a prison inmate must first show that a state statute, regulation, or policy “creates an objective expectation in 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) (cleaned up). If a liberty interest does exist, then the procedural due process inquiry 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 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.

I. The district court misapplied the law when concluding that Bowman has no state-created liberty interest entitling him to procedural due process protections.

The district court’s sole basis for denying an injunction or restraining order was that state law does not provide Bowman with a liberty interest that meets the criteria for procedural due process protection. DE 21, pp. 13-20. In reaching this conclusion, the district court misunderstood the manner in which federal courts are tasked with discerning state-created rights that trigger the federal procedural due process analysis.

This Court has summarized the applicable procedural due process holdings of the U.S. Supreme Court in *Slezak v. Evatt*, 21 F.3d 590, 593-95 (4th Cir. 1994). “The logical first question in assessing” a procedural due process issue is “whether the inmate has a protectible liberty interest” in the right he seeks to vindicate. *Id.* at 594. This case does not involve a federal constitutional liberty interest, but does suggest the possibility of a liberty interest under state law. “[S]uch a liberty interest . . . may be created by state law having a very specific quality.” *Id.* That quality is two-fold: first, state law must place “substantive limitations on official discretion,” and second, there must be “explicitly mandatory language in connection with requiring substantive predicates.” *Id.* (citations omitted). Further, these two qualities must work together in a particular way. State law can only be said to confer a procedural due process liberty interest when the state

law mandates “substantive *results* once prescribed procedures have revealed that substantive predicates have been established.” *Id.* (citation omitted). Put differently:

[C]onstitutionally protected liberty interests are only created by state law regimes which in the end effectively say to inmates: “If facts A, B, and C are established in an appropriate fact-finding process, you are thereupon legally entitled to a more favorable security or custody classification than you presently have,” or, “Unless facts A, B, and C are so established, you are legally entitled not to be placed in a less favorable classification than you now have.”

Id. at 595.

The state law here fits the bill, and straightforwardly so. First, state law provides Director Stirling with substantive predicates to follow when determining the availability of lethal injection drugs and certifying the same to the state supreme court. The statute, S.C. Code § 24-3-530(B), requires the Director to determine and certify the available methods of execution. In *Owens*, the state supreme court said that this provision “require[s] the Director to disclose some basic facts about the drug’s creation, quality, and reliability,” or put another way, “the drugs’ potency, purity, and stability.” 904 S.E.2d at 604 (cleaned up; internal quotations omitted). The state court continued that “the Director necessarily goes through a process that he decides is appropriate for satisfying himself that the drugs are capable of carrying out the death sentence according to law.” *Id.* at 605. The state court concluded that 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.* (quotations omitted).

The substantive predicates here are whether the execution drugs are potent, pure, and stable such that they can carry out the death sentence.⁴ And as required by statute, if the Director finds that these substantive predicates are met, then S.C. Code § 24-3-530(B) mandates that the Director “shall determine and certify” lethal injection’s availability, as the state court defined availability in *Owens*: “the point of law on which we primarily rely is the text of subsection 24-3-530(B)” when defining the Director’s statutory certification obligations. 904 S.E.2d at 292. This in turn satisfies the liberty interest formula this Court laid out in *Slezak*. “If facts A, B, and C are established [in this case, potency, purity, and stability of the drugs] in an appropriate fact-finding process, you [here, Mr. Bowman] are thereupon legally entitled to” receive information about the Director’s determination. *Slezak*, 21 F.3d at 595.

The district court reached a different conclusion on legally incorrect grounds. First, the district court reasoned that state law creates no liberty interest in the specific information Bowman seeks because the state supreme court previously rejected other inmates’ request for that information, and also because the statute does “not require by explicitly mandatory language that the Director provide the Additional Information . . . [or] require him to provide the information at all.” DE 21, pp. 19-20. Yet the Supreme Court has been clear, repeatedly, that state requirements can be mandatory while simultaneously leaving state officials with room to exercise their discretion. In other words, a mandatory state law is not the same thing as a state law that spells out every detail of the steps that a state official must take. In *Hewitt v. Helms*, 459

⁴ In contrast, the Supreme Court has found that no liberty interest existed for procedural due process purposes when state law provided no guidelines at all. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring) (statute conferring power to commute sentences did not provide “particularized standards or criteria [to] guide the State’s decisionmakers”); *Olim v. Wakinekona*, 461 U.S. 238, 249-250 (1983) (interstate prison transfer left to “completely unfettered” discretion of administrator); *Meachum v. Fano*, 427 U.S. 215, 228 (1976) (intrastate prison transfer at discretion of state officials).

U.S. 460, 471-72 (1983), the Court observed that the state officials' custody classification decisions were "largely predictive" and did not involve "binding requirements," but "on balance" the use of "mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." In *Bd. of Pardons v. Allen*, 482 U.S. 369, 375-76 (1987), the Court reaffirmed the principle from its earlier decision in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), that "general or broad release criteria—delegating significant discretion to the decisionmaker—did not deprive the prisoner of the liberty interest in parole release created by the Nebraska statute [T]he presence of official discretion in this sense is not incompatible with the existence of a liberty interest" In this case, the fact that the SCDC Director retains some discretion over the precise information he will disclose in explaining how he ascertained the potency, purity, and stability of the execution drugs does not negate the fact that the Director's duties are mandatory and governed by statutory predicates as interpreted by the South Carolina Supreme Court in *Owens*.

Second, the district court assigned improper weight to the state supreme court's discussion of Director Stirling's specific disclosures. In *Owens*, the state supreme court provided what it described as "two extreme examples" of the types of certifications that the Director could make in his affidavit about the execution drugs' adequacy, with one being that Stirling accepted the word of an unnamed person, and the other end of the spectrum being essentially what Stirling wound up certifying, that the drugs were tested and verified by the state SLED lab. 904 S.E.2d at 605. However, this was not a definitive determination of the Director's disclosure duties. Far from it, the state court "reiterated" that the Director must comply with the secrecy law and explain "how he determined the drugs were of sufficient 'potency, purity, and stability' to carry out their intended purpose." The state court emphasized it would decide any challenges to the

Director's certification only after that certification was actually issued. *Id.* Thus, rather than “elucidat[ing] [and presumably limiting] the scope of the Director's duties” as the district court believed, this portion of *Owens* merely recognized what is inherent in any exercise of procedural due process: that state authorities retain the limited ability to exercise their discretion within the boundaries prescribed by state law. Indeed, as noted in the U.S. Supreme Court cases discussed above, official discretion is not incompatible with mandatory state directives that create liberty interests.

