

RECEIVED

**Steven Vernon Bixby**

May 26 2023

S.C. SUPREME COURT

**v.**

**State of South Carolina**

**Attachment #1**

No. 22-4

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**STEVEN VERNON BIXBY,**

*Petitioner-Appellant,*

v.

**BRYAN P. STIRLING,** Commissioner,  
South Carolina Department of Corrections;  
**LYDELL CHESTNUT,** Deputy Warden,  
Broad River Correctional Institution Secure  
Facility,

*Respondents-Appellees.*

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STATUS REPORT

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\*CAPITAL CASE\*

Petitioner-Appellant Bixby is a South Carolina inmate under a sentence of death. He is currently appealing from the denial of a Rule 60(b), Fed.R.Civ.P. motion filed in the District Court of South Carolina in his closed 28 U.S.C. § 2254 habeas action. (COA No. 22-4). The district court construed the filing as an unauthorized successive petition and denied the motion. The district court also denied a certificate of appealability. See C/A 4:17-cv-00954-BHH, ECF No. 185.

Petitioner-Appellant Bixby appealed the district court's previous denial of 28 U.S.C. § 2254 relief, with this Court denying a certificate of appealability on April 29, 2022. (COA No. 21-5, Doc. 53). Yesterday, the Supreme Court of the United

States issued an Order List which shows the Court has denied Mr. Bixby's Petition for Writ of Certiorari. The completion of the prior appeal has today been reported to the Supreme Court of South Carolina. (Attachment 1, with copy of SCOTUS Order List from May 15, 2023).

Respondents file this status report to advise of the completion of the prior appeal and the report to the state court. The denial of the petition reflects the completion of Petitioner-Appellant Bixby's ordinarily available state and federal remedies. A notice of execution may issue.<sup>1</sup> *See In re Stays of Execution in Cap. Cases*, 471 S.E.2d 140, 142 (S.C. 1996). If so, Respondents will advise of same.

Respectfully Submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE  
Assistant Attorney General

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<sup>1</sup> In a recent capital case where the inmate had similarly exhausted ordinarily available state and federal remedies, the Supreme Court of South Carolina "direct[ed] the Clerk of Court not to issue a notice of execution until" a "decision in *Owens*" is issued. (Attachment 2). The referenced case is *Owens v. Stirling*, Appellate Case No. 2022-001280 – an appeal that concerns the constitutionality of the State's present methods of execution. A partial remand was ordered on January 26, 2023, regarding discovery. *Owens v. Stirling*, 882 S.E.2d 858 (S.C. 2023). The *Owens* case is still pending as of this filing.

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Columbia, SC 29211-1549  
(803) 734-6305

*s/Melody J. Brown*

By: \_\_\_\_\_  
ATTORNEYS FOR RESPONDENTS

May 16, 2023  
Columbia, South Carolina.

*CERTIFICATE OF SERVICE*

I certify that the foregoing motion was served upon counsel for Petitioner-Appellant, Joshua Snow Kendrick, Esq., John G. Baker, Federal Public Defender, David Weiss and Gretchen L. Swift, Esq., and all other parties to this action via CM/ECF.

*s/Melody J. Brown*

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May 16, 2023.



ALAN WILSON  
ATTORNEY GENERAL

May 16, 2023

*(via e-filing; service by email only)*

The Honorable Patricia A. Howard  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Steven Vernon Bixby v. Stirling, COA4 21-5 (28 U.S.C. § 2254)  
Steven Vernon Bixby v. Stirling, COA4 22-4 (Rule 60(b), Fed.R.Civ.P.)  
State v. Bixby, Appellate Case No. 2007-054161

Dear Ms. Howard:

Yesterday, the Supreme Court of the United States issued an Order List which shows the Court has denied Mr. Bixby's Petition for Writ of Certiorari. (See Attached Order List, p. 4). This concludes Mr. Bixby's ordinarily available federal habeas corpus proceedings under 28 U.S.C. § 2254. The stay issued by the federal district court on August 29, 2017 extended through the proceedings related to the then pending application. See C/A 4:17-cv-00954-BHH, ECF No. 52. See also 28 U.S.C. § 2251. No application is currently pending.

