STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 GOV 0238

JERRY W. CONNER, JAMES A. CAMPBELL, ARCHIE LEE BILLINGS, MARCUS ROBINSON, and JAMES EDWARD THOMAS Petitioners, v. NORTH CAROLINA COUNCIL OF STATE, Respondent.	**PETITIONERS' BRIEF OPPOSING THE COUNCIL OF STATE'S MOTION TO DISMISS**

INTRODUCTION

Petitioners argue that Respondent (hereinafter "Council") violated their procedural due process rights in adopting a lethal injection protocol after failing to provide petitioners notice and an opportunity to be heard and failing to follow the Administrative Procedure Act (APA) in that matter. The foundation of procedural due process protection is notice and the opportunity to be heard in a meaningful manner. Summers v. City of Charlotte, 149 N.C. App. 509, 562 S.E.2d 18, disc. review denied, 355 N.C. 758, 566 S.E.2d 482 (2002). The Council of State appears to acknowledge that it eschewed this protection, but argues that such safeguards are neither needed nor required by law.

Before adopting a rule, the Council of State must follow the procedures set forth in Chapter 150B, including, among others:

a. Publish a notice of text in the N.C. Register;
b. Hold a public hearing on the proposed rule after publication;

c. Accept oral or written comments;
d. Hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the NC Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published; and
e. Refrain from adopting a rule until the time for commenting on the proposed text of the rule has elapsed.

N.C. Gen. Stat. § 150B-21.2. None of these steps was taken prior to the Council of State's approval of the lethal injection protocol. For example, attorneys representing petitioners sent letters requesting specific changes in the proposed protocol and requesting to participate in the process (Letters attached as Appendix A). The Council of State either disregarded the letters or simply denied the requests to participate. (Letter attached as Appendix B).

The protections of procedural due process are essential in developing the protocol the State of North Carolina utilizes when deciding how to implement the death penalty. The legislature's delegation of responsibility to the Council of State to review the execution protocol developed by the Department of Correction (DOC) is intended to act as a check and balance to the DOC's exercise of authority over executions. In light of the DOC's lack of transparency in this matter, the application of due process requirements to the actions of the Council of State is even more important. The Council of State is the public's only chance for access to the procedure carried out in its name.

In most respects, the touchstone of executions in North Carolina is stealth. Executions are scheduled at 2:00 a.m. at Central Prison in Raleigh, when few are awake to witness them. Except for select persons defined by statute and the execution protocol as witnesses, citizens are banned from the grounds of Central Prison. The DOC permits witnesses to see very little through the glass opening into the death chamber, hiding much of the inmate's body and the tubing through which the drugs flow. Indeed, the DOC injects a paralytic drug into the inmate, solely to

further conceal from the witnesses any adverse physical reaction the inmate may have. Participants in executions are entirely anonymous, and technical mechanisms of the execution method are shrouded in secrecy.

Prior to February 6, 2007, neither the general public, nor the Council of State, nor the General Assembly had been given the opportunity to review various changes in the manner by which DOC executes inmates. Earlier variations of the protocol included giving half of the total dose of the anesthetic agent at the end of the process, after the administration of the two painful chemicals, and when the inmate supposedly was unconscious or dead. That these procedures were also never codified or given appropriate review is no reason to continue the error now that we have become aware of it.

The DOC's historical failure to comply with various statutory provisions further highlights the importance of the Council of State's obligation to comply with the APA. Recent disclosures by employees of the Department of Correction illustrate the danger of relying on only one side to define the truth.

Despite a state statute specifically requiring the presence at the execution of the surgeon or physician of the penitentiary (N.C. Gen. Stat. § 15-190), one of the physicians so charged described "wait[ing] in the warden's office until someone brought him an EKG printout and a death certificate filled out except for his signature," for executions conducted before 2006. Weigl, *Did Doctor Monitor Executions?* NEWS & OBSERVER, March 29, 2007 at 1 (article attached as Appendix C).

An affidavit provided by the medical director of Aspect Medical Systems, the manufacturer of the bispectral index monitor, or BIS monitor, demonstrates that the DOC obtained the monitor only by falsely representing that the monitor would be used exclusively in

hospital procedures. (Affidavit of Scott Kelly, attached as Appendix D). North Carolina DOC is the only such entity in the country to use the BIS monitor in executions because Aspect Medical Systems now requires purchasers to sign an affidavit that the monitor will not be used in executions. Attorneys presented this information in letters but were prevented from speaking directly with the Council of State. Without due process and without debate, the Council of State approved the BIS monitor for use in North Carolina executions.

Because of the denial of due process, the Council of State never meaningfully considered whether the BIS monitor could be used effectively for the purposes alleged by DOC. Aspect Medical Systems maintains that the monitor cannot be used effectively without the active participation of a specially-trained medical professional who has close access to the patient.

According to the DOC's representations to the federal court in Brown v. Beck, No. 5:06-CT-3018-H (E.D. N.C.), "[a] licensed registered nurse *and* a licensed physician are positioned in the observance room beside the Cardiac Monitor Defibrillator . . . and the BIS monitor will be located such that it can be observed and its values read by both medical professionals." (Defendants' Response to Court's Order in Brown attached as Appendix E) (emphasis added).

In April 2006, United States District Court Judge Malcolm Howard approved this proposed lethal injection protocol and ruled that the State could proceed with the execution of Willie Brown, Jr. Judge Howard ruled that the State could execute Brown in large part because prison officials presented a plan to have a physician and a nurse track the inmate's consciousness on the BIS monitor. According to Judge Howard's Order:

> The court is satisfied by the State's plan to use a licensed registered nurse and a licensed physician to monitor the level of the [inmate's] consciousness. . . The court is also satisfied that the licensed registered nurse and licensed physician used by [prison officials] in [inmate's] execution will be satisfactorily trained and

> fully capable of reading the BIS monitor and responding appropriately to the data they receive.

April 17, 2006 Order. Willie Brown, Jr. was executed on April 21, 2007.

A few months after Mr. Brown's execution, Warden Marvin Polk was deposed in continuing federal litigation about the State's lethal injection procedures and the role of the doctor in the execution. The lawyer asked Polk, "Can you describe the role [of the doctor] under the current execution protocol?" Polk answered, "To be present." Page and Rouse v. Beck, U.S.D.C. No. 5:04-CT-04-BO, Videotaped Deposition of Warden Marvin Polk at p. 104 (November 28, 2006) (attached as Appendix F).

