

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.

**REPLY IN SUPPORT OF APPELLANT BOWMAN'S
EMERGENCY MOTION FOR INJUNCTIVE RELIEF**

After more than a decade with no executions, South Carolina is poised to execute its third prisoner in just over four months, with at least three more executions anticipated between now and May. This dramatic return to executions is occurring pursuant to Appellee's misuse of state law to withhold information about the execution process to a degree that appears more restrictive than any other jurisdiction in the country. But, because of the breakneck pace of executions, the profound legal and constitutional questions arising from South Carolina's uniquely secretive approach have been subjected to federal review through hurried litigation in the days before an execution. This Court has never had an opportunity to issue a reasoned decision on this critically

important life-and-death matter. The Court should grant a stay to ensure thorough and careful review of the procedural due process violations detailed below before South Carolina can continue executing one prisoner after another.

With respect to Defendants' specific grounds for denying a stay, they continue to press reasons that they presented to the district court, but that the district court, for the most part, did not even address. Perhaps this was wise, as Defendants' positions lack merit.

I. Defendants wrongly assert that Bowman is required to first exhaust his federal constitutional claim in state court.

Defendants made this argument to the district court, but that court declined to address it. DE 21, p. 18. And for good reason.

As an initial matter, Defendants' argument should be rejected because "Congress could, of course, have routed all federal constitutional questions through the state court systems" but it "resolved differently and created the federal court system." *Wisconsin v. Constantineau*, 400 U.S. 433, 437-39 (1971).

Defendants also fail to contend with the fact that exhaustion is unnecessary when "we can say in advance of resort to the statutory procedure that it is incapable of affording due process . . ." *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 774 (1947) (internal citation omitted). Thus, as this Court explained in another case raising constitutional challenges to state procedures, "[w]here it is clear that resort to administrative remedies would be incapable of affording due process, there is certainly no need to exhaust." *Thetford Properties v. U.S. Dep't of Housing & Urban Development*, 907 F.2d 445, 449 (4th Cir. 1990); *see also Volvo GM Heavy Truck Corp. v. U.S. Dep't of Lab.*, 118 F.3d 205, 215 (4th Cir. 1997) (reaffirming *Thetford's* recognition that exhaustion of constitutional claims may be futile in some circumstances); *see also Darby v. Kemp*, 957 F.2d 145, 147 (4th Cir. 1992) (explaining that "exceptions [to

exhaustion] include futility of administrative review . . . and inadequacy of administrative remedies”) (overruled on other grounds).

Here, it would have been futile for Bowman to bring his request for more information about the execution drugs to the South Carolina Supreme Court. As this Court is well aware, prior to Freddie Owens’s execution, Director Stirling provided a certification about the testing of execution drugs, Owens raised due process concerns and requested the same information that Bowman seeks, and the state supreme court rejected the request. *See Bixby*, Doc. 1-3 and 1-5 to 1-7. Then, in the *Bixby* case, Defendants came to this Court and argued that the federal suit—which, as here, sought the information the state supreme court denied—had to be dismissed because the state supreme court already decided the procedural due process issue. *Id.* at Doc. 10, pp. 8 (Defendants arguing that the “S.C. Supreme Court has already rejected Owens’s argument.”). The certification that Director Stirling has now filed prior to Mr. Bowman’s execution contains an identical discussion of the drug testing as the one provided before Owens’s execution. *Compare* Doc. 1-4 with 1-15. It would be futile for Bowman to challenge the adequacy of a certification, and the scope of the information it discloses, when it has already been ratified by the state court. *See also Zinermon v. Burch*, 494 U.S. 113, 124-26 (1990) (procedural due process violation is actionable in federal court “where the state remedy, though adequate in theory, was not available in practice”).

This Court should reject Defendants’ “heads I win, tails you lose” approach. In the prior *Owens* litigation, Defendants argued that Mr. Owens could not seek federal review of his procedural due process claim because it was already decided by the state supreme court. But now, Defendants argue Mr. Bowman cannot seek federal review because he did not go to the state court first with his federal claim. Clearly, Defendants would prefer if there was no federal

forum at all to hear Bowman's federal constitutional claim, but that is simply not how our court system works.