The State is also advising of a separate appeal pending in the Fourth Circuit regarding the July 22, 2022 denial of Mr. Bixby's Rule 60(b), Fed.R.Civ.P. motion. The motion was construed as an unauthorized successive petition and denied. The district court also denied a certificate of appealability. See C/A 4:17-cv-00954-BHH, ECF No. 185. To the State's knowledge, there is neither a separate stay in place, nor, at this time, has one been requested for the post-judgment motion appeal. See *Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018).

Sincerely,

*s/Melody J. Brown*

Melody J. Brown  
Senior Assistant Deputy Attorney General

MBJ/abb  
Enclosure

cc: Joshua S. Kendrick, Esquire (w/copy of SCOTUS Order)

John G. Baker, Esquire (w/copy of SCOTUS Order)  
David Weiss, Esquire (w/copy of SCOTUS Order)  
Gretchen L. Swift, Esquire (w/copy of SCOTUS Order)  
Salley W. Elliott, Esquire (w/copy of SCOTUS Order)  
Barton J. Vincent, Esquire (w/copy of SCOTUS Order)  
The Honorable David M. Stumbo, Solicitor  
    Eight Judicial Circuit (w/copy of SCOTUS Order)  
Victim Advocacy Division (w/copy of SCOTUS Order)

(ORDER LIST: 598 U.S.)

MONDAY, MAY 15, 2023

ORDERS IN PENDING CASES

22A896 WO OF IDEAFARM V. SUPERIOR COURT OF CA

The application for stay addressed to Justice Thomas and referred to the Court is denied.

22M102 MARINOS-ARSENIS, CHRYSOULA V. BLUE CROSS BLUE SHIELD OF NJ

22M103 LAROCHE-ST. FLEUR, MAUDE V. BD. OF BAR OVERSEERS OF MA

The motions for leave to file petitions for writs of certiorari with the supplemental appendices under seal are granted.

22M104 ROLLER, JACKIE R. V. HOLLOWAY, CRYSTAL, ET AL.

The motion for leave to proceed as a veteran is denied.

22-448 CFPB, ET AL. V. COM. FIN. SERVICES ASSN., ET AL.

The motion of petitioners to dispense with printing the joint appendix is granted.

22-631 ) HIGHLAND CAPITAL MGMT. V. NEXPOINT ADVISORS, ET AL.

22-669 ) NEXPOINT ADVISORS, ET AL. V. HIGHLAND CAPITAL MGMT., ET AL.

The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

22-6496 WELSH, LONNIE K. V. COLLIER, BRYAN, ET AL.

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

22-6950 NEWSOME, BEATRICE V. FESTIVA RESORTS, ET AL.

22-6963 McALEXANDER, ZACHARY J. V. OTSUKA AMERICA PHARMACEUTICAL

22-6971 DINGLER, JOSEPH V. GARRETT, SHERIFF, ET AL.

22-6996 SEARCY, CANDACE V. ORCHARD NAT. TITLE  
 22-7004 KHANNA, AMIT, ET UX. V. WESTPORT VILLAGE AT IRONGATE  
 22-7104 CONTEH, SANFA S. V. DEPT. OF COMMERCE  
 22-7228 HARDMAN, SHARON V. KIJAKAZI, COMM'R, SOCIAL SEC.  
 22-7323 GOSSAGE, HENRY E. V. OPM, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until June 5, 2023, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

**APPEAL -- JURISDICTION NOTED**

22-807 ALEXANDER, THOMAS C., ET AL. V. SC CONFERENCE OF NAACP, ET AL.  
 Probable jurisdiction is noted.

**CERTIORARI GRANTED**

22-425 CARNAHAN, ADM'R, GSA V. MALONEY, CAROLYN, ET AL.  
 The petition for a writ of certiorari is granted.

22-6389 ) BROWN, JUSTIN R. V. UNITED STATES  
 )  
 22-6640 ) JACKSON, EUGENE V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument.

**CERTIORARI DENIED**

22-511 DIXON, THOMAS V. TEXAS  
 22-554 ST. JOHN, ANNA V. JONES, LISA, ET AL.  
 22-573 BRFH SHREVEPORT LLC V. WILLIS-KNIGHTON MEDICAL CENTER  
 22-708 GRIPUM, LLC V. FDA  
 22-720 DAKOTA FINANCE LLC, ET AL. V. NATURALAND TRUST, ET AL.

