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

NO. 5:06-CT-3018-H

WILLIE BROWN, JR., N.C. DOC #0052205,
Plaintiff,

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.

MOTION FOR PRELIMINARY INJUNCTION

Fed. R. Civ. P. 65(a)
Local Civil Rules 7.1 and 10.1

Plaintiff Willie Brown, Jr., N.C. DOC #0052205, (hereinafter "Plaintiff") through counsel and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, hereby moves this Court for a preliminary injunction barring Defendants from executing Plaintiff using an inadequate protocol for anesthesia during the course of Plaintiff's execution by lethal injection.

GROUNDS FOR MOTION

Plaintiff's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was denied on 27 February 2006, completing Plaintiff's federal habeas proceeding and requiring the Defendants to immediately schedule a date for carrying out Plaintiff's execution. As set forth in detail in the accompanying Memorandum in Support of Motion for Preliminary Injunction, Plaintiff seeks to enjoin Defendants from carrying out his execution using their intended inadequate anesthesia protocol, which unnecessarily risks infliction of pain and suffering. Defendants' protocol for anesthesia does not include adequate safeguards regarding the manner in which anesthesia is to be induced and maintained; does not establish the

appropriate minimum qualifications and medical expertise required of the personnel charged with inducing and maintaining an appropriate plane of anesthesia; does not provide for adequate monitoring of Plaintiff's level of anesthesia; does not authorize appropriately trained medical professionals to intervene in the event that an appropriate plane of anesthesia is not achieved or maintained during the course of lethal injection; and does not establish medically appropriate criteria upon which the personnel charged with inducing and maintaining anesthesia are to rely.

Defendants inadequate protocol for inducing and maintaining anesthesia throughout the course of Plaintiff's execution by lethal injection poses an unacceptable risk that Plaintiff will needlessly and consciously suffer excruciating pain in violation of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Plaintiff does not seek to invalidate, nor does this lawsuit imply the invalidity, of his conviction or death sentence. Plaintiff seeks only narrowly drawn relief from the unacceptable risk of conscious suffering during the lethal injection process as a result of Defendants' wholly unnecessary use of an inadequate means of achieving and maintaining an appropriate plane of anesthesia.

A preliminary injunction is warranted because Plaintiff will suffer immediate and irreparable harm if Defendants are not prevented from conducting Plaintiff's execution using their current protocol, which fails to ensure that an appropriate plane of anesthesia will be induced and maintained prior to execution. Plaintiff is also likely to succeed on the merits of his claim, and the public interest is served by granting preliminary equitable relief.

WHEREFORE, Plaintiff respectfully requests the Court to issue a preliminary injunction enjoining Defendants from executing Plaintiff using their intended inadequate protocol for

inducing and maintaining anesthesia. In light of Plaintiff's imminent execution, Plaintiff further requests that expedited consideration be given to this Motion.

Respectfully submitted this the 28th day of February 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MOTION FOR PRELIMINARY INJUNCTION** was served upon Defendants by hand-delivering a copy to the follow address:

Lavee Hamer, Esq.
General Counsel
North Carolina Department of Correction
214 W. Jones Street
Raleigh, North Carolina 27699

This the 28th day of February, 2006.

/s/ J. Donald Cowan, Jr.
J. Donald Cowan, Jr.
Attorney for Plaintiff

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and MARVIN POLK, Warden,
Central Prison, Raleigh, North Carolina, and
UNKNOWN EXECUTIONERS, Individually,
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Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Fed. R. Civ. P. 65(a)
Local Civil Rules 7.1(d) and 7.2

Plaintiff, Willie Brown, Jr., N.C. DOC #0052205, (hereinafter "Plaintiff") through counsel and pursuant to Local Civil Rules 7.1(d) and 7.2, hereby submits this Memorandum in Support of Motion for Preliminary Injunction.

INTRODUCTION

Under North Carolina law, Plaintiff, a death row inmate at Central Prison, will be executed by lethal injection. A growing body of evidence, including medical evidence, eyewitness observations, and veterinary literature, persuasively demonstrates that the protocol adopted by the North Carolina Department of Correction ("NCDOC") creates a significant risk that Plaintiff will fail to receive adequate anesthesia and will be conscious for the duration of his execution. Without adequate anesthesia, Plaintiff will first experience slow suffocation followed by the "extraordinarily painful" activation of sensory nerve fibers in the walls of his veins caused by the potassium chloride used to bring about cardiac arrest. (Heath Aff. ¶ 15.) Given this significant danger, Plaintiff seeks to prevent Defendants from executing him in a manner that is likely to subject him to this excruciating pain.