The lawyer asked, "Does this team member have any role in reading the BIS monitor?" Polk responded, "No." *Id.*

The lawyers asked, "Any role in reading the EKG?" Polk responded, "No." *Id.*

The physician present at the execution of Willie Brown confirmed his limited role. Dr. Obi Umesi states that he did not observe the BIS monitor or the heart-rate monitor, and that his role was "nothing more than being present." Weigl, *Did Doctor Monitor Executions?* NEWS & OBSERVER, March 29, 2007 at 1 (Appendix C).

Based on these and other concerns about the role of Department of Correction personnel involved in the development and implementation of the lethal injection protocol, as well as an interest in the substance of the proposed protocol, representatives of the petitioners sought but were denied input into the proceedings before the Council of State. Instead, the Council of State received testimony and input solely from some of the attorneys representing and defending the actions of the employees of the Department of Correction described above.

ARGUMENT

A. The Petitioners are not Required to Exhaust Administrative Remedies Established by the N.C. Department of Correction Because Such Remedies Have No Bearing on the Contested Action by the Council of State

Because the Contested Action is that taken by the Council of State, not the N.C. Department of Correction, any internal administrative system of complaints established by the DOC has no bearing on this litigation. The DOC has adopted an Administrative Remedy Procedure pursuant to N.C. Gen. Stat. § 148-118.1. That procedure constitutes the administrative remedy for any grievance "under the purview of the Administrative Remedy Procedure." N.C. Gen. Stat. § 148-118.2. The procedures utilized by the Council of State to adopt a lethal injection protocol are not under the purview of the Administrative Remedy Procedure. The DOC has no power to remedy the procedural failures of the Council of State or provide the relief requested by Petitioners.

B. The Honorable Donald Stephens Has Not Assumed Jurisdiction

The Council of State maintains that the Honorable Donald W. Stephens, Senior Resident Superior Court Judge, assumed jurisdiction over the Council of State action based on an Order Allowing Preliminary Injunction issued by Judge Stephens in the case of Robinson and Thomas v. Beck, Wake County Superior Court No. 07 CVS 001109 (January 25, 2007) (Order attached as Appendix G). In that Order, Judge Stephens found that:

> The Secretary of Correction and the Warden may not significantly alter the existing protocol for the manner and method of executions, which protocol has previously received court approval as constitutional, without first submitting such substantial changes to the Governor and Council of State for review and approval.

Judge Stephens further retained "jurisdiction over all matters *in this case*." (emphasis added).

The Council of State's argument that Judge Stephens has original jurisdiction over the Council of State's adoption of a protocol is wrong for a number of reasons. First, Judge Stephens did not invoke jurisdiction over the entire spectrum of lethal injection litigation. He simply retained jurisdiction in the case before him and pointed out the obvious- the only way that the State could legally execute Robinson and Thomas was to comply with the explicit language of N.C. Gen. Stat. § 15-188.

Second, the Council of State was not a party to Robinson and Thomas v. Beck, and Judge Stephens' Order retaining jurisdiction over that case does not encompass an action involving numerous other parties.

Third, Judge Stephens' Order predates the Council of State's activity that is contested here. Certainly, Judge Stephens could not foresee at the time of his order that the Council of State would decide to immediately adopt a new lethal injection protocol, much less that the Council would ignore all required administrative procedures when doing so.

Fourth, as discussed below, the Superior Court has jurisdiction only after the petitioners have exhausted their administrative remedies.

C. The Superior Court Has Jurisdiction Only After Review by the Administrative Law Judge

N.C. Gen. Stat. § 150B-43 provides the procedure for an appeal to the superior court for review of an agency's decision:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review under this Article, unless adequate procedure for judicial review is provided by another statute.

(emphasis added)

"Where a statute provides for 'an orderly procedure for an appeal to the superior court for review . . . this procedure is the exclusive means for obtaining judicial review,' and a civil action is only proper after all administrative remedies have been exhausted." N.C. Central University v. Taylor, 122 N.C. App. 609, 613, 471 S.E.2d 115, 118 (1996) (emphasis in the original), citing Johnson v. N.C. Dept. of Transportation, 107 N.C. App. 63, 70, 418 S.E.2d 700, 705 (1992) (quoting State v. House of Raeford Farms, 101 N.C. App. 433, 442, 400 S.E.2d 107, 113 (1991).

Petitioners seek to exhaust their administrative remedies by filing a contested case with the Administrative Law Judge. If Petitioners failed to exhaust those procedures, they would have no remedy in the Superior Court.

D. The Council of State is Bound by the APA and Failed to Comply in this Instance

The Council of State was asked to implement or interpret an enactment of the General Assembly in accordance with the following statute:

§ 15-188. Manner and place of execution.

> In accordance with G.S. 15-187, the mode of executing a death sentence must in every case be by administering to the convict or felon a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until the convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, the punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article. (1909, c. 443, s. 2; C.S., s. 4658; 1935, c. 294, s. 2; 1983, c. 678, s. 2; 1998-212, s. 17.22(b).)

The Council of State cannot approve a lethal injection protocol pursuant to N.C. Gen. Stat. § 15-188 without complying with the North Carolina Administrative Procedure Act. The Council of State must follow the rule-making procedures outlined in Chapter 150B of the North Carolina General Statutes because it is an agency engaged in rule-making, as defined by the statute.

> "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

150B-2(1a)

The Council of State falls well within the statutory definition of an agency subject to the APA. It is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements. Even in those instances, the exemption applies only to the narrow extent specified by the General Assembly. As no such exemption has been made for the Council of State in these circumstances or any others, it is apparent that the General Assembly intended the APA to apply to the Council.

> The purpose of the APA "is to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies," and the APA applies "to every agency as defined in G.S. 150B-2(1), except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary." N.C. Gen. Stat. § 150B-1(B), (c) (1989). . . . As our Supreme Court has held, the 'General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly.'

North Buncombe Ass'n of Concerned Citizens, Inc. v. Rhodes, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990), citing Vass v. Board of Trustees, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989).

The crux of the Council's argument is that because the Department of Correction's rule-making procedures are exempt from certain portions of the APA, that exemption should be extended to the Council of State when it engages in related activities. The Council makes this point by highlighting one of the sentences contained in a provision of the North Carolina Administrative Code (NCAC):

> 06 NCAC 02.0101 – Preliminary Steps for Rule-Making
>
> The proposed text shall be submitted by the executive department responsible for administering the statute to which the proposed rule relates. The executive department must follow Chapter 150B of the General Statutes on rule-making before submitting its recommendation to the Council. The hearing procedures applicable to that executive department apply. The Council may initiate rule-making in those matters which require its approval.