22-743 NEVADA IRRIGATION DIST., ET AL. V. CA WATER RESOURCES, ET AL.

22-818 ANYIKA, YUSUFU V. FRANCIS-ANYIKA, CECELIA

22-836 PEREZ SOTO, HIRAM I. V. ORONOZ-RODRIGUEZ, MAITE, ET AL.

22-854 ARCHER, DAVID V. WINN DIXIE STORES, INC., ET AL.

22-857 FOSTER, PAULETTE H., ET AL. V. WEARRY, MICHAEL

22-858 FINK, JOHN W. V. BISHOP, JONATHAN L., ET AL.

22-861 MARCHISOTTO, JOHN F. V. CANOVA, DEBRA, ET AL.

22-866 BELL, JOHN F. V. LUMPKIN, DIR., TX DCJ

22-870 TAVERAS, ELIEZER V. USDC SD FL

22-871 LOPEZ LUVIAN, MIGUEL A. V. GARLAND, ATT'Y GEN.

22-877 LUGO, JOHN V. STURM, AVENA L.

22-879 BASILE, CONSTANTINO V. LOS ANGELES FILM SCHOOL, ET AL.

22-881 ZIELINSKI, MARTIN J. V. WI LABOR REVIEW COMM'N, ET AL.

22-882 STEWART, MERRILEE V. RRL HOLDING CO. OF OH, ET AL.

22-889 WOLLNER, RYAN V. PEARPOP INC.

22-902 GONZALEZ FLAVELL, SARA V. MARSHALL, TRACY J., ET AL.

22-916 McMANUS, PRISCILLA V. NBS DEFAULT SERVICES, ET AL.

22-924 FIFE, JOHN M. V. FINANCIAL INDUSTRY AUTHORITY

22-948 PAREMSKY, GENNADY Y. V. INGHAM COUNTY MEDICAL, ET AL.

22-950 SMULLEY, DOROTHY A. V. SAFECO INS. CO. OF IL, ET AL.

22-952 DeMICHAEL, RINA R. V. FL DEPT. OF MANAGEMENT SERV.

22-961 STEEVES, DEAN A. V. UNITED STATES

22-966 McLILLY, CAVANTA V. DOUGLAS, ADAM

22-967 BANKS, DAVID V. UNITED STATES

22-975 WELLMAN, DEBRA-ANN V. HEB GROCERY CO.

22-979 OWENS, NICOLE V. GA GOV.'S OFFICE OF STUDENT

22-981 UDOH, EMEM U. V. MINNESOTA

22-983 WILLIAMS, REMINGTYN A., ET AL. V. DAVIS, SUPT., LA STATE POLICE

22-985 WALKER, FERRELL V. UNITED STATES

22-988 CREDIT CONSULTING SERVICES, INC. V. PAREDES, MARITZA

22-1002 VAN OVERDAM, AUSTIN V. TEXAS A&M UNIVERSITY, ET AL.

22-1007 JERICO BAPTIST CHURCH V. BANK OF AMERICA, N.A.

22-1014 ESTATE OF WILSON, ET AL. V. LAS VEGAS POLICE DEPT., ET AL.

22-6489 MORTON, BRIAN M. V. UNITED STATES

22-6665 CORTEZ-NIETO, ORLANDO, ET AL. V. UNITED STATES

22-6690 BIXBY, STEVEN V. V. STIRLING, COMM'R, SC DOC, ET AL.

22-6930 HACKNEY, ROBERT E. V. MICHIGAN

22-6933 HESSMER, JOHN V. BRYAN, SHERIFF

22-6938 GONZALEZ, RAUL V. LUMPKIN, DIR., TX DCJ

22-6939 FLORES, FRANCISCO V. LUMPKIN, DIR., TX DCJ

22-6941 KERR, TERRY V. ALDRIDGE/PITE, LLP, ET AL.

22-6943 THURSTON, TRAVIS V. FLORIDA

22-6948 SPIKER, ROBERT E. V. ERSKINES, ROBERT E., ET AL.

22-6949 McDOWELL, CHRISTOPHER M. V. REEVES, CARLTON W.