The district court also misunderstood the import of the state supreme court's decision overruling the objections to Director Stirling's certification prior to Freddie Owens's execution. *See* DE 1-4, 1-6, 1-8 (certification, objection, and order denying objection). As the district court itself observed, Owens objected that Stirling's certification violated both statutory and due process rights in failing to provide adequate information. DE 21, pp. 19-20. The state supreme court then denied the objection without specifying whether it was ruling on statutory grounds, due process grounds, or both. In the subsequent federal lawsuit, *Bixby*, No. 3:24-cv-05072-JDA, Defendants took the position that the state court had rejected the due process objection, *see* DE 10, p. 9, and the district court agreed, *see* DE 19, p. 14. Thus, this decision from the state court was not a “definitive answer” on the scope of state law, as the district court believed when it denied Bowman an injunction. DE 21, p. 20. It is possible the state court was ruling only on the basis of state law. It is also possible it was ruling only that there was no due process problem with Stirling's certification. There is simply no way to know the true legal underpinning of the state supreme court's order. In the absence of clarity, there was no basis for the district court to assume that the state supreme court's overruling of Owens's objection had anything to do with state law.

Further, even if one accepts the district court's premise that the ratification of Stirling's affidavit prior to Owens's execution was somehow a state-imposed limitation on the liberty interest, that does not end the due process inquiry. The U.S. Supreme Court has already rejected this mode of reasoning. 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. The Supreme Court reversed, holding that this amounted to an arbitrary due process violation. The Court went on to reject the notion, urged by Defendants here, 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). Having clarified the role of federal review in ensuring federal constitutional protections as to a state-created right, 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 certification about the execution drugs does not answer the procedural due process question; it only begins it.

At the end of the day, the answer to the question whether Bowman has a state-conferred liberty interest should be simple: state law provides substantive predicates for the SCDC Director to certify the availability of lethal injection drugs, and imposes a mandatory requirement that the

Director issue that certification, thereby limiting the Director's discretion. This is more than enough to conclude that state law confers on Bowman a liberty interest that in turn triggers procedural due process protections. Because the district court got this question wrong and declined to undertake the procedural due process analysis to which Bowman is entitled, this Court should enter a stay and remand for appropriate review in the first instance.

II. After conducting the preliminary injunction and procedural due process analysis, the balance of equities will tip in Bowman's favor because providing him with the limited information he seeks will not meaningfully impair any state interest.

Should the Court choose to conduct the procedural due process review for the first time on appeal, it should find in Bowman's favor because he has a reasonable likelihood of success on his constitutional claim, and he can satisfy the other factors for granting an injunction.

A. Bowman is likely to succeed on his procedural due process claim.

As already explained, the question whether a plaintiff is entitled to greater procedural due process protections involves a fact-specific analysis and balancing of (a) the 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.

This balance favors Bowman. He has a right under state law to reasonable information; he has tailored his request for information, seeking only that which is not barred from disclosure by state secrecy rules concerning executions; and the information Bowman seeks poses no threat to South Carolina's ability to impose death sentences.

1. Bowman's interest and the risk of erroneous deprivation: Defendants' refusal to provide basic information about the execution drugs undermines Plaintiff Bowman's ability to make an informed choice about his method of execution.

Prior to his execution notice being issued, Bowman asked Director Stirling to disclose the information Bowman would need to make an informed choice about whether lethal injection will be a less inhumane method of execution than other available methods. DE 1-12. Yet the certification Stirling provided does not include any of the information that Bowman requested, as discussed in Dr. Almgren's affidavit. DE 1-7.

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 Bowman cannot meaningfully decide which method of execution "will cause him the least pain" without knowing the risks inherent in the specific drugs Defendants plan to use for lethal injection.

Dr. David Waisel, a practicing anesthesiologist, reached similar conclusions. DE 1-16. Upon review of information pertaining to the execution of Richard Moore, Dr. Waisel, concluded "to a reasonable degree of medical certainty that South Carolina failed to administer five grams of effective pentobarbital during the execution of Richard Moore" resulting in the "substantial risk that he experienced needless and extensive suffering during his execution." *Id.* He explained that because of the "State's inadequate transparency, there is insufficient information about the lethal injection process for anyone to assess its risks and benefits as compared to execution by firing squad or electrocution." *Id.*

Bowman also needs the information because his unusually large body size increases the risk that the standard dose of pentobarbital will fail to bring about his death in a timely and humane way. Further, because of Plaintiff Bowman's unusually large body size, he will require a different dosage than the average person to ensure the execution occurs without the problems seen in Moore's execution. As Dr. Waisel explained, because Plaintiff Bowman's body composition falls into the "severely obese" category, there is an increased danger of difficult IV access that could be compounded by an "ineffective dose of pentobarbital" leading to a potentially torturous execution process. *Id.*

Moreover, the circumstances of Richard Moore's recent execution suggest that SCDC has already conducted at least one pentobarbital execution that inflicted unanticipated pain. Dr. Waisel reviewed records pertaining to Mr. Moore's execution. This review revealed numerous troubling facts and issues pertaining to Mr. Moore's execution:

Mr. Moore's autopsy revealed he was administered "2 x 2.5 g pentobarbital [5 grams] at 18:01" and "a second round of 2 x 2.5 g [5 grams] at 18:12." He was pronounced dead 23 minutes after the administration of the initial 5 grams of pentobarbital at 18:24. Given the extraordinarily high dose of pentobarbital administered at the outset of the execution, it is concerning that two separate five-gram doses of pentobarbital were required before Richard Moore was declared dead. A properly administered dose of five grams of effective pentobarbital should eliminate all breathing within a minute or less. . . I believe to a high degree of medical certainty that it is physiologically and pharmacologically impossible for Mr. Moore to remain alive for ten minutes after a dose of five grams of fully-potent pentobarbital, unless that dose was not delivered completely.