Cited in Respondent's Brief at p. 6. By highlighting this particular sentence, the Council implies that the department's procedures apply to the Council. The plain language reading of the provision is that the hearing procedures applicable to that executive department apply *to that department*, even where the Council of State must later approve its rule. In other words, Council of State approval of a rule submitted by a department does not relieve the department from following its own administrative procedures. The Council's interpretation is particularly unnatural in light of the fact that both preceding sentences refer to actions to be taken by the department, not the Council. Furthermore, it makes little sense to state what hearing procedures might apply to Council of State in the event that it should engage in rule-making, immediately before stating that such rule-making is possible.

Moreover, of two plausible readings of the final sentence of this section, the Council picks the less natural one. "The Council may initiate rule-making in those matters which require its approval" could read as either;

a. The Council may initiate rule-making or may simply approve the rule without a rule-making; or
b. If the Council thinks that the department's rule is potentially acceptable, the Council may initiate rule-making as the first step in adopting the rule.

For the Council to say that it has not engaged in rule-making is to endorse a reading which does not make sense in a section entitled "Preliminary Steps for Rule-Making." It is interesting that this section of the Council's rules is so titled given that, according to the Council, it does not engage in rule-making at all.

The Council also cites as authority § 06 NCAC -02.0102 – Petition for Rule-Making Hearings and § 06 NCAC-02.0103 as authority. These sections say nothing about whether the Council's approval constitutes rule-making, but § 02.0102 does makes clear that the Council of State can conduct rule-makings and hold hearings.

Petitioners agree with the Council that "the Council of State rules require the proposing agency to follow the provisions of N.C. Gen. Stat. Chapter 150B that are applicable to that agency in promulgating such rules and proposing them for approval by the Council." Respondent's Brief at 7. Petitioners further agree that the Administrative Procedure Act does not apply to DOC's rule-making. Respondent's Brief at 7. But the Council's analysis says nothing whatever about whether the approval by the Council of State itself constitutes rule-making.

The Council further states:

> Finally, it is by no means clear that the Lethal Injection Protocol promulgated and proposed for approval by the Department of Correction is a rule at all, and even more unclear that the approval by the Council of State constitutes a rule, even in absence of valid rules by the Council of State.

Respondent's Brief at p. 7. The Council does not address the APA definition of "rule" in making this claim. The statutory definition of "rule" is broad and covers many types of agency actions:

> "'Rule' means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.

§ 150B-2(8a). The statute goes on to exempt a number of minor acts and ministerial functions from the scope of the rule, none of which pertain to the Council of State. Deciding the protocol by which men and women are to be put to death is hardly a ministerial act.

The Council was asked to review a proposed lethal injection protocol to determine whether it is in compliance with § 15-188. As such, its action interpreted an enactment of the General Assembly and would be defined as rule-making under the relevant statute. The plain language of Chapter 150 requires the Council to follow the rule-making procedures of the APA under these circumstances. There is no applicable exception. It is the Council's action in approving the protocol, rather than the DOC's action in proposing the protocol, that is subject to the APA. Thus the Council of State's approval of the lethal injection protocol is not shielded by the DOC's statutory exemption from rule-making procedures.

The N.C. Gen. Stat. § 150B-1(d) exemption of the Department of Correction from ordinary rule-making procedures is not directed specifically at the manner in which the State will execute condemned inmates but to all "matters relating solely to persons in its custody or under its supervision." But compare Overton v. Bazzetta, 539 U.S. 126, 137 (2003) (holding constitutional prison regulations restricting inmates' visitation rights, distinguishing that case from cases which "involve the infliction of pain...or deliberate indifference to the risk that it might occur"). Here, the underlying issue is whether the execution protocol involves deliberate indifference to the risk of infliction of pain which would offend the constitutional prohibitions of cruel or unusual punishment guaranteed by the Eighth and Fourteenth Amendments to the United

States Constitution and Article I, §27, of the North Carolina Constitution, which issue must be determined in light of "'the evolving standards of decency that mark the progress of a maturing society,'" Roper v. Simmons, 543 U.S. 551, 561 (2005) (holding unconstitutional the execution of under age 18 murderers).

Meaningful implementation of the applicable statutes and rules requires that the rule-making in this case be by the Council of State, the agency which can best take into account "the evolving standards of decency...of a maturing society" along with other considerations developed in rule-making proceedings before the Council of State after proposal of an execution protocol by the Department of Correction.

Conclusion

The OAH, not the Superior Court, has original jurisdiction over the procedural claims filed here. The Petitioners have no other administrative remedies available to them to contest the Council of State's actions. The Council makes no real argument that there are not two rule-makings here: first, the proposal by the Department of Correction, and second, the approval by the Council. The Definition section of the APA (150B-2) makes it clear that they both are rule-makings. Although the Department of Correction is not bound by the APA rule-making provisions, the Council of State is required to provide notice, allow for comment, and comply with all other procedures set forth in Chapter 150B.

The Council apparently conceives of itself as little more than a rubber stamp for state agencies. To the contrary, the Council of State is itself an agency, and is therefore bound by all the procedural regulations and due process safeguards normally attendant to such a status.

Given that Petitioners' claim is properly filed, the failure of the Council of State to comply with statutorily-required notice and comment provisions, and the gravity of the matter at stake, the Court should deny the Respondent's Motion to Dismiss and schedule a hearing on this matter.

This the 16th day of April, 2007.

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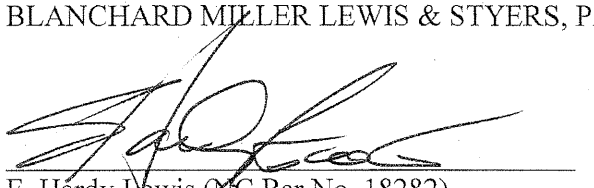

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CERTIFICATE OF SERVICE

This is to certify that the foregoing **Petitioners' Brief Opposing Council of State's Motion to Dismiss** has been duly served upon defendants by depositing a copy, postage pre-paid in the United States Mail, to the following counsel:

Donald R. Teeter, Sr., Special Deputy Attorney General
Thomas J. Pittman, Special Deputy Attorney General
North Carolina Department of Justice
114 West Edenton Street
P.O. Box 629
Raleigh, NC 27602-0629

This the 16th day of April, 2007.

Elizabeth F. Kuniholm/Lucy N. Inman

APPENDIX A

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February 5, 2007

VIA TELECOPIER — URGENT REQUEST

David McCoy, Secretary
North Carolina Council of State
Office of the Governor
The Capitol
Raleigh, NC 27601

Re: Council of State — Consideration of Lethal Injection Protocol

Dear Mr. McCoy:

I represent James Campbell, who has been scheduled by the Department of Correction to be executed by lethal injection on February 9, 2007. On his behalf, I request an allocation of time to address the Council of State regarding the Lethal Injection Protocol, at its scheduled meeting on Tuesday, February 6, 2007. I make this request pursuant to Article I, Section 12, of the North Carolina Constitution, which declares the people's right to petition their government.