22-6952 BROOKINS, BRIAN D. V. GEORGIA

22-6959 DAVIS, THURSTON R. V. LUMPKIN, DIR., TX DCJ

22-6960 MITCHELL, JAMES J. V. FLORIDA

22-6967 GARCIA, ARNOLDO A. V. VALDEZ, AFOD, ET AL.

22-6969 SHETSKIE, CHRISTOPHER A. V. COLORADO

22-6976 HARRIS, GOLDA D. V. CREDIT ACCEPTANCE CORP., ET AL.

22-6977 TALIB, SHARIF V. MARYLAND

22-6979 McCRAY, IVEY V. JONES, WILLIAM D., ET AL.

22-6991 DICKERSON, SAMUEL V. SCARLETT, KEN, ET AL.

22-6992 REAVES, SAMUEL V. LUMPKIN, DIR., TX DCJ, ET AL.

22-6997 FREITAS, JOHN B. V. WISE, JUDGE, ET AL.

22-7003 MELTON, JUSTIN V. PERRY, JARED, ET AL.

22-7011 WATERS, CHARLES M. V. WATERS, ANITA M.

22-7015 REAVES, TIMOTHY V. VIDAL, SUPT., SOUZA

22-7018 WRIGHT, MICHAEL V. CONTRA COSTA CTY., CA, ET AL.

22-7020 SKIEF, TIWIAN L. V. LUMPKIN, DIR., TX DCJ

22-7021 WILLIAMS, VICTOR T. V. LUMPKIN, DIR., TX DCJ

22-7071 BAKER, ELMER D. V. NEAL, WARDEN

22-7080 JAMES A. V. CONNECTICUT

22-7088 GRZESLO, JAMES D. V. FISHER, WARDEN

22-7125 TORRENCE, CHARLES M. V. PETERSON, WARDEN

22-7127 MEYER, WILLIAM M. V. THORNELL, DIR., AZ DOC, ET AL.

22-7149 HAMMOND, EUGENE V. FORT, WARDEN

22-7153 HARVEY, TAMAR D. V. RUSSELL, ASST. WARDEN

22-7165 WOO, JAMES V. EL PASO CTY. SHERIFF, ET AL.

22-7172 HARMON, HENRY A. V. NOEL-EMSWELLER, KAYLA, ET AL.

22-7178 FRAZIER, DAVID V. TENNESSEE

22-7182 RAKHMATOV, AZIZJON V. UNITED STATES

22-7184 MIDDLEKAUFF, DARRELL K. V. WASHBURN, SUPT., EASTERN OR

22-7194 PAULK, MONQUEL D. V. UNITED STATES

22-7201 BROWN-MALLARD, ADRIENNE V. NEXT DAY TEMPS, ET AL.

22-7221 KUTSCHENREUTER, CARLOTTA S. V. McCLAIN, WARDEN

22-7234 LeBEAU, GERALD W. V. UNITED STATES

22-7239 KNIGHT, EDWARD V. UNITED STATES

22-7241 RAY, ERIC M. V. UTAH

22-7245 DiBIASE, PAUL V. UNITED STATES

22-7247 GUZMAN, CLAUDIA C. V. UNITED STATES

22-7249 GODETTE, DARYL L. V. UNITED STATES

22-7253 SOLIS, ILSE I. V. UNITED STATES

22-7261 PROPHET, SUSAN E. V. UNITED STATES

22-7263 RAMIREZ, CHRISTOPHER L. V. UNITED STATES  
22-7264 MCKINNEY, COREY S. V. UNITED STATES  
22-7265 FRANKS, ALLEN V. FLORIDA  
22-7272 MARTINEZ, CHRISTOPHER E. V. UNITED STATES  
22-7273 HERNANDEZ-JIMENEZ, FIDELMAR V. UNITED STATES  
22-7278 WARD-MALONE, CHRISTOPHER J. V. UNITED STATES  
22-7279 THOMAS, ROBERT J. V. UNITED STATES  
22-7282 LINDER, DAVID W. V. LAMMER, WARDEN  
22-7284 JOHNSON, HERBERT B. V. UNITED STATES  
22-7288 GONZALEZ-ENRIQUEZ, GILBERTO V. UNITED STATES  
22-7289 BISHOFF, TERRICK V. UNITED STATES  
22-7290 HOWARD, MICHAEL K. V. UNITED STATES  
22-7292 SIMPSON, JASON E. V. UNITED STATES  
22-7295 WILLIAMS, SALEEM D. V. TOBY, WARDEN  
22-7296 THOMAS, NATHAN K. V. UNITED STATES  
22-7300 SULLIVAN, JAMES D. V. UNITED STATES  
22-7307 LATHAN, DAREK V. UNITED STATES  
22-7339 HARVEY, HOLLY V. GEORGIA

The petitions for writs of certiorari are denied.