II. Defendants wrongly suggest that Bowman has not raised a cognizable procedural due process claim.

Bowman has a statutory right to choose among the available methods of execution under S.C. Code § 24-3-530. Bowman also has a state-created right to information about the methods of execution. *See Owens v. Stirling*, 904 S.E.2d 580, 605 (2024). The state supreme court guaranteed in *Owens* that "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available." *Id.* at 608. Absent adequate information, the statutory right to elect the most humane, least cruel method of execution is effectively meaningless. Defendant Stirling's inexplicable refusal to provide information regarding lethal injection, which no statutory bar prohibits, implicates Bowman's state-created right to information and to choose his method of execution. Because a state-created liberty interest is at stake, Bowman is entitled to procedural due process protections.

Defendants attempt to recast Bowman's claim as one that is not cognizable under procedural due process because, in Defendants' telling, it is a substantive request for information rather than a complaint about the process that state law provides. Doc. 21, pp. 20-21.

The first reason this fails is that no court has ever embraced the novel theory that Defendants now espouse. In the district court's prior order, it cataloged the decisions of the Fifth, Sixth, Eighth, and Eleventh Circuits where death row inmates brought procedural due process claims challenging secrecy statutes and seeking information about execution procedures. *See Bixby*, No. 3:24-cv-5072-JDA, Doc. 31, pp. 27-28. Not a single one rested on or even mentioned the premise that these were non-viable procedural challenges. All were decided on the ground

that there was no cognizable liberty interest in information about execution methods, and none involved South Carolina's unique conferral of a state liberty interest in electing a method of execution or its recognition of the need for "basic facts" in the exercise of that right. The Court should decline Defendants' invitation to greenlight Mr. Bowman's execution through a wholly new legal theory unmoored from case law.

In further contrast, there are procedural due process decisions where the nature and scope of information provided to plaintiffs was a key factor in assessing whether state procedure satisfied federal constitutional concerns. In *Wolff v. McDonnell*, 418 U.S. 539, 563-65 (1974), the Court held that "the minimum requirements of procedural due process" called for prisoners facing discipline to receive "written notice of the charges" and a "written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." In a parallel with the issues here, the Court in *Wolff* noted that the provision of information "helps to insure [that state officials] will act fairly." *Id.* at 656. Similarly, in *Wilkinson v. Austin*, 545 U.S. 209, 225-26 (2005), a prison procedure for classifying prisoners for supermax placement was held sufficient to comply with procedural due process, in part, because procedures required that prisoners be provided with "a brief summary of the factual basis for the classification review." *See also Dyer v. Maryland State Bd. of Educ.*, 187 F. Supp. 3d 599, 617 (D. Md. 2016) ("The notice and hearing requirements are distinct aspects of procedural due process and are governed by separate standards: notice, in particular, is an elementary and fundamental requirement of due process, and must be *reasonably calculated to convey information concerning a deprivation.*") (emphasis added; quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).¹

¹ Even in other § 1983 lawsuits where no state-created liberty interest existed, federal judges have acknowledged that procedural due process claims are a proper vehicle for death row inmates to seek information about the execution process. In *Phillips v. DeWine*, 841 F.3d 405,

Consistent with case law, the district court’s prior decision in *Bixby* accepted the premise that the claim raised in this suit is properly characterized as a matter of procedural due process. When discussing the extent to which the state supreme court conferred liberty interests on death row inmates in *Owens*, the court “acknowledge[d] that the Death Penalty Statute also provides the Remaining Plaintiffs with a right to have the Director *explain the process* he used to satisfy himself that the SCDC has drugs that are adequate to conduct an execution by lethal injection.” *Bixby*, Doc. 31, p. 31 n.16 (emphasis added). Thus, Bowman’s claim in this suit is that, by denying him access to a very basic set of information, Defendants arbitrarily deprived him of his state-created right to an explanation of Director Stirling’s process of verifying the execution drugs’ adequacy. And when a state confers a liberty interest as a matter of “state procedural law . . . that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). No amount of rewording by Defendants can change the procedural nature of Bowman’s claim.

III. Defendants draw the Court’s attention to the applicable legal framework for identifying state liberty interests that are protected by due process, but have waived their argument under that framework.

As Defendants note, Bowman’s briefing relies in part on the methodology for identifying protected liberty interests—i.e., mandatory state directives and substantive predicates under state law—promulgated by the Supreme Court in *Hewitt* and *Greenholtz*. Doc. 21, p. 19. Defendants state that the Supreme Court moved away from that framework in *Sandin v. Conner*, 515 U.S.