With best regards,

Sincerely,

Elizabeth Kuniholm

Elizabeth F. Kuniholm

EFK/me
cc: Governor Michael F. Easley
Lieutenant Governor Beverly Perdue
Richard H. Moore, State Treasurer
Les Merritt, State Auditor
Cherie K. Berry, Commissioner of Labor
Roy A. Cooper, III, Attorney General
Elaine F. Marshall, Secretary of State
James E. Long, Commissioner of Insurance
June Atkinson, Superintendent of Public Instruction
Steve Troxler, Commissioner of Agriculture

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February 1, 2007

Mr. David T. McCoy
Secretary to Council of State
State of North Carolina
5200 Administration Building
116 W. Jones Street
Raleigh, NC 27603-1300

Re: Petition to Council of State
Meeting Scheduled for February 6, 2007

Dear Mr. McCoy:

Pursuant to 06 NCAC 02. 0101, I am enclosing a Petition for Rule Related to the Duties of the Council of State Pursuant to N.C. Gen. Stat. § 15-188. I have taken the liberty of forwarding copies of the Petition to the members of the Council of State.

Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Kenneth J. Rose
Counsel for Jerry Conner

Enclosure

PETITION FOR RULE RELATED TO THE DUTIES OF THE COUNCIL OF STATE PURSUANT TO N.C. GEN. STAT. § 15-188

To: Governor Michael Easley and Members of the Council of State

Proposed Rule: The State of North Carolina shall not employ the bispectral ("BIS") index monitor for use in executions.

Statutory Authority: N.C. Gen. Stat. § 15-188 provides in pertinent part that:

> The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article *and approved by the Governor and Council of State*, the *necessary appliances* for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article.

(emphasis added).

Jerry Conner, Archie Billings and Fernando Garcia, inmates on North Carolina's death row at Central Prison, Raleigh, N.C., through counsel, hereby petition the Council of State to adopt the proposed rule governing the manner and place of execution pursuant to its authority under N.C. Gen. Stat. § 15-188. Petitioners ask the Council of State to ban the use of the bispectral ("BIS") index monitor from use in executions. In support of this petition, Petitioners state as follows:

Without the required approval from the Governor and the Council of State, North Carolina has executed two inmates using a new "appliance" to assist in the infliction of the punishment of death - the BIS monitor, which is manufactured by Aspect Medical Systems of Newton, Massachusetts.

North Carolina is the only state in the country that employs a BIS monitor to assist in executions. The FDA has not approved the BIS monitor for use in executions, and the President of Aspect Medical has stated that company representatives did not

know the Department of Correction's purposes in purchasing the machine. (Ex) In fact, in communications with Aspect Medical, representatives of the Department of Correction "indicated that they were purchasing the Aspect Medical BIS monitor for use in operating rooms, mobile operating rooms and intensive care units and never indicated in any way that they intended to use it in connection with [an] execution." (Ex.). The President of Aspect Medical has stated under oath that the company would not have sold the BIS monitor to the Department of Correction had the Defendants honestly indicated its intended use.

Medical professionals must interpret the data provided by the BIS monitor in conjunction with their clinical judgment. (Ex.) Medical professionals cannot make necessary clinical judgments from a remote location. (Ex.) Thus, use of the BIS monitor in an execution requires physician participation and close proximity to the inmate.

Moreover, the BIS monitor is not an effective measure of an inmate's level of consciousness during an execution. In his dissent in Brown v. Beck, 445 F.3d 752 (4th Cir. 2006), Judge Michael summarized "the impressive array of evidence" demonstrating that a BIS monitor is "not suitable . . . as the sole indicator of Brown's level of unconsciousness:"

> 'It is virtually universally accepted and understood by all anesthesiologists that the BIS monitor and other brain function monitors cannot be used as the sole method for assessing anesthetic depth,' but must be used alongside other markers of consciousness (such as purposeful reflex movement, blood pressure, and heart rate)...[citation omitted]....In addition to offering testimony to this effect from three leading medical experts, Brown offers persuasive evidence from independent, authoritative sources. For instance, Aspect Medical Systems, the manufacturer of the BIS monitor purchased by the State, warns that '[c]linical judgment should always be used when interpreting the BIS in conjunction with other

> available clinical signs. Reliance on the BIS alone for intraoperative anesthetic management is not recommended.'[citation omitted].....
>
> The American Society of Anesthesiologists (ASA) and the American Association of Nurse Anesthetists have promulgated standards that counsel against the use of brain functioning technology, such as BIS monitors, in isolation without other monitoring methods or interpretation by personnel with appropriate training in anesthesia. Most notably, the ASA has observed:
>
> > The general clinical applicability of [BIS monitors] in the prevention of intraoperative awareness has not been established. Although a single randomized clinical trial reported a decrease in the frequency of awareness in high-risk patients, there is insufficient evidence to justify a standard, guideline, or absolute requirement that these devices be used to reduce the occurrence or intraoperative awareness in high-risk patients [or any other group of patients] undergoing general anesthesia.
>
> American Society of Anesthesiologists, Practice Advisory for Intraoperative Awareness and Brain Function Monitoring, 104 Anesthesiology 847, 855 (2006) Likewise, a recent study on the reliability of BIS monitors in the medical journal Anesthesiology concludes that ('[a]nesthesia providers should not rely exclusively on the BIS reading when assessing depth of anesthesia.') See Dagmar J. Niedhart et al., Intrapatient Reproducibility of the BISxp Monitor, 104 Anesthesiology 242, 242 (2006).

445 F.3d at 745-55.

The Department of Correction obtained the BIS monitor for a use for which it is ill-suited and not approved. The Governor and Council of State members should adopt a rule plainly stating that it will neither endorse nor condone the use of this equipment in an execution.

Applicable Procedures for Adoption of this Rule

The rulemaking procedures of Title 6, Chapter 2 of the North Carolina Administrative Code apply to the Council of State. Pursuant to § 150B-2(1a), the Council of State is an agency, so it has to follow the Rulemaking guidelines of § 150B.

Before adopting a rule, the Council of State must:

a. Publish a notice of text in the N.C. Register
b. Hold a public hearing on the proposed rule after publication
c. Accept oral or written comments
d. There are specific requirements for each of these procedures in the statutes.
e. An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the NC Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.
f. An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed…

N.C. Gen. Stat. § 150B-21.2

Respectfully submitted, this 1st day of February, 2007.