21-1281 INTERACTIVE WEARABLES, LLC V. POLAR ELECTRO OY, ET AL.  
22-22 TROPP, DAVID A. V. TRAVEL SENTRY, INC., ET AL.  
22-37 TEVA PHARMACEUTICALS USA, INC. V. GLAXOSMITHKLINE LLC, ET AL.

The petitions for writs of certiorari are denied. Justice Kavanaugh would grant the petitions for writs of certiorari.

22-821 CHEVRON CORP., ET AL. V. HOBOKEN, NJ, ET AL.

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

22-876 POHLE, DANIEL L. V. PENCE, MICHAEL, ET AL.

The petition for a writ of certiorari is denied. The Chief Justice took no part in the consideration or decision of this petition.

22-974 WEISS, CHARLES J. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Alito and Justice Kavanaugh took no part in the consideration or decision of this petition.

22-999 AMARA, JANICE C., ET AL. V. CIGNA CORP., ET AL.

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

22-6958 POWERS, THOMAS V. DOLL, DAVID, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

22-6988 CONERLY, CARINA V. WINN, JUDGE, ET AL.

22-7120 BRESSI, AARON J. V. PA PAROLE BD., ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

**HABEAS CORPUS DENIED**

22-993 IN RE KRISHNA MAHARAJ  
22-7298 IN RE GABRIEL D. YANKEY  
22-7332 IN RE MICHAEL P. MARTIN  
22-7362 IN RE IRINA COLLIER

The petitions for writs of habeas corpus are denied.

**MANDAMUS DENIED**

22-6931 IN RE DeANN GRAHAM  
22-6980 IN RE MICHAEL BLODGETT

The petitions for writs of mandamus are denied.

22-6989 IN RE IRINA COLLIER

The petition for a writ of mandamus and/or prohibition is denied.

**REHEARINGS DENIED**

22-619 IN RE LARRY E. KLAYMAN  
22-623 HALL, JAMES W. V. G.M.S. MANAGEMENT, ET AL.  
22-668 KAMA, NACHAIYA V. MEMORIAL HERMANN HEALTH, ET AL.  
22-690 HARRIS-PATTERSON, ACQUANITTA L. V. ARMCO STEEL, ET AL.  
22-794 CALIFORRNIAA, EURICA V. VIDAL, KATHERINE K.  
22-825 COLLINS, JAMES K. V. D.R. HORTON-TEXAS LTD.  
22-6260 WILLIAMS, PAULA V. CONDUENT HUMAN SERVICES LLC  
22-6328 TAYLOR, VERSIAH M. V. UNITED STATES  
22-6373 HERRIOTT, ALICJA Z. V. HERRIOTT, PAUL B.  
22-6382 WARREN, JAMES A. V. FLORIDA  
22-6460 DeJEAN, DAVONTE V. UNITED STATES  
22-6470 ELLIS, MARY A. V. DEPT. OF LABOR  
22-6480 ROHLF, ANTHONY V. LUMPKIN, DIR., TX DCJ  
22-6589 IN RE MOSES JACKSON

22-6605 KOMATSU, TOWAKI V. NEW YORK, NY, ET AL.

22-6672 J. M. V. OR DEPT. OF HUMAN SERVICES

The petitions for rehearing are denied.

**ATTORNEY DISCIPLINE**

D-3119 IN THE MATTER OF DISCIPLINE OF MICHAEL BRANDON COHEN

Michael Brandon Cohen, of Altoona, Pennsylvania, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Cite as: 598 U. S. \_\_\_\_ (2023)

1

THOMAS, J., dissenting

## SUPREME COURT OF THE UNITED STATES

JOHN Q. HAMM, COMMISSIONER, ALABAMA  
DEPARTMENT OF CORRECTIONS  
*v.* KENNETH EUGENE SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 22–580. Decided May 15, 2023

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting from the denial of certiorari.