Plaintiff filed this civil action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief based on allegations that Defendants' anesthesia protocol violates his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. Plaintiff specifically alleges that Defendants' protocol for anesthesia does not include adequate safeguards regarding the manner in which anesthesia is to be induced and maintained; does not establish the appropriate minimum qualifications and medical expertise required of the personnel charged with inducing and maintaining an appropriate plane of anesthesia; does not provide for adequate monitoring of Plaintiff's level of anesthesia; and does not authorize medical professionals credentialed, licensed, and proficient in the practice of anesthesia to intervene in the event that an appropriate plane of anesthesia is not achieved or maintained during the course of his execution by lethal injection.

Plaintiff does not seek to invalidate, nor does this lawsuit imply the invalidity of, his conviction or death sentence. Plaintiff seeks only narrowly drawn relief from the unacceptable risk of conscious suffering during the lethal injection process as a result of Defendants' unnecessary use of an inadequate means of achieving and maintaining an appropriate plane of anesthesia.

Plaintiff respectfully requests that this Court, pending a final determination of the merits of Plaintiff's claim, preliminarily enjoin Defendants from their gratuitous use of an inadequate protocol for anesthesia during the course of his execution by lethal injection.

BACKGROUND

I. PROCEDURAL HISTORY

In 1983, Plaintiff was convicted of first-degree murder and robbery with a dangerous weapon and sentenced to death for the murder of Valerie Ann Roberson Dixon. On direct appeal, the Supreme Court of North Carolina affirmed Plaintiff's convictions and sentence. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985) (Exum, J., dissenting as to sentence). The United States Supreme

Court denied Plaintiff's petition for certiorari. *Brown v. North Carolina*, 476 U.S. 1165 (1986) (Brennan & Marshall, JJ., dissenting from the denial of certiorari).

Plaintiff filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina in 1998. The district court denied the petition in its entirety in August 2004, and this judgment was affirmed by the Fourth Circuit in July 2005. The United States Supreme Court denied certiorari on 27 February 2006. Pursuant to N.C. Gen. Stat. § 15-194(1), Defendants may immediately schedule a date for carrying out Plaintiff's execution after receiving notice that "[t]he United States Supreme Court has filed an opinion upholding the sentence of death following completion of the initial State and federal postconviction proceedings."

On 13 February 2006, Plaintiff filed an emergency grievance with Central Prison officials. (Compl., Ex. A.) As of the filing of this Memorandum, Plaintiff has received no response from officials at Central Prison or the NCDOC Grievance Board despite Plaintiff's request that his grievance be treated as an emergency and despite his impending execution. Plaintiff has now fully availed himself of the administrative grievance process, and any delay in the issuance of a final decision results from inaction on the part of Defendants. Plaintiff has therefore effectively exhausted his administrative remedies. In the alternative, Plaintiff submits that pursuit of administrative review is futile under the circumstances of this case. Similar grievances have been submitted by inmates George Franklin Page, Kenneth Rouse, and Sammy Perkins in August 2004. The NCDOC issued an identical response to each of these emergency grievances, recommending that no action be taken.[1] (*See* Page, Rouse, and Perkins Grievance Documents, attached as Exhibit A.)

[1] Plaintiff understands that an emergency grievance challenging Defendants' protocol for inducing and maintaining anesthesia during execution was submitted by inmate Kenneth Boyd in October 2005 and denied by the Defendants.

II. LETHAL INJECTION PROTOCOL

The current North Carolina lethal injection process involves the pushing of two identical sets of five syringes into two intravenous lines leading to the inmate's body. The sequence of injections is as follows:

> The first syringes contain no less than 3000 milligrams of sodium pentothal, an ultra short acting barbiturate that quickly puts the inmate to sleep. The second syringes contain saline to flush the IV line clean.
>
> The third syringes contain no less than 40 milligrams of pancuronium bromide (Pavulon), which is a chemical paralytic agent. The fourth syringes contain no less than 160 millequivalents of potassium chloride, which at this high dosage interrupts nerve impulses to the heart, causing it to stop beating. The fifth syringes contain saline to flush the IV lines clean.