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COUNSEL FOR FERNANDO GARCIA

APPENDIX B

STATE OF NORTH CAROLINA
OFFICE OF STATE BUDGET AND MANAGEMENT

MICHAEL F. EASLEY
GOVERNOR

DAVID T. MCCOY
STATE BUDGET DIRECTOR

February 5, 2007

Elizabeth F. Kuniholm
Attorney at Law
Kuniholm Law Firm
P.O. Box 30303
Raleigh, North Carolina 27622

Dear Ms. Kuniholm:

I am in receipt of your correspondence dated this day requesting an opportunity to address the Council of State at its regularly scheduled meeting tomorrow morning. Your request cannot be granted. The Council of State's monthly meeting is a regularly scheduled business meeting and is not a public hearing. Routinely, there is no public comment component on the Council's agenda and your right to petition under Article I, Section 12 of the North Carolina Constitution can be fulfilled through other means.

You may attend the meeting in person or you can listen to the proceedings via webcast at www.ncapt.tv .

Sincerely,

David McCoy
Secretary to the Council

drnc

cc: Governor Michael F. Easley
Lieutenant Governor Beverly Perdue
Elaine F. Marshall, Secretary of State
Roy A. Cooper, Attorney General
James E. Long, Commissioner of Insurance
Richard H. Moore, State Treasurer
Les Merritt, State Auditor
Steve Troxler, Commissioner of Agriculture
June Atkinson, Superintendent of Public Instruction
Cherie Berry, Commissioner of Labor

APPENDIX C

Death Penalty

Published: Mar 29, 2007 12:00 AM
Modified: Mar 29, 2007 04:56 AM

Did doctor monitor executions?

Doctor who attended at least 18 state executions speaks publicly, breaking the anonymity that has surrounded capital punishment. His deposition shows the clash between medical ethics and the law

ANDREA WEIGL, Staff Writer

RALEIGH - A prison doctor stood in a small observation room near a brain-wave machine during the state's past two executions.

He said in an interview this week that as the inmates died just a few feet away, he did not monitor their level of consciousness, and prison officials never asked him to, despite a federal judge's order requiring that.

The question of whether Dr. Obi Umesi can stand in the observation room with a heart monitor and brain-wave monitor and not track a dying man's vital signs is at the center of a legal dilemma that has delayed five executions in this state.

If Umesi monitored the dying man's consciousness, he might have violated his profession's ethical rules.

If he did not, the state would be violating the judge's order.

State lawyers indicated that they would dispute Umesi's comments. After his Monday interview, the state Attorney General's Office, which represents prison officials, released a 188-page deposition he gave Dec. 1. In it, Umesi said he looked at the brain-wave monitor and viewed its readings.

"Technically, they are in the same room as the monitors," said Umesi's lawyer, Robert Clay of Raleigh. "They are specifically not looking at the monitors."

Umesi said Monday that his only duty was to be present and he did not violate his ethics.

"I would not participate in an execution," Umesi said. "I would not voluntarily take a life."

Umesi's decision to speak publicly and the release of his deposition, part of federal litigation about the state's lethal injection procedures, have pierced the secrecy that surrounds executions.

A state law protects the identities of those at executions. The deposition of Umesi protected his identity, referring to him only as "Team Member 3" and was taken over the telephone equipped with a voice-altering device. The Attorney General's Office released a copy of the deposition and Noelle Talley, the agency's spokeswoman, identified Umesi as "Team Member 3."

Umesi, 50, is a contract physician with the prison system who works 12-hour evening shifts at Central Prison on Thursdays, when executions occur. He has been Wake County's jail doctor since 1991. Public records show Umesi has certified condemned inmates' deaths since 2003 and has been present at more executions than any other doctor -- at least 18 of the past 20.

Before the past few executions, Umesi said, he waited in the warden's office until someone brought him an EKG printout and a death certificate filled out except for his signature. He said he certified the inmates' deaths without ever seeing the inmates' bodies. Two other doctors who have done execution duty in interviews described a similar routine.

Dr. Obi Umesi, shown at the Wake County jail in 2004, gave varying accounts about whether he monitored the consciousness of condemned inmates as a judge ordered.
News & Observer File Photo

more photos

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Doctors' identities disclosed

A state law protects the identities of those involved in executions. However, prison officials and their lawyers have repeatedly said in court records and at court hearings that the doctor who is present at the execution signs the condemned inmate's death certificate. A separate state law requires the warden to send a letter verifying that the inmate was executed to the clerk of court in the county where the inmate was sentenced the death. The warden and the prison physician sign that letter.

The News & Observer was able to obtain copies of those death certificates and letters in 36 of the last 43 executions.

Dr. Obi Umesi and Dr. Paula Smith, now the prison system's chief of health services, sat down for an interview Monday at their lawyers' office. Umesi, Smith and Dr. Olushola Metiko are represented by Raleigh lawyers Robert Clay and Diane Meelheim. Those three doctors were present for at least 24 of the last 27 executions since 2001. Meelheim said Metiko was unable to attend the interview.

Another former prison doctor, Dr. Barbara Pohlman, also was interviewed. All three -- Umesi, Smith and Pohlman -- described staying in the warden's office during executions and signing the documents without seeing the inmate's dead body. Public records show Smith had execution duty at least five times from 2001

In April, U.S. District Judge Malcolm Howard allowed the execution of killer Willie Brown to proceed. But he said a doctor must watch a brain-wave monitor to ensure that Brown was fully sedated before being injected with paralyzing and heart-stopping drugs.

A lawsuit had questioned whether inmates were conscious when injected with the fatal drugs.

Brown and Samuel R. Flippen were executed last year under that order.

For the past few executions, Umesi said, Warden Marvin Polk asked him to move closer to the second-floor death chamber. Umesi said he stood on the back wall of an observation room, unable to clearly see the brain-wave and heart-rate monitors or the inmate on a gurney.

Umesi said the warden did not ask him to do anything else. "He asked nothing more than being present," Umesi said.

Asked whether he looked at either the brain-wave monitor or the heart-rate monitor, Umesi said: "I would not be observing those."

Next page >

Staff writer Andrea Weigl can be reached at 829-4848 or aweigl@newsobserver.com.

until 2002 when she says she was the director of health services at Central Prison. Her predecessor in that job, Pohlman, certified inmates' deaths in at least six executions from 1998 to 2000, records show.

Asked why she stayed away from the death chamber, Pohlman said that everyone else was gathered in the warden's office. "I assumed it was established practice," she said.