In 1988, Kenneth Eugene Smith and an accomplice murdered Elizabeth Sennett for \$1,000 apiece. The State of Alabama sentenced Smith to death. Last year, it scheduled Smith’s execution for November 17, 2022, and Smith brought an Eighth Amendment challenge to the State’s plan to execute him by lethal injection. On the afternoon of November 17, a divided Eleventh Circuit panel held that Smith had pleaded a viable method-of-execution claim, reversing the District Court’s contrary ruling. Later that evening, the Eleventh Circuit granted Smith a stay of execution. The State applied to this Court to dissolve the Eleventh Circuit’s stay, and we granted the application. But, after this last-minute litigation, the State was unable to execute Smith before its death warrant expired. Smith’s lawsuit thus remains pending in the District Court.

In this petition, the State now asks this Court to summarily reverse the Eleventh Circuit’s holding that Smith pleaded a viable Eighth Amendment claim. I would do so. The judgment below rests on flawed Circuit precedent that is irreconcilable with our method-of-execution case law.

“The Constitution allows capital punishment” and “does not guarantee a prisoner a painless death.” *Bucklew v. Precythe*, 587 U. S. \_\_\_, \_\_\_, \_\_\_ (2019) (slip op., at 8, 12).

THOMAS, J., dissenting

Nonetheless, in defined circumstances, our cases countenance a claim that “the State’s chosen method of execution cruelly superadds pain to the death sentence,” thus violating the Eighth Amendment. *Id.*, at \_\_\_ (slip op., at 13). To plead and prove such a claim, “a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” *Ibid.* Only with such a showing can “a State’s refusal to change its method . . . be viewed as ‘cruel and unusual’ under the Eighth Amendment.” *Baze v. Rees*, 553 U. S. 35, 52 (2008) (plurality opinion).

Our cases further provide guidance on what a prisoner must show to prove that his proposed alternative method is “feasible and readily implemented.” In *Bucklew*, we explained that “the inmate’s proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly.” 587 U. S., at \_\_\_ (slip op., at 21) (internal quotation marks omitted). And, just last Term, the Court underscored that the prisoner “must make the case that the State really can put him to death, though in a different way than it plans,” by “providing the State with a veritable blueprint for carrying the death sentence out.” *Nance v. Ward*, 597 U. S. \_\_\_, \_\_\_ (2022) (slip op., at 8); see also *ibid.* (“If the inmate obtains his requested relief, it is because he has persuaded a court that the State could readily use his proposal to execute him”).

These precedents unmistakably establish two propositions. First, it is *the prisoner’s* burden to “plead and prove a known and available alternative.” *Glossip v. Gross*, 576 U. S. 863, 880 (2015). Second, the focus of the “feasible and readily implemented” element is *practical* availability, which is ultimately a question of fact. See *Nance*, 597 U. S., at \_\_\_ (slip op., at 8); *Bucklew*, 587 U. S., at \_\_\_ (slip op., at 21).

Cite as: 598 U. S. \_\_\_\_ (2023)

3

THOMAS, J., dissenting

Here, Smith challenged the State's chosen method of lethal injection based on the proposed alternative of execution by nitrogen hypoxia. As the plaintiff, Smith was required to "plea[d] factual content" making it plausible that he could establish the availability element of his claim. *Ashcroft v. Iqbal*, 556 U. S. 662, 678 (2009); see Fed. Rule Civ. Proc. 8(a). Smith, however, did not even *attempt* to plead facts indicating that Alabama "could readily use [nitrogen hypoxia] to execute him." *Nance*, 597 U. S., at \_\_\_\_ (slip op., at 8). Instead, he alleged only that, "[a]s a matter of law, nitrogen hypoxia is an available and feasible alternative method of execution," citing *Price v. Commissioner, Ala. Dept. of Corrections*, 920 F. 3d 1317, 1328–1329 (CA11 2019), as support. Motion To Alter or Amend Judgt. in No. 2:22-cv-00497 (MD Ala., Oct. 19, 2022), ECF Doc. 24–1, Exh. A, p. 19, ¶74 (emphasis added). And the Eleventh Circuit considered this threadbare allegation sufficient to satisfy Smith's pleading burden on the availability element.

