

No. _____

**In the
Supreme Court of the United States**

ROY WARD,
Petitioner,

v.

ROBERT CARTER, JR. and
RON NEAL,
Respondents.

On Petition for a Writ of Certiorari
to the Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

CAPITAL CASE

The State of Indiana recognizes no constitutional obligation to notify condemned prisoners of the lethal substances it will use to execute them.

The question presented is:

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitles condemned state prisoners to notice of the lethal substances a state will use to execute them.

PARTIES TO THE PROCEEDINGS

Petitioner, the plaintiff in the state trial court, the appellant in the Indiana Court of Appeals, the respondent on petition to transfer to the Indiana Supreme Court, and the appellant at oral argument and on petition for rehearing in the Indiana Supreme Court, is Roy Ward, a state prisoner held in Indiana State Prison in LaPorte County, Indiana.

Respondents, the defendants in the state trial court, the appellees in the Indiana Court of Appeals, the petitioners on petition to transfer to the Indiana Supreme Court, and the appellees at oral argument and on petition for rehearing in the Indiana Supreme Court, are Robert Carter, Jr., in his official capacity as commissioner of the Indiana Department of Correction, and Ron Neal, in his official capacity as warden of Indiana State Prison. Robert Carter, Jr. replaced Bruce Lemmon, former commissioner of the Indiana Department of Correction, as a respondent in this litigation at the Indiana Court of Appeals stage after Mr. Carter was appointed as the new commissioner of the department in January 2017.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Roy Ward respectfully petitions for a writ of certiorari to review the judgment of the Indiana Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Indiana Supreme Court is reported at 90 N.E.3d 660. *See* App. 1a. The opinion of the Indiana Court of Appeals is reported at 79 N.E.3d 383. *See* App. 13a. The opinion of the Indiana Circuit Court of LaPorte County is unpublished but included in the Appendix. *See* App. 23a.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on February 13, 2018, and rehearing was denied on April 23, 2018. This Court has jurisdiction to grant a writ of certiorari to review the judgment of the Indiana Supreme Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”

STATEMENT

Petitioner Roy Ward (“Petitioner”), a state prisoner who is under sentence of death and incarcerated by the State of Indiana’s Department of Correction at Indiana State Prison in LaPorte County, Indiana, filed his complaint against

Respondents, the commissioner of the Indiana Department of Correction, now Robert Carter, Jr., and the warden of Indiana State Prison, Ron Neal (“Respondents”), in the LaPorte Circuit Court on December 22, 2015 alleging that they had failed to provide adequate due process in their selection of the lethal substances with which they intend to execute him in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and state law.

Respondents’ Indiana Trial Rule 12(b)(6) Motion to Dismiss Petitioner’s federal Due Process claim brought pursuant to 42 U.S.C. § 1983 as well as his state law claims was granted by the state trial court on July 13, 2016. *See* App. 23a-26a. The state trial court held, following oral argument, that Petitioner’s due process rights “have been met when the Court held a hearing on the matter [Respondent’s Motion to Dismiss] on June 24, 2016. Plaintiff appeared and was able to be heard by the Court. Therefore, Plaintiff’s due process rights have not been violated.” *Id.* 25a.

Petitioner appealed the trial court’s dismissal of his federal constitutional claim and state law claims. On June 1, 2017, following oral argument, the Indiana Court of Appeals in *Ward v. Carter*, 79 N.E.3d 383 (Ind. Ct. App. 2017) reversed the state trial court’s order dismissing Petitioner’s suit and remanded the case on one of his state law claims without reaching his Fourteenth Amendment Due Process claim. *See* App. 13a-22a. As the state appellate court noted: “Because we have found that Ward’s complaint prevails based on relevant [state] statutory language, we need not consider his due process arguments.” *Id.* 22a n.6.

Respondents petitioned the Indiana Supreme Court for transfer on July 3, 2017. Respondents did not address Petitioner's federal Due Process Clause claim either in their petition to transfer or in their reply brief. Petitioner raised his federal constitutional claim in his response in opposition to Respondents' petition to transfer.