North Carolina Department of Correction "Execution Method," *available at* http://www.doc. state.nc.us/dop/deathpenalty/method.htm. Upon a signal from the Warden, both sets of syringes are injected simultaneously in order "one" through "five," with each succeeding chemical solution being introduced within a few seconds after the injection of the immediately preceding chemical solution is completed.

Under Defendants' execution protocol, Plaintiffs will be rendered dead by the administration of potassium chloride, the third drug administered in the lethal injection sequence. (Heath Aff. ¶ 12.) Potassium chloride is a salt solution that when given in high concentrations causes cardiac arrest. (*Id.*) The other drugs that are administered during the procedure, sodium pentothal and pancuronium bromide, while intended to be administered in lethal doses, are not responsible for the death of the prisoner. (*Id.*) While the successful delivery into the circulation of sodium pentothal and pancuronium bromide in high doses would be lethal, the lethality of sodium pentothal and pancuronium is due to respiratory arrest, which takes several minutes and does not typically occur prior to the administration of potassium chloride. (*Id.*) In the execution sequence, before death can

be caused by respiratory arrest from sodium pentothal and pancuronium bromide, death is caused by potassium chloride. (*Id.*)

Intravenous injection of concentrated potassium chloride solution causes excruciating pain. The vessel walls of veins are richly supplied with sensory nerve fibers that are highly activated by potassium ions. The intravenous administration of concentrated potassium in doses intended to cause death would be extraordinarily painful. (Heath Aff. ¶ 15.) Stated differently, potassium chloride is locally toxic and extremely painful on injection if undiluted. Toxicity on local injection would cause extreme pain in an awake patient. (Boysen Aff. ¶ 10.)

Defendants also intend to administer pancuronium bromide, or Pavulon, in the process of carrying out Plaintiff's death sentence. This chemical has no anesthetic quality. (Heath Aff. ¶ 18; Concannon Aff. ¶ 13.) Rather, pancuronium bromide is a neuromuscular blocking agent, which means it interferes with neuromuscular transmission and, in effect, results in total muscle paralysis, an inability to move or breathe. (Boysen Aff. ¶ 9.) An awake subject would experience extreme terror, as the subject would be unable to move respiratory muscles and would asphyxiate and suffocate. (*Id.*; *see also* Concannon Aff. ¶ 13.) Should an inmate remain conscious when the pancuronium bromide is administered, the inmate would suffer slow suffocation as well as the excruciating pain of the potassium chloride, all while being completely paralyzed and unable to communicate. (Heath Aff. ¶¶ 14, 20.) The inmate would not be able to speak, grimace, or make any move to indicate the horror being experienced. Onlookers, especially those without any medical training, would be convinced they are witnessing a placid and peaceful demise, when just the opposite is occurring. (Boysen Aff. ¶ 9; Heath Aff. ¶ 21.) The use of a chemical paralytic agent such as pancuronium, with its attendant risk of the extreme distress of conscious paralysis, renders even more important the need to have the general anesthetic provided by medical personnel credentialed, licensed, and proficient in the field of anesthesia. (Heath Aff. ¶¶ 26, 35.)

In order to induce unconsciousness prior to injection of potassium chloride and pancuronium bromide, Defendants' anesthesia protocol calls for an injection of thiopental sodium, or sodium pentothal, which is an ultra short-acting barbiturate anesthetic. Sodium thiopental is injected for the purpose of achieving anesthetic induction and to render a patient unconscious. (Boysen Aff. ¶ 4.) The medically-accepted method for administering this drug is through a short tubing connected to an indwelling intravenous catheter, and the drug is flushed into the venous system by free running fluid, either a saline or glucose containing source. (*Id.*) The package insert that accompanies sodium thiopental used in lethal injections in North Carolina contains a directive that the drug be administered only by individuals experienced in the conduct of intravenous anesthesia. (Heath Aff. ¶ 36, Ex. 3.) This type of directive serves as a warning to physicians and other medical professionals that this drug should not be used by individuals who lack advanced training in the administration of anesthesia. (*Id.*)

The American Veterinary Medical Association ("AVMA") has explicitly recognized the significant dangers associated with each of the chemicals selected by Defendants to carry out executions by lethal injection. According to AVMA guidelines, potassium chloride is unacceptable in veterinary euthanasia protocols that fail to provide for the presence of properly trained veterinary personnel to induce proper anesthesia and maintain an unconscious state throughout the euthanasia process. (Concannon Aff. ¶ 14.) The AVMA further states that the use of neuromuscular paralyzing drugs, to include pancuronium bromide, solely or in conjunction with other drugs is unacceptable as a means of euthanasia. (Concannon Aff. ¶ 13); *see also 2000 Report of AVMA Panel on Euthanasia*, *available at* http://www.avma.org/resources/euthanasia.pdf. The AVMA recommends the use of a longer-lasting barbiturate like pentobarbital for animal euthanasia, rather than ultra short-acting sodium pentothal. (Concannon Aff. ¶ 4.)