Understanding the court's reasoning below requires some background about Alabama law and the Eleventh Circuit's *Price* decision. In 2018, Alabama enacted a statute authorizing execution by nitrogen hypoxia for inmates who elected that method within 30 days of their sentences becoming final or, for those whose sentences were already final before June 1, 2018, within 30 days of that date. Ala. Code §15–18–82.1(b)(2). (Smith did not elect nitrogen hypoxia, so lethal injection remains the only method of execution authorized by state law in his case. §15–18–82.1(a).) Nearly five years later, Alabama has yet to carry out any execution by nitrogen hypoxia or to finalize a protocol for implementing that method—which "ha[s] never been used to carry out an execution and ha[s] no track record of successful use" in any jurisdiction. *Bucklew*, 587 U. S., at \_\_\_\_ (slip op., at 22) (internal quotation marks omitted).

Since *Price*, however, the Eleventh Circuit has treated the existence of this Alabama statute as relieving inmates

THOMAS, J., dissenting

like Smith of their burden to plead and prove that nitrogen hypoxia is feasible and readily implemented in fact. “If a State adopts a particular method of execution,” *Price* reasoned, “it thereby concedes that the method of execution is available to its inmates.” 920 F. 3d, at 1327–1328. Thus, “an inmate may satisfy his burden to demonstrate that [a] method of execution is feasible and readily implemented by” simply “pointing to the executing state’s official adoption of that method of execution.” *Id.*, at 1328. Here, that is exactly what Smith did, and the Eleventh Circuit, applying *Price*, held that nothing more was required.

However, *Price*’s reasoning rests on a fundamental misunderstanding of the inquiry marked out by *Baze*, *Glossip*, and *Bucklew*. Those cases set forth the circumstances in which a State’s use of one method of execution, rather than an identified “‘known and available alternative,’” constitutes cruel and unusual punishment under the Eighth Amendment. *Bucklew*, 587 U. S., at \_\_\_ (slip op., at 13) (quoting *Glossip*, 576 U. S., at 878); see *Baze*, 553 U. S., at 52. The gravamen of the constitutional wrong is the State’s unjustified “refus[al] to adopt” that proffered alternative despite its “documented advantages,” including its ready availability. *Ibid.* Accordingly, whether the State has authorized the proffered alternative as a matter of state statutory law has no relevance to the plaintiff’s burden of showing a constitutional violation. *Bucklew* has already explained why: “[T]he Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can’t be controlled by the State’s choice of which methods to authorize in its statutes.” 587 U. S., at \_\_\_–\_\_\_ (slip op., at 19–20).

The *Bucklew* Court made that statement in the context of explaining that “[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State’s law,” *id.*, at \_\_\_ (slip op., at 19), but the underlying logic cuts both

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ways. See *Heffernan v. City of Paterson*, 578 U. S. 266, 272 (2016) (“[I]n the law, what is sauce for the goose is normally sauce for the gander”). When the question is whether the Eighth Amendment requires a State to replace its chosen method with an alternative method in executing the plaintiff, it is simply irrelevant, without more, that the State’s statutes authorize the use of the alternative method in *other* executions that are to take place sometime in the indefinite future. Here, Smith alleged only that, and nothing more. He therefore failed to state a claim, and the Eleventh Circuit erred by holding otherwise.

The Eleventh Circuit’s error is not only plain but also serious enough to warrant correction. Even if “the burden of the alternative-method requirement ‘can be overstated,’” *Bucklew*, 587 U. S., at \_\_\_\_ (KAVANAUGH, J., concurring) (slip op., at 1), it remains an essential element of an Eighth Amendment method-of-execution claim, and it must be appropriately policed lest it become an instrument of dilatory litigation tactics. The comparative analysis set forth in *Baze*, *Glossip*, and *Bucklew* contains an inherent risk of incentivizing “an inmate intent on dragging out litigation . . . to identify only a method of execution on the boundary of what’s practically available to the state.” *Middlebrooks v. Parker*, 22 F. 4th 621, 625 (CA6 2022) (Thapar, J., statement respecting denial of rehearing en banc). The Eleventh Circuit’s approach of treating any statutorily authorized method as available as a matter of law—even an entirely novel method that may not be readily implementable in reality—only heightens that danger. In turn, and as a result, it “perversely incentivize[s] States to delay or even refrain from approving even the most humane methods of execution” any earlier than the moment they are prepared to put them into practice. *Price v. Dunn*, 587 U. S. \_\_\_\_, \_\_\_\_ (2019) (THOMAS, J., concurring in denial of certiorari) (slip op., at 11).