Mr. Moore's autopsy also documents that he suffered from pulmonary edema. . . pulmonary edema is when fluid from the bloodstream floods the lungs, making it more difficult to breathe, and causing sensations of shortness of breath similar to the experience of drowning. While pulmonary edema can have many causes, it is my belief with a reasonable degree of medical certainty that Mr. Moore's edema was caused by the obstruction of

his upper airway from the sedation effects of pentobarbital, even as he continued breathing, which caused fluid to seep out of the blood vessels inside his lungs. Mr. Moore's autopsy report documents clinical features of this type of edema—called negative pressure pulmonary edema—in that he had pink froth in his airway. Its onset would occur almost immediately following the initial IV administration of pentobarbital, as the tissues in his upper airways collapsed and his vocal cords closed. If sensate, a person whose lungs filled with the fluid of pulmonary edema would suffer feelings of drowning and suffocation. In an execution setting where the administered pentobarbital is either not completely effective or is delivered ineffectively, the pentobarbital would affect the prisoner's airways and lead to pulmonary edema while simultaneously failing to sufficiently anesthetize the prisoner to these torturous sensations. It appears likely that during Mr. Moore's execution, he consciously experienced feelings of drowning and suffocation during the 23 minutes that it took to bring about his death.

DE 1-16.

As both Dr. Waisel and Dr. Almgren explain, without the information outlined above, Bowman will not be in a position to decide between the methods of execution while fully informed of the risks attendant to the lethal injection option. It is difficult to imagine a more weighty private interest than the ability to make an informed decision about one's manner of death. And even the district court, which denied relief, acknowledged that the information Bowman has asked for "could genuinely benefit" him. DE 21, p. 21.

2. The refusal to provide basic information about the execution drugs does not significantly impair any state interest.

In refusing to provide basic information about the drugs, Defendants are likely to assert two state interests: the interest in shielding identifying information about individuals and entities involved in carrying out executions, and the interest in being able to carry out Plaintiff Bowman's death sentence. Yet providing the information Bowman seeks would compromise neither interest.

As for the first interest, confidentiality, Bowman 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), (E), 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, Plaintiff Bowman 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. He has not tried to find out who those people were so their specific history, skills, or qualifications can be scrutinized. Mindful of state law, Plaintiff has 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 to refuse disclosure of this information. Defendants can disclose the drug-related information to Bowman without violating any provision of the secrecy law.

The purpose of the secrecy statute, S.C. Code § 24-3-580, is “to ensure 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” and is not limited to information pertaining to lethal injection. The Defendants provided, in each affidavit, the dates on which the electric chair and systems were tested. Complaints Exhibits 4, 9 and 15. Inexplicably, the Defendants failed to provide similar information regarding the dates on which the lethal injection drugs were tested even though the South Carolina Supreme Court instructed the Defendants that testing should be “recently performed.” Complaint Exhibits 4, 6, 9, 15, 12 and 13; *Owens v. Stirling*, 443 S.C. 246, 293, 904 S.E.2d 580, 605 (2024), *reh'g denied* (Aug. 16, 2024).

Turning to the next State interest, 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 conducted executions while also permitting access to the same or similar information that Bowman seeks.

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.⁵ Yet in the same time period, since 2020, Texas has executed 24 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 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.

⁵ 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).

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 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.

3. Bowman has raised a strong procedural due process claim.

In sum, Bowman can meet the “likelihood of success on the merits” prong of his injunction request because he has a strong claim that Defendants’ conduct violates his procedural

due process rights. Plaintiff Bowman has a state-created right to information about the potency, purity, and stability of the drugs that may be used in his execution. Without the necessary information, it is highly likely, if not certain, that Bowman's right to meaningfully elect his method of execution will go unmet. And Defendants do not have a countervailing State interest because the material Bowman seeks is not expressly barred by state law, Bowman does not seek any material that will risk revealing the identity of any person or entity involved in executions, and other states have been able to conduct executions while also providing the very same information.

B. Plaintiff Bowman will suffer irreparable injury without an injunction.

In the preliminary injunction analysis, the next factor the Court must consider is irreparable injury. Bowman's execution is scheduled for January 31, 2025. 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. "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 lingering and painful method that could have been avoided had the State provided the basic information necessary to make an informed choice about Bowman's manner of death; and a choice, no less, that Bowman has a right to under state law. Because Bowman 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).

The risk of irreparable injury is only heightened by the fact that Richard Moore's pentobarbital execution did not go as planned—possibly involving the terrifying sensation of

drowning for several minutes before his death—and the compounding risk that the available pentobarbital will not be sufficient to bring about a speedy and uncomplicated death for Bowman, a person of unusually large size.⁶ Bowman’s unusually large body size will require a different dosage than the average person to ensure the execution occurs without the problems seen in Moore’s execution. DE 1-16 (Dr. Waisel’s Declaration). Because Bowman’s body composition falls into the “severely obese” category, there is an increased danger of difficult IV access that could be compounded by an “ineffective dose of pentobarbital” leading to a potentially torturous execution process. *Id.* At the very least, due process should require that Bowman have access to all of the available information to assess these risks when choosing his method of execution, where the disclosure of that information is not explicitly barred by state law.

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

As already discussed, the information Bowman seeks is not barred from disclosure by any state law, and has been provided in other states that have been able to vindicate their interests in imposing death sentences. There is no reason why South Carolina should be any different. Moreover, the Court can require disclosure of the drug-related information without having to find any aspect of state law unconstitutional. Bowman’s claim is not that the secrecy law itself violates due process rights; it is that Defendants’ implementation of the law withholds far more than is necessary to protect the state interests the statute was designed to ensure.

⁶ The Department of Corrections shows Marion Bowman’s height as 6’04” and his weight as 389 lbs. (available at *Inmate Search Detail Report, Bowman, Jr., Marion*, <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%20000006006>).

As a result, giving Bowman the information he needs to make a meaningful, informed decision about his method of execution will pose no barrier to Defendants carrying out executions, nor will it meaningfully disrupt any other state interest or state law. While Defendants certainly have an interest in the timely enforcement of death sentences, this interest should carry little weight in the Court's analysis since the relief Bowman seeks in this suit will not cause any significant delay.