Retired Drs. Rosemary Jackson of Bahama and Edwin Scott Thomas of Raleigh also were identified by public records as the doctors who signed death certificates for executed inmates. Neither returned messages or responded to requests for interviews.

Related Content

- Extracts from deposition given Dec. 1 by Dr. Obi Umesi. (PDF)

Read more stories about North Carolina's death penalty.

More Death Penalty

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- Execution impasse unlikely to end soon
- Doc's execution role: 'Be present'
- Did doctor monitor executions?
- Bill could restore execution schedule
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILE NUMBER 5:06-CT-3018-H

WILLIE BROWN, JR. **Plaintiff,** v. **THEODIS BECK, Secretary, North Carolina Department of Correction, and MARVIN POLK, Warden, Central Prison, and UNKNOWN EXECUTIONERS,** **Defendants.**	**AFFIDAVIT OF SCOTT D. KELLEY, M.D.**

Affiant, being first duly cautioned and sworn, states as follows:

1. I am a physician licensed by the Commonwealth of Massachusetts and the State of California. I am certified by the American Board of Anesthesiology, with a Special Qualification in Pain Management. I practice anesthesiology at Brigham and Women's Hospital, a Harvard Medical School Affiliate.

2. In 1980 I received a Bachelor of Science degree (with Honors) and a Master of Science degree from Stanford University. I earned my Doctor of Medicine at University of California, San Francisco in 1984. I completed a residency in anesthesia at University of California, San Francisco.

3. Until moving to Massachusetts in 2000, I served as Associate Professor of Clinical Anesthesia and Director of Liver Transplant Anesthesia at University of California, San Francisco.

4. I am a member of American Society of Anesthesiologists, Society for Ambulatory Anesthesia, International Society of Anesthetic Pharmacology and International Anesthesia Research Society.

5. I am Vice President and Medical Director of Aspect Medical Systems, Inc. ("Aspect"), which is located in Newton, Massachusetts. As described in its Mission Statement, Aspect develops technology to:

> "help[] medical professionals deliver the best possible patient care through innovative brain monitoring technologies."

6. Aspect's products incorporate Bispectral Index ("BIS") technology, which provides doctors and nurses with reliable information about the effects that drugs have on the brain and affirm the clinical decisions made by those doctors and nurses in providing patient care.

7. I have extensive knowledge of BIS systems, and I have authored a clinical handbook for anesthesia professionals on BIS monitoring. I frequently lecture on BIS systems, and I have personally trained hundreds of healthcare professionals in the use of BIS monitoring. I also regularly use BIS systems in my own anesthesiology practice.

8. I have reviewed Defendants' Notice and Response to 7 April 2006 Order, Second Affidavit of Marvin L. Polk, and Third Affidavit of Mark Dershwitz, M.D., Ph.D. submitted in this action on April 12, 2006. From those documents I have learned that the Defendants have modified the execution protocol and propose to utilize a BIS monitor during the execution of the Plaintiff Willie Brown, Jr.

9. Earlier this week, representatives of the Defendants purchased that BIS monitor, an Aspect A-2000 EEG Monitor with BIS, by calling Aspect's 1-800 telephone sales number. In response to standard inquiries from Aspect's telephone sales team, those representatives of the

Defendants indicated that they were purchasing the Aspect BIS monitor for use in operating rooms, mobile operating rooms and intensive care units and never indicated in any way that they intended to use it in connection with the execution of the Plaintiff.

10. The Operating Manual for the Aspect A-2000 EEG Monitor with BIS, which was shipped to the Defendants with the product, clearly indicates that:

> "the BIS monitor is intended for use on . . . patients within a hospital or medical facility providing patient care. . . ."

11. While the Defendant Polk notes in his Second Affidavit, ¶ 3, that "the BIS monitor has been approved by the Food and Drug Administration ("FDA") for multiple purposes," he does not indicate that the intended uses submitted to the FDA by Aspect and the "cleared indications" by the FDA have always related solely to the provision of therapeutic care to patients by trained doctors and nurses.

12. The BIS monitors have never been tested or submitted for approval or approved by the FDA for the use intended by the Defendants.

13. Furthermore, as the Operating Manual notes, the BIS monitor:

> "is intended for use under the direct supervision of a licensed healthcare practitioner or by personnel trained in its proper use."

14. The Operating Manual warns of potential false readings which:

> "may be caused by poor skin contact . . . , muscle activity or rigidity, head and body motion, sustained eye movements, improper sensor placement and unusual or excessive electrical interference."

These or other factors may lead to "inappropriate BIS values."

15. For this reason, medical professionals must interpret the data provided by the BIS monitor:

> "Clinical judgment should always be used when interpreting the BIS in conjunction with other available clinical signs. Reliance on

the BIS alone for intraoperative anesthesia management is not recommended."

16. The Defendants' Notice and Response indicates that:

"Defendants currently employ a Cardiac Monitor Defibrillator . . . [which will be] located in the observation room adjacent to the execution chamber . . . [along with a] licensed registered nurse and . . . licensed physician. . . ."

17. The Defendants do not specify the precise location of the BIS monitor, indicating only that it "will be located such that it can be observed and its values read by both medical professionals."

18. Both Aspect and standard anesthesia treatises recommend that medical professionals integrate the BIS monitoring with their own direct observation of the patient (along with traditional monitoring – i.e., blood pressure, heart rate, respiratory rate, etc.).

19. The Defendants' Notice and Response and the supporting Affidavits indicate that the "licensed registered nurse" and the "licensed physician" will be at a remote location from the Plaintiff and may be relying excessively -- or even solely – on the BIS monitor readings rather than clinical observations.

20. The Defendants also do not indicate whether the licensed registered nurse and licensed physician have received appropriate training in the use of the BIS monitor.

21. Aspect has not taken any position on death penalty issues. Rather, Aspect's concern is that its product may be employed by the Defendants in a manner that is entirely contrary to its intended use, its cleared indications for use and its Operating Manual. Aspect is further concerned that the BIS monitor may be operated by persons lacking appropriate training.

22. Had I known the Defendants' true purpose in purchasing the Aspect A-2000 EEG Monitor with BIS, I would have interceded to prevent the sale.

23. Further, the Affiant sayeth not

This, the 14th day of April 2006.

Scott D. Kelley, M.D.

This the 14th day of April 2006, sworn to and subscribed before me.