The Eleventh Circuit’s flawed logic in *Price* has already

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forced us to intervene in one last-minute capital emergency. This petition offered an opportunity, which may well prove unique, to consider and correct *Price's* faulty reasoning outside of that posture. Because the Court declines that opportunity, I respectfully dissent.

# The Supreme Court of South Carolina

Mikal D. Mahdi, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-002131

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## ORDER

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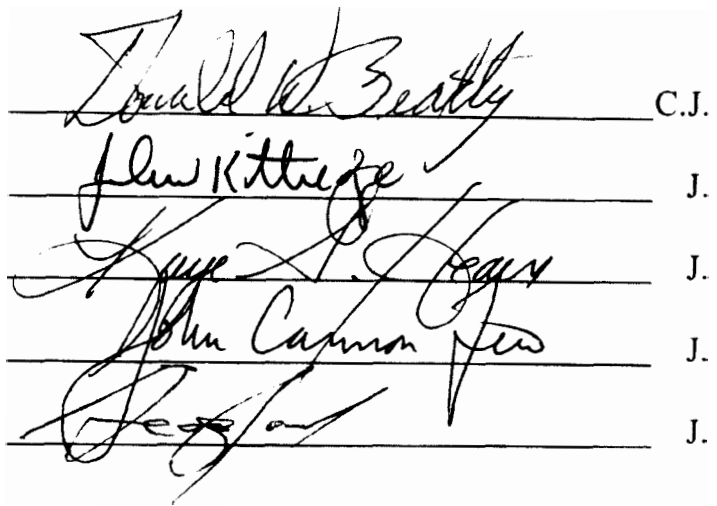
Petitioner pled guilty to murder, second-degree burglary, and grand larceny and was sentenced to death. This Court affirmed Petitioner's sentence. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). Following the denial of his application for post-conviction relief, this Court denied Petitioner's request for a writ of certiorari. Petitioner subsequently filed a petition for a writ of habeas corpus in the federal court, which issued a stay of execution pending resolution of the habeas corpus action. The petition for a writ of habeas corpus was denied, and the United States Supreme Court recently denied Petitioner's petition for a writ of certiorari. *Mahdi v. Stirling*, 20 F.4th 846 (4th Cir. 2021), *cert. denied.*, No. 22-5536, 2023 WL 124121 (Jan. 9, 2023).

Petitioner has now sent a letter to the Clerk of Court asking that she refrain from issuing a notice of execution for Petitioner based on the pendency of *Owens v. Stirling*, Appellate Case No. 2022-001280, which challenges the constitutionality of South Carolina's methods of execution. The State opposes the request.

While we recognize the duty of the Clerk of this Court to issue an execution notice is ministerial,<sup>1</sup> due to the pendency of *Owens* and in order to conserve judicial, attorney, and Department of Corrections recourses, we direct the Clerk of Court not to issue a notice of execution until this Court issues its decision in *Owens*.

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<sup>1</sup> See *Roberts v. Moore*, 332 S.C. 488, 488, 505 S.E.2d 593, 593 (1998) (holding it is a ministerial duty of the Clerk of the Supreme Court to issue an execution notice pursuant to S.C. Code Ann. § 17-25-370 (2014)).



Donald W. Beatty C.J.  
John Kitzinger J.  
Kaye L. Hays J.  
John Cameron J.  
Sergeant J.

Columbia, South Carolina

February 9, 2023

cc:

- Teresa L. Norris, Esquire
- Alan McCrory Wilson, Esquire
- J. Anthony Mabry, Esquire
- Seth C. Farber, Esquire
- Brandon W. Duke, Esquire
- E. Charles Grose, Jr., Esquire
- John Lafitte Warren III, Esquire
- Donald J. Zelenka, Esquire
- Melody Jane Brown, Esquire