Finally, the public interest in disclosure and injunctive relief also favors Bowman. Defendants' secrecy policies about lethal injection are some of the most restrictive in the country, and in some respects conceal more information 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 continue executing prisoners, 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).

In the litigation below, Defendants only mustered speculative reasons why it was implementing the secrecy law as broadly as possible. For example, Defendants suggest that anti-death penalty advocates could "hound the supplier" of the execution drug, or death penalty opponents will uncover and advertise the identities of those involved in executions. DE 18, pp. 22-23. Yet aside from this unsupported alarmism, Defendants never explained how the relief sought—information disclosed to the prisoner's counsel pursuant to a carefully crafted protective order—would lead to advocate hounding or disclosures by death penalty opponents. This Court

should not dismiss procedural due process concerns, let alone those implicating the manner in which a person will die, on the basis of such thin conjecture.

Apparently, what Defendants really believe is that no substantial information about the execution drugs can be provided because, “[n]o matter what steps are taken to protect information in discovery, there remains the inherent danger and hardship that would follow even an inadvertent disclosure.” DE 18, p. 23 (internal citation omitted). This maximalist position reveals how Defendants’ application of the secrecy law is out of balance. The South Carolina Legislature could have passed a law that said no information whatsoever about the execution drugs was allowed to be disclosed. It did not. Instead, the Legislature focused on protecting the identities of the companies and individuals involved in the execution process, not the properties of the drugs. When conducting the due process balancing of Plaintiff Bowman’s interests against those of Defendants, the Court should consider that Defendants’ concealment of information goes well beyond what the plain language of the state secrecy law requires.

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 Bowman. *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 Plaintiff Bowman’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.

CONCLUSION

Marion Bowman has a right under state law to reasonable information needed to make an informed decision about the method by which he will be put to death. That information can be provided without doing any appreciable harm to Defendants' interest in carrying out his execution without undue delay.

The district court below denied injunctive relief without reaching any aspect of the procedural due process analysis prompted by Bowman's suit. The court instead held that Bowman is not entitled to procedural due process protection because state law does not provide any applicable liberty interest in the information he requests about the potency, purity, and stability of the execution drugs. Because this ruling was incorrect, the Court should enter a stay of execution, and remand for the district court to undertake the procedural due process inquiry in the first instance. Alternatively, the Court may reach the full legal question itself, find in Bowman's favor, and enter an order staying his execution until such time as Defendants provide the information outlined in Dr. Almgren's affidavit and afford Bowman the opportunity to make a new, adequately-informed choice about his method of execution.

Bowman respectfully requests that the Court resolve this matter as expeditiously as possible in light of his scheduled execution on January 31, 2025, at 6:00 p.m.

Respectfully submitted,

/s/ Gabrielle Amber Pittman

Gabrielle Amber Pittman

Deputy Chief

Capital Habeas Unit for the Fourth Circuit

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COUNSEL FOR PLAINTIFF

January 29, 2025

The Supreme Court of South Carolina

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

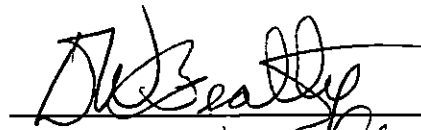
Appellate Case No. 2006-038802

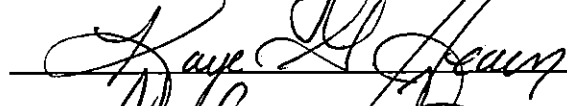
ORDER

Petitioner seeks a stay of execution. The State has filed a return, and Petitioner has filed a reply. The Director of the South Carolina Department of Corrections has provided an affidavit certifying that, as of June 11, 2021, the only statutorily approved method of execution available in South Carolina is electrocution. Further, in response to an inquiry from the Clerk of the Court, the Director has provided an explanation as to why two methods of execution under S.C. Code Ann. § 24-3-530 (2021), lethal injection and firing squad, are currently unavailable.

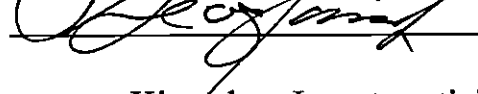
According to the Director's response, lethal injection is unavailable due to circumstances outside of the control of the Department of Corrections, and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies.

Under these circumstances, in which only a single method of execution is available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.


C.J.


J.


J.


J.

Kittredge, J., not participating.

Columbia, South Carolina

June 16, 2021

cc:

Donald J. Zelenka, Esquire

Bryan Peter Stirling, Esquire

Barton Jon Vincent, Esquire

Melody Jane Brown, Esquire

Daniel Clifton Plyler, Esquire

Emily C. Paavola, Esquire

Alan McCrory Wilson, Esquire

The Supreme Court of South Carolina

The State, Respondent,

v.

Brad Keith Sigmon, Appellant.

Appellate Case No. 2002-024388

and

Brad Keith Sigmon, Petitioner,

v.

The State of South Carolina, Respondent.

Appellate Case No. 2021-000584

ORDER

Petitioner was sentenced to death following his convictions for two counts of murder and first-degree burglary. This Court affirmed Petitioner's convictions and sentences on direct appeal, and the United States Supreme Court denied Petitioner's request for a writ of certiorari. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005), *cert. denied*, 548 U.S. 909 (2006). Following the denial of state post-conviction relief and federal habeas corpus relief, the United States Supreme Court denied Petitioner's request for a writ of certiorari. *Sigmon v. Sterling*, No. 8:13-cv-01399-RBH, 2018 WL 4691197 (D.S.C. Sep. 30, 2018), *aff'd*, 956 F.3d 183 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021). Petitioner's execution has been scheduled for June 18, 2021.

Petitioner now seeks a stay of execution pending review of his request for a writ of habeas corpus in this Court's original jurisdiction. In addition, Petitioner seeks a

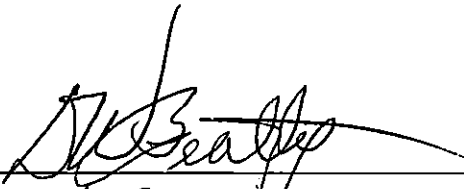
stay of execution until such time as his allegation that permitting his execution to proceed with only one authorized method of execution violates S.C. Code Ann. § 24-3-530 (2021) is determined.