Notary Public

My Commission Expires: 11-4-2012

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILE NUMBER 5:06-CT-3018-H

WILLIE BROWN, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**DEFENDANTS' NOTICE AND**
	)	**RESPONSE TO 7 APRIL 2006 ORDER**
THEODIS BECK, Secretary, North Carolina Department of Correction, and MARVIN POLK, Warden, Central Prison, et al.,	)	
	)	
Defendants.	)	

On 7 April 2006, this Court issued an Order ("Order") conditionally denying Plaintiff's motion for preliminary injunction and permitting Plaintiff's execution to proceed as scheduled on 21 April 2006, subject to the following condition:

> that there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride.

(Order, p. 14) (emphasis in original). The Court further ordered that, if, during the execution, Plaintiff exhibited signs of consciousness, those personnel would immediately provide such care as was necessary to insure that Plaintiff was immediately returned to an unconscious state. (Order, p. 14). Finally, the Court ordered Defendants to file with the Court and serve upon the Plaintiff a "notice setting forth the plans and qualifications of such personnel." (Order, p. 15). As set forth in greater detail below as well as in the Third Affidavit of Mark Dershwitz, M.D., Ph.D. and the Second

Affidavit of Marvin L. Polk, copies of which are attached hereto as Exhibits 1 and 2 respectively and the contents of which are incorporated herein by reference, Defendants have: (1) purchased a bispectral index monitor ("BIS monitor"), a diagnostic device approved by the Food and Drug Administration ("FDA") that is used extensively in clinical settings to insure the unconsciousness of surgical patients; (2) revised the execution protocol to utilize the BIS monitor to measure the Plaintiff's level of consciousness throughout the execution procedure; (3) revised the execution protocol to provide for the administration of additional quantities of sodium pentothal beyond the initial dose of not less than 3000 mg, if the Plaintiff, based on the readings of the BIS monitor, has not been rendered unconscious; and (4) revised the execution protocol to insure that Plaintiff is in fact unconscious, as measured by the BIS monitor, prior to the administration of any pancuronium bromide.

The BIS monitor was approved by the FDA in 1996 to serve as a monitor of the depth of anesthesia in both surgical patients as well as those patients who are mechanically ventilated in intensive care units while under sedative medications.[1] (Third Dershwitz Aff., ¶¶ 6, 8.) In 2004, the FDA approved the BIS monitor as a device to prevent intraoperative awareness in surgical patients. (Third Dershwitz Aff., ¶ 6.) The device is used regularly in clinical settings where anesthesia is administered as well as in intensive care units for patients receiving mechanical ventilation whose sedative medications might have to be adjusted to maintain unconsciousness based on the readings from the attached BIS monitor. (Third Dershwitz Aff., ¶¶ 3, 8.)

The BIS monitor is connected by a cable to a strip of multiple electrodes which themselves are attached to a patient's forehead. (Third Dershwitz Aff., ¶ 4.) These electrodes, because they are

---

[1] Defendants' expert, Mark Dershwitz, M.D., Ph.D., served as one of the investigators who participated in the initial clinical studies of the BIS monitor prior to its approval by the FDA. (Third Dershwitz Aff., ¶ 3.)

analogous to those used to monitor a patient's heart rhythm with an electrocardiogram ("ECG"), can be applied by any health care provider experienced in the use of ECG monitors, including registered nurses, paramedics, and emergency medical technicians ("EMT's"). (Third Dershwitz Aff., ¶ 4.) In both the clinical and intensive care settings, a registered nurse has the requisite skill and training to and therefore typically applies the BIS monitor electrodes. (Third Dershwitz Aff., ¶¶ 4, 8.) Moreover, registered nurses possess sufficient skill and training to obtain, record, and interpret the values displayed on the BIS monitor screen. (Third Dershwitz Aff., ¶¶ 4, 8.)

Defendants currently employ a Cardiac Monitor Defibrillator to observe and monitor the heart activity of the condemned prisoner. The Cardiac Monitor Defibrillator located in the observation room adjacent to the execution chamber, attached to the condemned prisoner by electrodes similar to an ECG and by electrical leads. A licensed registered nurse and the licensed physician are positioned in the observation room beside the Cardiac Monitor Defibrillator. Both medical professionals can observe the Cardiac Monitor Defibrillator, and the licensed registered nurse monitors the condemned prisoner's heart activity continuously. The BIS monitor will be located such that it can be observed and its values read by both medical professionals.

As a practical matter, the BIS monitor, through the electrodes attached to a patient's forehead, acquires electroencephalogram ("EEG") or brain waves and analyzes these waves using its onboard computer. (Third Dershwitz Aff., ¶ 5.) The BIS monitor displays a digital readout of the BIS value, with a value of "0" indicative of the absence of brain electrical activity, and a value of "100" indicative of the patient being awake. (Third Dershwitz Aff., ¶ 5.) Multiple clinical trials in human beings have demonstrated that a very high probability of unconsciousness and a very low probability of awareness when the BIS value during surgical procedures drops below "60." (Third Dershwitz Aff., ¶ 7.) Accordingly, in the clinical anesthesia setting, the goal of medical personnel is to

maintain a BIS level below "60." (Third Dershwitz Aff., ¶ 7.) According to Dr. Dershwitz, an individual who received a 3000 mg dose of sodium pentothal would be expected to produce a BIS monitor reading below "60" for hours assuming even then that the individual's cardiovascular and respiratory functions were aggressively supported. (Third Dershwitz Aff., ¶ 9.)

Based on consultation with Dr. Dershwitz, Defendants have revised their execution protocol to incorporate the use of the BIS monitor in three material respects to insure the unconsciousness of the Plaintiff at the time that the pancuronium bromide injection is administered and, correspondingly, at the time that the potassium chloride is administered. First, Defendants have purchased for use in the execution of Plaintiff a BIS monitor which, when connected to Plaintiff, will permit Defendants to monitor the level of consciousness of Plaintiff during the execution procedure. (Second Polk Aff., ¶ 6; Third Dershwitz Aff., ¶ 2.) Second, if the BIS monitor displays a reading of "60" or higher after the initial dose of 3000 mg of sodium pentothal, the execution team employed by Defendants will continue to administer sodium pentothal until the BIS monitor reading falls below "60." (Second Polk Aff., ¶ 6.) Third, the execution team employed by Defendants will not administer any quantity of pancuronium bromide to Plaintiff until such time as the BIS monitor reading falls below "60." (Second Polk Aff., ¶ 6.) In the expert opinion of Dr. Dershwitz, to a reasonable degree of medical certainty, by incorporating these changes into the execution protocol, Defendants will ensure that Plaintiff will be rendered unconscious prior to the administration of either pancuronium bromide or potassium chloride. (Third Dershwitz Aff., ¶ 11.)