431 (6th Cir. 2016), dissenting Judge Stranch explained that “[t]he appropriate analysis of plaintiffs’ due process claim employs the procedural due process framework set forth in” *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Jones v. Commissioner*, 812 F.3d 923, 935 (11th Cir. 2016), four dissenting judges noted that the en banc majority failed to apply the *Goldberg* and *Mathews* procedural due process framework to the challenge to Georgia’s lethal injection secrecy law.

472, 482 (1995). *Id.* Yet Defendants fail to explain this Court’s own synthesis of Supreme Court precedent governing procedural due process, including *Sandin*. This Court has said:

To [establish the existence of a state-created liberty interest, a prisoner] must show that the Operating Procedure creates an “objective expectation” in the liberty interest “in such a way that an inmate could reasonably expect to enforce [it] against prison officials.” *Thompson*, 490 U.S. at 465, 109 S.Ct. 1904. That objective expectation can be created by “substantive predicates” that “guide” or “limit” official discretion and that use “explicitly mandatory language” such that “a particular outcome must follow” if those predicates are satisfied. *Id.* at 462–63, 109 S.Ct. 1904 (cleaned up). Moreover, if the regulation is shown to be sufficiently mandatory, Desper would also have to show that deviating from that procedure “imposes atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995); *see also Prieto v. Clarke*, 780 F.3d 245, 248–57 (4th Cir. 2015).

Desper v. Clarke, 1 F.4th 236, 247 (4th Cir. 2021).

Thus, *Sandin* did not do away with the inquiry into mandatory directives and substantive predicates. It only added an additional layer to the analysis, examining whether the state rule at issue imposes atypical hardships. But Defendants have never argued or addressed this point, either in this litigation or in *Owens*. Accordingly, Defendants have waived it as a basis for denying Bowman relief.

IV. Dr. Waisel’s declaration raises legitimate concerns that should factor into the weighing of due process, but the resolution of competing expert views is unnecessary in this context.

By proffering Dr. Antognini’s declaration and criticizing the questions that Dr. Waisel raised about the executions of Freddie Owens and Richard Moore, Defendants invite the Court to resolve competing factual claims in a battle of experts. But this is not an Eighth Amendment case, and the Court need not make factual determinations on the question of whether lethal injection constitutes cruel and unusual punishment. Instead, the procedural due process analysis

invites the Court to weigh the value of additional procedural safeguards (here, the disclosure of more information) as one factor when assessing whether Bowman's and the State's interests are appropriately balanced.

Against this backdrop, several important facts remain uncontested by Defendants. Defendants do not, and cannot contest that Dr. Waisel is an eminently qualified anesthesiologist who understands the procedures and risks involved in administering pentobarbital. Defendants do not, and cannot contest, that Moore was given a second dose of pentobarbital, even though the initial dose was extraordinarily high and by itself should have been sufficient to bring about his death. And several important questions remain unanswered by Defendants. Why was the administration of a second dose necessary for Moore? Was a second dose also necessary for Owens? And why do Defendants refuse to share the information about the properties of their pentobarbital that could answer those questions?

In light of these legitimate questions about pentobarbital's efficacy in prior executions—and regardless of their ultimate resolution—the provision of additional information about the potency, purity, and stability of the execution drugs will allow Bowman to have a meaningful understanding of whether the drugs will carry out their intended purpose. This is precisely the right that the state supreme court conferred. *See Owens v. Stirling*, 904 S.E.2d 580, 604-05 (S.C. 2024) (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.”).

CONCLUSION

In sum, South Carolina has undertaken its accelerated and dramatic return to executions pursuant to a sweeping state secrecy law that, particularly as misapplied by Appellees, raises serious procedural due process questions that, because of the state's extraordinarily quick

timetable for executions, have never had the full and thorough review that they deserve, and that the Constitution requires. Nor have any death row inmates delayed raising these issues. Indeed, in the prior *Bixby* case, the district court said the issue was not ripe until Director Stirling issued his certification, which under state law comes just three weeks before the execution date.

At the very least, this Court should issue a stay to permit a more considered and deliberate review process of these important constitutional issues before allowing South Carolina to continue its parade of executions.

Respectfully submitted,

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January 30, 2025

CERTIFICATE OF COMPLIANCE

The foregoing document complies with the Court's word limit for replies to motions.

This document has been served upon counsel of record through the CM/ECF filing system.

January 30, 2025

s/ Gabrielle Amber Pittman