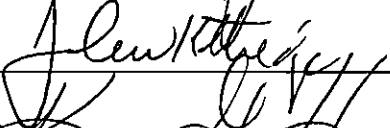
Because Petitioner has failed to show a constitutional violation constituting a denial of fundamental fairness shocking to the universal sense of justice, we deny his request for a writ of habeas corpus in our original jurisdiction. *See* Rule 245(a), SCACR (providing the Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties, unless the public interest is involved, or special grounds of emergency or other good reasons exist why the original jurisdiction of the Court should be exercised); *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (holding that to receive habeas corpus relief in this Court's original jurisdiction, a petitioner must show a constitutional "violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice" (quoting *State v. Miller*, 84 A.2d 459, 463 (N.J. Super. Ct. App. Div. 1951))). As a result, the motion for a stay of execution pending review of Petitioner's request for a writ of habeas corpus is denied.

As to Petitioner's request to stay his execution pending a determination of whether section 24-3-530 has been violated, the Director of the South Carolina Department of Corrections has provided an affidavit certifying that, as of June 3, 2021, the only statutorily approved method of execution available in South Carolina is electrocution. Further, in response to an inquiry from the Clerk of the Court, the Director has provided an explanation as to why two methods of execution under section 24-3-530, lethal injection and firing squad, are currently unavailable.

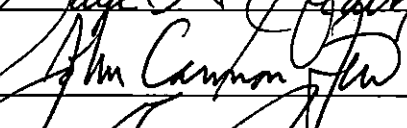
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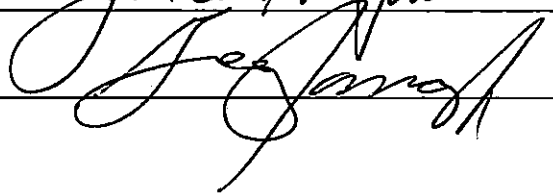
Under these circumstances, in which electrocution is the only method of execution available, and due to the statutory right of inmates to elect the manner of their execution, we vacate the execution notice. *See* S.C. Code Ann. § 24-3-530 (2021). We further direct the Clerk of this Court not to issue another execution notice until the State notifies the Court that the Department of Corrections, in addition to maintaining the availability of electrocution, has developed and implemented appropriate protocols and policies to carry out executions by firing squad.


C.J.


J.


J.


J.


J.

Columbia, South Carolina
June 16, 2021

cc:

Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
Megan Elizabeth Barnes, Esquire
Joshua Snow Kendrick, Esquire
Alan McCrory Wilson, Esquire
Bryan Peter Stirling, Esquire
Barton Jon Vincent, Esquire
Daniel Clifton Plyler, Esquire
J. C. Nicholson, Jr., Esquire

**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

RECEIVED

Sep 19 2023

S.C. SUPREME COURT

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

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 1st DAY OF September, 2023

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

**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

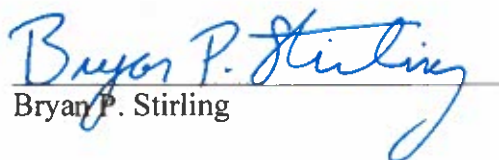
PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

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

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

 (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.

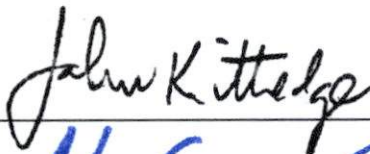
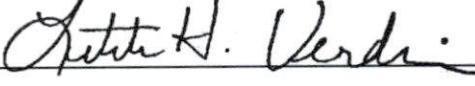
State of South Carolina, Respondent.

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.

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****AFFIDAVIT OF DR. MICHAELA ALMGREN****S.C. SUPREME COURT****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 environment² 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 503b³ outsourcing pharmacy where I perform duties of an outsourcing pharmacist, clinical

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.

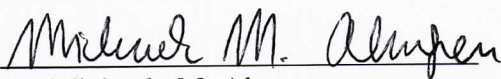
7. The affidavit does not address where the drugs will be stored and how the storage conditions will be monitored between now and September 20th. The nearly three weeks leading up to September 20 provides ample opportunity for quality issues to arise with these drugs if they are not stored correctly, 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.

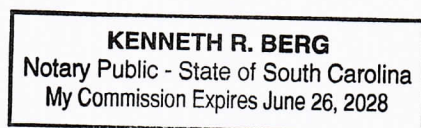

Dr. Michaela M. Almgren

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.



[Signature] (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

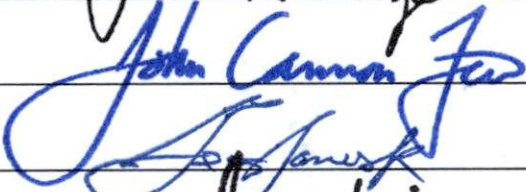
ORDER

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.

RECEIVED**Oct 08 2024****S.C. SUPREME COURT****THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

The State,

Respondent,

v.

Richard Bernard Moore,

Appellant.

Appellate Case No. 2001-021895

The Honorable Gary E. Clary
Spartanburg County
Trial Court Case No. 2000GS4200619, 2000GS4200617, 2001GS4202460

AFFIDAVIT OF BRYAN P. STIRLING

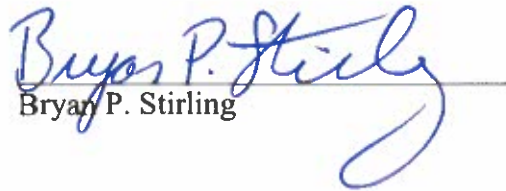
PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who having first been duly sworn, deposes and states as follows:

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 October 4, 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 Richard Bernard Moore.
6. According to the Execution Notice for Richard Bernard Moore, 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 November 1, 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 Moore’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 September 3, 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 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 the Department, 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

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 8th DAY OF October, 2024

 (SEAL)

NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 2/9/2034

The Supreme Court of South Carolina

Brad Keith Sigmon, Mikal D. Mahdi, and Marion
Bowman, Jr., and Steven V. Bixby, Petitioners,

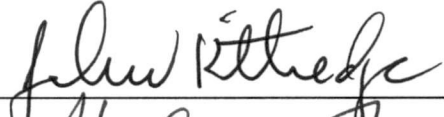
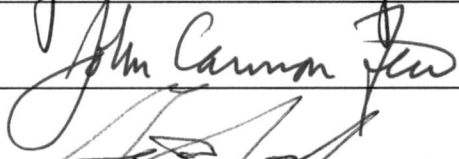
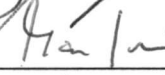
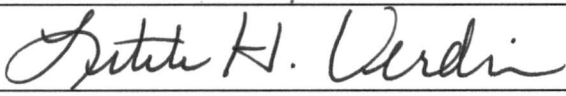
v.