Respectfully submitted, this 12th day of April 2006.

ROY COOPER
Attorney General

/s/ Thomas J. Pitman
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Special Deputy Attorney General
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Attorney for Defendants Beck and Polk

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 12, 2006, I electronically filed the foregoing Defendants' Notice and Response to 7 April 2006 Order with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted,

/s/ Thomas J. Pitman
Thomas J. Pitman
Special Deputy Attorney General

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

WESTERN DIVISION

NO.5:04-CT-04-BO

GEORGE FRANKLIN PAGE, N.C. DOC #0310202, and KENNETH BERNARD ROUSE, N.C. DOC # 0353186,

Plaintiffs,

v.

THEODIS BECK, Secretary, North Carolina Department of Correction, and MARVIN POLK, Warden, Central Prison, Raleigh, North Carolina and UNKNOWN EXECUTIONERS, Individually, and in their Official Capacities,

Defendants.

VIDEOTAPED DEPOSITION OF WARDEN MARVIN POLK

(Taken by Plaintiffs)

Raleigh, North Carolina

Tuesday, November 28, 2006

Reported in Stenotype by
Sarah K. Mills
Transcript produced by computer-aided transcription

APPEARANCES

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ALSO PRESENT: Bob Hahn, Videographer

VIDEOTAPED DEPOSITION OF WARDEN MARVIN POLK, a witness called on behalf of PlaintiffS, before Sarah K. Mills, Notary Public, in and for the State of North Carolina, at the law offices of Smith Moore, 2800 Two Hannover Square, Raleigh, North Carolina, on 28th day of November 2006, commencing at 10:05 a.m.

INDEX OF EXAMINATIONS

INDEX OF EXHIBITS

(INDEX OF EXHIBITS (Continued)

received training on the BIS Monitor?

A. No.

Q. Can you describe to me what the role is of Team Member 3 under the current execution protocol?

A. To be present.

Q. Does this team member have any role in reading the BIS Monitor?

A. No.

Q. Any role in reading the EKG?

A. No.

Q. Could you describe for me -- the Team Member 3 you told me is a physician?

A. Yes.

Q. What license -- what type of license does that person hold?

A. Medical Doctor.

Q. Under the current protocol, are there any other qualifications required by the Department of Correction for the position of Team Member 3?

A. No.

Q. What is the qualification required?

A. To be a Medical Doctor.

Q. Is there any other training that's required by the Department of Correction for the position of Team Member 3?

APPENDIX G

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

2007 JAN 25 AM 11:2

COUNTY OF WAKE SUPERIOR COURT DIVISION

WAKE COUNTY, C.S.C. 07 CVS 001109

MARCUS ROBINSON and JAMES EDWARD THOMAS,
Plaintiffs

Vs.

THEODIS BECK, Secretary of the NC Department of Corrections; MARVIN POLK, Warden; et al., in their individual and official Capacities,
Defendants

ORDER ALLOWING PRELIMINARY INJUNCTION

This matter came on for hearing before the undersigned judge upon motion by plaintiffs for injunctive relief to stay their scheduled executions. Plaintiffs contend that a January 17, 2007 decision of the North Carolina Medical Board prohibits physicians from participating in their execution. Plaintiffs acknowledge that the presence and participation by physicians in past executions have provided guarantees of medical intervention to insure humane treatment of condemned prisoners. Under these past executions in which physicians participated, federal courts have approved executions so long as there existed sufficient medical protocol protections to minimize the potential for pain and suffering of the prisoner.

Plaintiffs contend that the absence of a physician's participation in the monitoring and supervision of a condemned prisoner's medical condition during an execution creates a potential risk of pain and suffering to the prisoner in violation of the Constitutional prohibition against cruel and unusual punishment.

The defendants at this hearing do not challenge the legal authority of the Medical Board to prohibit physician participation in an execution. Defendants' Counsel has announced that defendants have elected to comply with the Medical Board's decision and that physicians will no longer participate in the protocol to be followed in executions. Although a physician will be present during an execution, that physician will not supervise or participate in the injection of any drugs or the monitoring of the prisoner's medical condition. Defendants contend that the Warden has the responsibility to insure that an execution is carried out in a constitutional and lawful manner and that the Warden may do so through the use of trained medical personnel that does not include a physician.

Defendants contend that their current execution procedures and protocol can be lawfully carried out without the participation of a physician.

The defendants' current position is different from that which they have taken in past executions. This current procedure and protocol eliminates the physician's participation in an execution. This is a new execution protocol approved by the Secretary of Corrections and the Warden. In view of this significant change in the execution protocol, the court rules that G.S. 15-188 [Manner and place of execution.] is controlling.

G.S. 15-188 provides in part the following: "The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of this Article."

The court is of the opinion that the Secretary of Corrections and the Warden may not significantly alter the existing protocol for the manner and method of executions, which protocol has previously received court approval as constitutional, without first submitting such substantial changes to the Governor and Council of State for review and approval. In the absence of a protocol approved by the Governor and the Council of State which authorizes an execution to be carried out under procedures that do not require the participation of a physician, the requirements of G.S. 15-188 and Article 19 of Chapter 15 of the General Statutes have not been met.

WHEREFORE, the court having determined that the Governor and the Council of State have not reviewed and approved a new execution protocol which eliminates the requirement of participation by a physician, it is hereby ordered that the Plaintiffs' motions for preliminary injunction are allowed. The State of North Carolina is restrained and enjoined from carrying out the scheduled executions of Plaintiffs until there has been compliance with the requirements of law as heretofore set forth in this order.

However, if the Governor and Council of State or the Warden determines that the decision of the North Carolina Medical Board is invalid and is contrary to existing state law and prevents the Warden from conducting an execution in a lawful and constitutional manner, this order is entered without prejudice to the right of the defendants to file a third party action against the North Carolina Medical Board and to join that Board as a third party defendant to litigate that issue in this proceeding.

The undersigned judge retains jurisdiction over all matters in this case.

THE SHERIFF OF WAKE COUNTY IS ORDERED TO IMMEDIATELY NOTIFY THE WARDEN OF CENTRAL PRISON THAT THE EXECUTIONS OF THE PLAINTIFFS HAVE BEEN STAYED UNTIL FURTHER ORDER OF THIS COURT. THE SHERIFF SHALL ALSO CAUSE A COPY OF THIS ORDER TO BE SERVED UPON THE WARDEN.

Marcus Robinson & James Edward Thomas vs. Theodis Beck, et al.
07 CVS 1109

It is so ordered this the 25th day of January, 2007.

Donald W. Stephens
Senior Resident Superior Court Judge