On September 7, 2017, the Indiana Supreme Court granted Respondents' petition to transfer and, on October 5, 2017, the state supreme court held oral argument. At oral argument, Respondents notified the Court that they were selecting lethal substances that they intended to use for the executions of condemned state prisoners, including Petitioner, but declined to identify the substances. To date, Respondents have not disclosed the identity of the lethal substances. Respondents contended at oral argument that the only question for the Indiana Supreme Court to consider in reviewing Petitioner's claims was what procedural process Petitioner was entitled to in the Indiana Department of Correction's selected method of lethal injection. As Respondents argued: "What or what was not done in this particular protocol is largely beside the point. The question is going forward what will the [Indiana] Department [of Correction] need to do when it identifies a new execution procedure."¹ Respondents did not concede Petitioner is entitled by right to any notice whatsoever of the identity of the lethal

¹ Indiana Supreme Court online portal of oral arguments in *Roy Ward v. Robert Carter, Jr., et al.*, 46S03-1709-PL-00569 (Ind. Oct. 5, 2017), available at <https://mycourts.in.gov/arguments/default.aspx?&id=2146&view=detail&yr=&when=&page=3&court=sup&search=&direction=%20ASC&future=False&sort=&judge=&county=&admin=False&pageSize=20>

substances they will use in Petitioner's execution. Petitioner raised his federal constitutional claim at oral argument.

On February 13, 2018, the Indiana Supreme Court issued its Opinion in *Ward v. Carter*, 90 N.E.3d 660 (Ind. 2018) affirming the trial court's dismissal of Petitioner's federal Due Process Clause claim, as well as his state law claims, against Respondents. *See* App. 1a-11a. The Indiana Supreme Court's decision rejected Petitioner's claim that he had an independent federal due process right to notice of the lethal substances with which the state intended to execute him separate from the state statutory claim he brought under the Indiana Administrative Rules and Procedures Act, Ind. Code §§ 4-22-2 et seq. ("ARPA"). The state supreme court decided that Petitioner's "federal constitutional claims cited only due process violations, which hinged upon whether the Department's lethal injection protocol amounted to a rule subject to ARPA. Since we hold the Department protocol does not carry the effect of law and therefore is not a rule subject to ARPA, his constitutional claims necessarily fail." *Id.* 11a.

On April 23, 2018, the Indiana Supreme Court denied Petitioner's Petition for Reconsideration of dismissal of his Fourteenth Amendment Due Process claim. *See* App. 12a.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Indiana Supreme Court.

The Indiana Supreme Court has decided Indiana has no independent obligation under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to notify condemned prisoners of the lethal substances the state will use for executions. Respectfully, the state supreme court's decision must be in conflict with relevant decisions of this Court. The Court here should grant review and hold that the Due Process Clause of the Fourteenth Amendment entitles condemned state prisoners to the right to meaningful notice of the lethal substances a state will use to execute them.

1. Relevant decisions of the Court presume there is a right to notice.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides: "No state shall . . . deprive any person of life, liberty, or property without due process of law". U.S. Const. amend. XIV. This Court has found that in order to receive due process of law, a person must necessarily have meaningful notice of a state's intended deprivation of life, liberty, or property and the opportunity to be heard to object to the intended deprivation. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Without meaningful notice, coupled with the meaningful opportunity to be heard, prior to the state's intended deprivation, a person is denied due process of law. *See Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). "[A] person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J.,

concurring). “Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.” *Id.* at 172.

The right under the Due Process Clause to be meaningfully heard prior to state deprivation cannot be separated from the right to meaningful notice of the intended deprivation. *See Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’” *Id.* at 80 (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). The right to meaningful notice is central to due process under law and a prerequisite to the right to a meaningful opportunity to be heard. Notice is necessarily the means by which a state should “apprise the affected individual of, and permit adequate preparation for, an impending hearing.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). “The essential requirements of due process, and all that respondents seek . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Loudermill*, 470 U.S. at 546. “If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.” *Fuentes*, 407 U.S. at 81; *see also Hale*, 68 U.S. at 233 (“Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense.”); *Davidson v. New Orleans*, 96 U.S. 97, 107 (1877) (process that is “arbitrary, oppressive, and unjust”

does not suffice as “due process of law”) (Bradley, J., concurring). Without specific, actual, and meaningful notice of a state’s intended deprivation, a person is not able to meaningfully exercise his procedural rights under the U.S. Constitution.