State of South Carolina, Respondent.

Appellate Case No. 2024-001373

ORDER

Petitioners Sigmon, Mahdi, Bowman, and Bixby, death-sentenced inmates who are eligible for notices of execution, ask this Court to modify the schedule set forth in this Court's order dated August 30, 2024, for the issuance of execution notices. They ask that no execution notices be issued until January 3, 2025. We grant the request and hold the issuance of further execution notices in abeyance until January 3, 2025.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina
November 14, 2024

cc:

Joshua Snow Kendrick

Gabrielle Amber Pittman

Alan McCrory Wilson

Melody Jane Brown

Donald J. Zelenka

William Joseph Maye

Gerald W. King, Jr.



**FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF NORTH CAROLINA
Capital Habeas Unit for the Fourth Circuit**
129 West Trade Street, Suite 300
Charlotte, NC 28202
(704) 374-0720
Fax (704) 375-2287

John G. Baker
Federal Public Defender

Megan C. Hoffman
First Assistant

Gerald "Bo" King, Jr.
CHU Chief

November 22, 2024,

Bryan P. Stirling
Director, South Carolina Department of Corrections
P.O. Box 21787
Columbia, SC 29210

Sent via email to stirling.bryan@doc.sc.gov

Re: Marion Bowman, #006006
Request for Information Regarding Execution Drugs

Director Stirling,

In advance of Marion Bowman potentially receiving an execution date in January 2025, we are writing to request that you provide information about the available lethal injection drugs so that Mr. Bowman can make an informed choice among the methods of execution.

As you are aware, pursuant to your obligation to certify the available methods of execution under S.C. Code § 24-3-530(B), you are required to "set forth [the] process" you undertook to determine "that the drugs are capable of carrying out the death sentence" and do so "in sufficient detail that a condemned inmate and his attorneys may understand whether there is a basis for challenging the constitutionality of his impending execution." *Owens v. Stirling*, 443 S.C. 246, 293, 904 S.E.2d 580, 605 (2024).

While you "must comply with the shield statute," S.C. Code § 24-3-580, when making this disclosure, *see Owens*, 293 S.C. at 293, 904 S.E.2d at 605, the law is not a blanket prohibition on disclosing execution drugs' properties. It provides only targeted protection "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." S.C. Code § 24-3-580(I).

We request the following information about the presently available execution drugs, none of which relates to any person or entity's identity:

1. The dates on which the drugs were tested.
2. The Beyond Use Date, after which compounded drugs should not be used.

3. If the drugs were commercially manufactured, the expiration date.
4. The methods and procedures used to test the pentobarbital, including documentation of test method validation and details of quality control procedures and methodology.
5. The actual results obtained from the testing.
6. Where the drugs will be stored prior to their use, and how the storage conditions will be monitored, including temperature and humidity controls.

We recognize we are making this request before an execution notice has issued and prior to the triggering of your statutory obligation to certify the available methods of execution. We believe it is important, however, to submit this request as soon as possible. Pursuant to Judge Austin's decision in *Bixby v. Stirling*, No. 3:24-cv-05072-JDA, issued October 30, 2024, any legal challenge to a decision on your part to not disclose information not covered by the secrecy law will only become ripe after your position on Mr. Bowman's access to information is announced. Judge Austin dismissed claims of this type without prejudice. Mr. Bowman intends to institute a new lawsuit in the event that your certification omits the requested information.

At this preliminary juncture, you may not yet have the information in your possession. If that is the case, our alternative request is that you notify us whether you intend to provide it once it becomes available.

Even though disclosing the information listed in this letter would not violate any aspect of S.C. Code § 24-3-580 or result in the identification of any person or entity involved in executions, we acknowledge the State's interest as codified by the secrecy law. In an abundance of caution, we would agree to a consent protective order restricting our ability to disseminate the information publicly, and redaction of information related to the identity of any person or entity. Our purpose here is solely to provide our client with a sufficient basis to meaningfully exercise his statutory right to elect his method of execution.

Sincerely,



Gabrielle Amber Pittman
Deputy Chief

David Weiss
Assistant Federal Public Defender

COUNSEL FOR MARION BOWMAN

cc: Salley Elliott, elliott.salley@doc.sc.gov
Bart Vincent, vincent.barton@doc.sc.gov



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Division of Legal Counsel & Compliance

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

December 9, 2024

Gabrielle Amber Pittman, Deputy Chief
David Weiss, Assistant Federal Defender
129 West Trade Street, Suite 300
Charlotte, N.C. 28202

RE: Request for Information

Sent via email to G_Amber_Pittman@fd.org and David_C_Weiss@fd.org

Dear Ms. Pittman and Mr. Weiss:

This is to confirm receipt of your letter dated November 22, 2024. As the Department of Corrections has stated in various filings, we believe the previous affidavits submitted by Director Stirling certifying the available methods of execution set forth what is required to adequately explain how the drugs were determined to be sufficient to carry out the intended purpose. Nevertheless, Director Stirling evaluates the information to be included in his affidavit when each notice of execution is received. The Department of Corrections therefore cannot anticipate at this time the specifics of an affidavit certifying available methods of execution for Marion Bowman.

Sincerely,

Salley W. Elliott
Deputy Director of Legal and Compliance

cc: Barton J. Vincent, General Counsel for SCDC

The Supreme Court of South Carolina

The State, Respondent,

v.

Marion Bowman, Jr., Appellant.

Appellate Case No. 2002-023546

The Honorable The Honorable Diane Schafer Goodstein
Dorchester County

Trial Court Case No. 2001GS1800348, 2001GS1800349

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.



CLERK

Columbia, South Carolina
January 3, 2025

cc:

Donald J. Zelenka

Melody Jane Brown

Salley W. Elliott

Lindsey Sterling Vann

Teresa L. Norris

Alan McCrory Wilson

Gerald W. King

John G. Baker

Gabrielle Amber Pittman

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

v.

Marion Bowman, Jr.,

Appellant.

Appellate Case No. 2002-023546

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2001GS1800348, 2001GS1800349

CERTIFICATE OF SERVICE

I certify that the Affidavit of Bryan P. Stirling was served on counsel of record listed below on January 8, 2025, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447:

Lindsey S. Vann at lindsey@justice360sc.org
S. Boyd Young at byoung@sccid.sc.gov
Teresa L. Norris at Teresa_Norris@fd.org
G. Amber Pittman at G_Amber_Pittman@fd.org; apittman@mcgowanhood.com
Gerald W. King at Gerald_King@fd.org
John G. Baker at John_Baker@fd.org
Donald J. Zelenka at dzelenka@scag.gov
Melody J. Brown at MBrown@scag.gov
Alan McCrory Wilson at agwilson@scag.gov

Respectfully Submitted,



Salley W. Elliott
S.C. Bar No. 1871
South Carolina Department of Corrections
P.O. Box 21787
Columbia, S.C. 29221-1787
(803) 896-4237
Elliott.Salley@doc.sc.gov

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

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 Affidavit of Bryan P. Stirling, dated January 7, 2025.

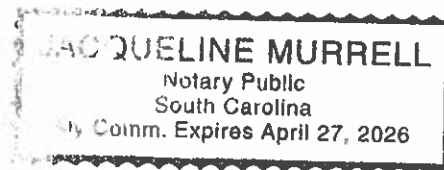
STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) AFFIDAVIT OF PERSONAL SERVICE

On the 8th day of January 2025, I served the Affidavit of Bryan P. Stirling, dated, January 7, 2025, by delivering personally and leaving a copy of the same at Broad River Correctional Institution, 4460 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 8th day of January 2025

Jacqueline Murrell (L.S.)
Notary Public for South Carolina
My Commission Expires: 4.27.26



ACCEPTANCE OF SERVICE

Service of a copy of the within Affidavit of Bryan P. Stirling is accepted at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina, this 8th day of January 2025.

s/ Marion Bowman, Jr.
Marion Bowman, Jr.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

The State,

Respondent,

v.

Marion Bowman, Jr.,

Appellant.

Appellate Case No. 2002-023546

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No. 2001GS1800348, 2001GS1800349

AFFIDAVIT OF BRYAN P. STIRLING

MS #1

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

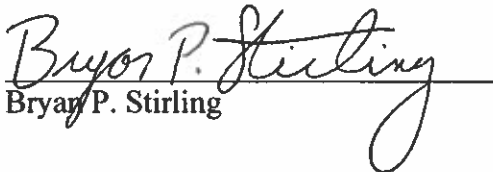
1. I am over the age of eighteen, of sound mind, and competent to give this testimony.
2. I served as the Interim Director of the South Carolina Department of Corrections ("Department") between October 1, 2013, and February 19, 2014, when I was confirmed by the Senate as the Director. I have served as 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 January 3, 2025, 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 Marion Bowman, Jr.
6. According to the Execution Notice for Marion Bowman, Jr., 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 January 31, 2025.
7. I hereby certify that all three statutorily approved methods of execution—electrocution, the firing squad, and lethal injection—are available for carrying out Bowman'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 January 6, 2025, 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 and confirmed the concentration of the solution

BMK

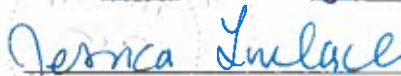
provided is consistent with the vial labeling of pentobarbital, 50 milligrams per milliliter, and acknowledged the substance's concentration in terms of its purity and stability. The appropriate and responsible Department staff reported to me that, based on a review of SLED's test results, data published by National Institutes of Health, and information regarding executions by lethal injection using pentobarbital carried out by the Department, 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

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 7th DAY OF January, 2025

 (SEAL)

NOTARY PUBLIC FOR S.C.
COMMISSION EXPIRES: 4/5/2026

MP5
#3

DECLARATION OF DR. DAVID B. WASEL, M.D.

I. Expert Qualifications

I, Dr. David B. Waisel, M.D., am currently a practicing anesthesiologist at St. Jude Children's Research Hospital in Memphis, Tennessee. I served as a Professor of Anesthesiology at Yale School of Medicine from September 2020 through December 2023, and an Associate Professor of Anesthesia at Harvard Medical School from July 2006 through August 2020. I have been practicing clinical anesthesiology for approximately thirty (30) years, and I have administered anesthesia to more than 20,000 patients. I am currently licensed to practice in Tennessee.

I was certified as a Diplomate by the American Board of Anesthesiology in 1994. I performed voluntary recertification in 2005 and 2016. I was also certified as a Diplomate by the American Board of Anesthesiology for Pediatric Anesthesiology in 2013 and performed voluntary recertification in 2024. My complete curriculum vitae is included with this report as an Attachment.

II. Referral Question

I have been asked by counsel for Plaintiff Marion Bowman to provide an expert medical opinion as to whether South Carolina provides him with sufficient information to assess the risks and benefits of execution by lethal injection as compared to the state's other available methods of execution.

III. Documents and Resources Considered

I have reviewed the documents provided to me in this matter, as well as other readily available reference materials. The most notable materials include:

- Autopsy report for Richard Moore
- Declaration of Dr. Michaela Almgren
- Press Conference following execution of Freddie Eugene Owens
- Press Conference following execution of Richard Moore

My opinions are based on the information available to me as of the date of this report. Should further information become known to me through additional documentation, reports, or testimony relevant to my opinions in this matter, or should I receive additional requests from Plaintiff's counsel, I may supplement this report as needed.

IV. Conclusions and Opinions

My understanding is that death-sentenced prisoners in South Carolina are offered the option of execution by lethal injection, firing squad, or electrocution. This declaration concerns lethal injection only.

Based upon the information I have now, it is my opinion to a reasonable degree of medical certainty that South Carolina failed to administer five grams of effective pentobarbital during the execution of Richard Moore. As a result, there is a substantial risk that he experienced needless and extensive suffering during his execution.