To establish a violation of the right to due process under the Fourteenth Amendment generally, a person must show, first, that the state’s intended deprivation interferes with his life, liberty, or property interests, and, second, that the state’s notice of intended deprivation or opportunity for hearing is not sufficiently meaningful. *See Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *see also Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (Prisoners “may not be deprived of life, liberty, or property without due process of law.” (citations omitted) (procedural due process required prior to revocation of prisoner’s jail credit time); *Wilkinson v. Austin*, 545 U.S. 209, 221, 224, (2005) (procedural due process required prior to prisoner’s transfer to high-security prison); *Morrissey v. Brewer*, 408 U.S. 471, 483-90 (1972) (procedural due process required prior to revocation of prisoner’s parole). A court will consider three factors to determine whether the state’s notice and opportunity for hearing prior to the intended deprivation are sufficiently meaningful: (1) the nature of a person’s interests affected by the state’s procedure; (2) the risk of error created by the state’s procedure; and (3) the state’s interests in maintenance of its procedure. *See Eldridge*, 424 U.S. at 335. The relevant decisions of this Court recognize that specific, actual, and meaningful notice of a state’s intended deprivation are necessary for a person to meaningfully exercise his right to due process under the United States Constitution.

2. Rejection of a notice right conflicts with relevant decisions of the Court.

The Court should grant review in this case to clarify and hold that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitles a condemned state prisoner to the right to meaningful notice of the lethal substances with which a state intends to execute him. Respectfully, the Indiana Supreme Court's rejection of this independent right to notice conflicts with the relevant decisions of the Court that find meaningful notice prior to deprivation an essential requirement of due process under the Fourteenth Amendment.

Here, Petitioner's right to meaningful notice under the Due Process Clause of the Fourteenth Amendment is at issue because his life and liberty interests are implicated by the state's intended execution of him by injection of lethal substances into his body. *See Thompson*, 490 U.S. at 460; *McDonnell*, 418 U.S. at 556. First, Petitioner has life and liberty interests in notice of the lethal substances with which the State of Indiana intends to execute him. *See e.g., Washington v. Harper*, 494 U.S. 210, 229 (1990). "[N]otice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him." *Vitek v. Jones*, 445 U.S. 480, 496 (1980); *see also Hall v. Florida*, 572 U.S. ___, 134 S.Ct. 1986, 2001 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). Without the right to meaningful notice of the lethal substances with which the State of Indiana will execute him, any potential Eighth Amendment challenge by

Petitioner to the use of a particular substance is effectively blocked by the state because, lacking notice of the lethal substances the state intends to use, he necessarily cannot make out a claim against the state's lethal injection protocol under the requirements set out by this Court. *See Glossip v. Gross*, 576 U. S., ___, 135 S. Ct. 2726, 2737 (2015); *Baze v. Rees*, 553 U.S. 35, 47-50 (2008). Notice of the lethal substances with which the State of Indiana intends to execute Petitioner are necessary for him to meaningfully exercise his procedural rights under the Fourteenth Amendment to U.S. Constitution.

Second, the state's notice policy at present is not meaningful because, other than the fact that by statute Petitioner is on notice he will be executed by lethal injection, he has been provided no notice, and the state recognizes no such notice, of the lethal substances with which he will be injected. *See* Ind. Code § 35-38-6-1(a) ("The punishment of death shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person: (1) in a quantity sufficient to cause the death of the convicted person; and (2) until the convicted person is dead."). The state's policy of providing no notice of the substances it will use in its lethal injection protocol fails to satisfy the requirements of due process. *See Austin*, 545 U.S. at 220-24. The State of Indiana's notice of policy is of particular concern under the Fourteenth Amendment as the "heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life" requires "respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Ford v.*

Wainwright, 477 U.S. 399, 410, 414 (1986) (quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). It may go without saying that meaningful notice of the intended deprivation in the immediate matter is of no use to Petitioner after the infliction of the state's intended deprivation.

Review of the three factors outlined in *Mathews v. Eldridge* show condemned state prisoners, including Petitioner, must have meaningful notice of the lethal substances the state will use to execute them in order to exercise their procedural rights under the Due Process Clause of the Fourteenth Amendment to U.S. Constitution. First, a condemned prisoner's interests in his life and liberty are necessarily at issue where he will be executed by injection through use of unknown substances. *Eldridge*, 424 U.S. at 335. A condemned prisoner has an interest in not being executed in a manner that violates the Eighth Amendment to the U.S. Constitution. See *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976) (plurality); *Baze*, 553 U.S. at 49. Without a right to notice, a state may deny a condemned prisoner procedure to bring a constitutional challenge by withholding notice of the lethal substances it intends to use in executions and thereby extinguish any potential claims against the lethal injection protocol. A state deprivation "that places an individual's life or liberty at risk is almost uniquely compelling." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985). The U.S. Supreme Court has recognized the protections of the Due Process Clause in far less consequential assertions to a liberty interest. See, e.g., *Loudermill*, 470 U.S. at 538-41; (liberty interest in civil servant job protection); *Memphis Light*, 436 U.S. at 9012 (liberty interest in receiving public

utility services); *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975) (liberty interest in attending public school). “It cannot be that the Court is more concerned about property losses that are not irremediable than about irretrievable human claims.” *Solesbee*, 339 U.S. at 23.