It is my opinion to a reasonable degree of medical certainty that, given the State's inadequate transparency, there is insufficient information about the lethal injection process for anyone to assess its risks and benefits as compared to execution by firing squad or electrocution.

V. Discussion and Analysis

1. I have been told that executions in South Carolina call for the administration of pentobarbital via intravenous injection. Pentobarbital is a member of a class of drugs called barbiturates. Barbiturates act on the body by depressing various organ systems, including the central nervous system. Pentobarbital is classified as "short-acting," which means that it has an initial onset of action within one arm-brain circulation time, which is usually considered to be less than 1 minute and is often more rapid.
2. Furthermore, IV drugs, including barbiturates, have a remarkably consistent drug-specific onset upon reaching a functioning intravenous circulation. I would expect to see even greater consistency of effect with higher doses. For instance, if a patient received a 350 mg/kg dose, I would expect a somewhat quicker effect in a 50 kg patient and a somewhat slower onset in heavier patients in which the per kg basis is less than 5 mg/kg (e.g. 100 kg). Larger doses, however, make such distinctions non-consequential. The larger doses mean that there should be remarkable consistency in the onset of action.
3. I have been informed that South Carolina prison officials are declining to provide death-sentenced inmates with any specific information about the potency, purity, or stability of the particular dose of pentobarbital to be used in their executions, with the sole exception of providing a general assurance that the drugs have been tested and approved by the forensic lab of the S.C. Law Enforcement Division (SLED). State prison officials are also declining to provide death-sentenced inmates with any of the SLED lab reports or results.
4. I have reviewed the affidavit of Dr. Michaela Almgren, which details the information needed to ensure that the pentobarbital South Carolina uses in execution is effective. I concur with her conclusions, and like Dr. Almgren, it is my opinion that the information she identifies is necessary for a death-sentenced inmate to be able to make a meaningfully informed decision about the relative risks of lethal injection compared to the other available execution methods.
5. The concerning circumstances surrounding the two most recent executions in South Carolina—which indicate that problems occurred—amplify the need for prisoners to be provided with information about the execution drugs going forward.
6. Records detailing the precise actions taken to carry out the executions by lethal injection of Richard Moore (November 1, 2024) and Khalil Allah (Freddie Owens) (September 20, 2024) are unavailable. This limits the ability to evaluate precisely what occurred during

those executions, which makes it difficult to assess the risks posed by this method. However, what we do know about each execution is disturbing.

7. Mr. Moore's autopsy revealed he was administered "2 x 2.5 g pentobarbital [5 grams] at 18:01" and "a second round of 2 x 2.5 g [5 grams] at 18:12." He was pronounced dead 23 minutes after the administration of the initial 5 grams of pentobarbital at 18:24. Given the extraordinarily high dose of pentobarbital administered at the outset of the execution, it is concerning that two separate five-gram doses of pentobarbital were required before Richard Moore was declared dead. A properly administered dose of five grams of effective pentobarbital should eliminate all breathing within a minute or less.
8. I believe to a high degree of medical certainty that it is physiologically and pharmacologically impossible for Mr. Moore to remain alive for ten minutes after a dose of five grams of fully-potent pentobarbital, unless that dose was not delivered completely.
9. Mr. Moore's autopsy also documents that he suffered from pulmonary edema, a complication that, in my experience, occurs in many, if not most, executions involving pentobarbital. Generally, pulmonary edema is when fluid from the bloodstream floods the lungs, making it more difficult to breathe, and causing sensations of shortness of breath similar to the experience of drowning. While pulmonary edema can have many causes, it is my belief with a reasonable degree of medical certainty that Mr. Moore's edema was caused by the obstruction of his upper airway from the sedation effects of pentobarbital, even as he continued breathing, which caused fluid to seep out of the blood vessels inside his lungs. Mr. Moore's autopsy report documents clinical features of this type of edema—called negative pressure pulmonary edema—in that he had pink froth in his airway. Its onset would occur almost immediately following the initial IV administration of pentobarbital, as the tissues in his upper airways collapsed and his vocal cords closed. If sensate, a person whose lungs filled with the fluid of pulmonary edema would suffer feelings of drowning and suffocation. In an execution setting where the administered pentobarbital is either not completely effective or is delivered ineffectively, the pentobarbital would affect the prisoner's airways and lead to pulmonary edema while simultaneously failing to sufficiently anesthetize the prisoner to these torturous sensations. It appears likely that during Mr. Moore's execution, he consciously experienced feelings of drowning and suffocation during the 23 minutes that it took to bring about his death.
10. While no autopsy was performed on Mr. Owens, I listened to a press conference given by the South Carolina Department of Corrections, which reported that his execution began at 6:35 p.m., and that he was declared dead at 6:55 p.m. Given what happened in Mr. Moore's execution, I would want to know whether Mr. Owens's twenty-minute execution also required a second dose of five grams of pentobarbital. Because a properly administered dose of effective pentobarbital should stop breathing within a minute, the fact that Mr. Owens' execution lasted 20 minutes indicates that a problem of some kind occurred.
11. The absence of drug property information is even more concerning for Marion Bowman in light of his body composition, which I am informed is 6'4", 375 lbs. This is a body mass index of 46, which is in the category of "Severely Obese." Peer-reviewed published

outcome data indicate that the prevalence of difficult IV access has been reported at 3.1 – 5.9%, depending on many characteristics including BMI.¹ Bowman’s execution process could become especially complicated, and even torturous, in the event that problems caused by an ineffective IV were compounded by an ineffective dose of pentobarbital.

12. On the basis of all the materials I have reviewed, it is my conclusion that the vast lacunae of available information makes it impossible for Mr. Bowman and his counsel to make an informed decision about his preferred execution method.

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

Executed on January 10, 2025.

/s/ David B. Waisel
David B. Waisel, M.D.

¹ Difficult IV access can be defined as whether obtaining access on the first attempt is unsuccessful or whether access is unable to be obtained. Data typically coalesces around 3-30% of difficult IV access for patients with minimal risk factors and greater than 50% of difficult IV access for patients with significant risk factors. See Heart & Lung 2020;49:273-286; J Clin Med 2020;9:799; J Clin Nurs 2017;26:4267-75; Br J Anaesth 2018;121:358-66; BioMedical Material and Engineering 2013;23:93-108, among others.