An analysis of the remaining two factors outlined in *Mathews v. Eldridge* further demonstrate that the interests at stake in a state’s intended lethal injection protocol necessitate that condemned state prisoners, including Petitioner, have a right under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to notice of the lethal substances a state intends to use to execute them. The risks to a condemned prisoner’s interests are great. A state’s interests in refusing to provide any notice whatsoever of the lethal substances to be used are minimal. *See Eldridge*, 424 U.S. at 335. A condemned prisoner’s ability to object to a potentially unconstitutional method of lethal injection is eliminated under a no-notice policy, here maintained by the State of Indiana. *See Wilkinson*, 545 U.S. at 221. A state refusing to provide notice has no apparent countervailing interests in withholding notification, other than that of shielding itself from litigation. The Due Process Clause requires “the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard.” *Frank v. Mangum*, 237 U.S. 309, 334-35 (1915). “The right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *See Eldridge*, 424 U.S. at 333 (citations and quotation

marks omitted). The right to notice of the lethal substances in the State of Indiana's lethal injection protocol is inherent in Petitioner's right to due process under the Fourteenth Amendment to the U.S. Constitution.

To be clear, Petitioner is not requesting the Court grant his petition in order to expound upon the precise contours, limits, and reaches of his right to notice. Rather, because the State of Indiana has rejected the assertion that this independent right exists, Petitioner asks the Court to correct the state's assumption, made in contradiction to relevant decisions by this Court, that the Due Process Clause does not reach through the closed doors of the execution chamber in LaPorte County, Indiana. The relevant decisions of this Court recognize the specific, actual, and meaningful independent right to notice under the Fourteenth Amendment that Petitioner asserts.

Presently, the State of Indiana's rejection of an independent right to notice permits it to select, rescind, alter, and introduce lethal substances in its lethal injection protocol without a guarantee of any notice to Petitioner whatsoever aside from what Respondents as they may or may not deem suitable choose to reveal. It is anticipated Respondents may object to this petition on grounds that at some unknown future date they may voluntarily reveal to Petitioner the lethal substance or substances they will use to execute him. They may even, in an effort to moot Petitioner's action, suddenly on their own accord offer up for the Court's review the lethal substances they to use for execution. But, under their reading of the Fourteenth Amendment, the identity of these lethal substances would be voluntary

revealed and could be voluntarily replaced at any time without notice. And replaced with what? The State of Indiana does not concede Petitioner has a right to know. Sodium hypochlorite? *See Saenz v. State*, 479 S.W.3d 939, 954 (Tex. Ct. App. 2015) (affirming conviction for murders committed through injection of bleach). Treponema pallidum? *See Pollard v. United States*, 384 F.Supp. 304, 306 (M.D. Ala. 1974) (finding cause of action for deadly injections of syphilis). Water? *U.S. v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984) (affirming conviction for “torture of prisoners” through use of “water cure” technique). Without a recognized independent right to notice, the potential harm of being injected with a constitutionally objectionable substance, or a substance in constitutionally objectionable quantity, would remain inherently transitory through execution, and the lethal substances used or not used could not be ultimately determined until after death. *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. ___, 133 S.Ct. 1523, 1531 (2013).

A condemned state prisoner has the right under the Due Process Clause to be notified, prior to death, of the lethal substances a state will use to execute him. This notice must be meaningful. In Indiana, there is no certainty of any notice at all, meaningful or otherwise, and, therefore, no certainty of a reasonable and meaningful opportunity to be heard. “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. An elementary and fundamental requirement of due process in

any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Manzo*, 380 U.S. at 550 (citations and quotation marks omitted). The State of Indiana will execute Petitioner by the injection of lethal substances into his body in a quantity great enough to produce death. See I.C. § 35-38-6-1(a). The state has provided no notice of the identity of these lethal substances. None will be required unless this Court grants review.

Therefore, the Court should grant rehearing to recognize the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitles a condemned state prisoner to meaningful notice of the lethal substances with which a state intends to execute him.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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