The selection of the above-described chemicals and the development of protocols for their administration for purposes of lethal injection are matters wholly within the Defendants' discretion.

Under North Carolina statute, death sentences are to be carried out by the administration of "a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent." N.C. Gen. Stat. §§ 15-187, 15-188. The North Carolina statutes do not prescribe the specific dosages, sequences, or manner of administering lethal chemicals to carry out executions; nor do the statutes prescribe any certification, training, or licensure required of those who participate in the execution process. There is no statutory proscription on the particular means for achieving and maintaining an appropriate plane of anesthesia as a precursor to execution by lethal injection. Rather, it is squarely within Defendants' discretion to establish a means of inducing and maintaining anesthesia by properly trained professionals in compliance with the constitutional prohibition against cruel and unusual punishment.

Furthermore, the statutes, as interpreted by the North Carolina Supreme Court, do not prescribe or limit the categories or combinations of drugs or chemicals that may be used to carry out executions by lethal injection. *See State v. Hunt*, 357 N.C. 454, 455, S.E.2d 502, 503 (2003) (holding that "[t]he addition of 'only' to N.C.G.S. § 15-187 does not reflect a legislative intent to limit the drugs or chemicals that can be used during a lethal injection execution, but rather limits the method of execution in North Carolina solely to lethal injection instead of asphyxiation by lethal gas or some other method"). Indeed, the State of North Carolina has explicitly acknowledged that it has discretion to utilize alternative or additional chemicals in carrying out executions by lethal injection, asserting that "the statutes reasonably cannot be interpreted as prohibiting the DOC from utilization of other necessary and appropriate lethal drugs or chemicals to make the execution more humane." (*See* State's Emergency Petition for Writs of Certiorari and Prohibition and Motion to Vacate Stay of Execution, *State v. Hunt*, No. 5A86-10, attached as Exhibit B.)

ARGUMENT

Plaintiff seeks narrow preliminary equitable relief from Defendants' gratuitous use of an inadequate protocol for anesthesia that unnecessarily places Plaintiff at serious risk of suffering

excruciating pain in the course of his execution. Plaintiff willingly concedes that there exist means of inducing and maintaining an appropriate plane of anesthesia throughout the lethal injection process consistent with statutory and case law regarding execution by lethal injection in North Carolina. However, Defendants have willfully turned a blind eye to the inadequacies of their anesthesia protocol and the unacceptable and wholly unnecessary risk that Plaintiff will consciously suffer horrifying pain before his death by lethal injection is effectuated.

I. THE LEGAL STANDARD

The Fourth Circuit has recognized a district court's authority to enter a preliminary injunction in a Section 1983 lawsuit challenging the constitutionality of law enforcement practices. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-34 (1975)). To obtain a preliminary injunction, Plaintiff must satisfy the test set forth in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977):

> The decision of the district court must be based upon a flexible interplay of the four factors to be considered: (1) the likelihood of irreparable harm to the plaintiff without the temporary injunction; (2) the likelihood of harm to the defendant with the injunction; (3) plaintiff's likelihood of success on the merits; and (4) the public interest.

Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980) (summarizing the test established in *Blackwelder*, 550 F.2d at 196).

The relative harms to the plaintiff and defendant are the most important considerations in this analysis. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). If, after balancing these two factors, the balance tips in favor of the plaintiff, a preliminary injunction is appropriate if "the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Rum Creek*, 926 F.2d at 359.

The balance of hardships in this case strongly favors Plaintiff, as Plaintiff will clearly suffer irreparable harm in the absence of a preliminary injunction. Plaintiff is also likely to succeed on the merits of this case, and the public interest is served by granting preliminary equitable relief, which will allow the important question of the constitutionality of Defendants' anesthesia protocols to be resolved on the merits.

II. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFF

A. Likelihood of Immediate Irreparable Harm To Plaintiff

The immediacy of the harm Plaintiff faces is undeniable as Defendants are required to immediately schedule Plaintiff's execution following the denial of his Petition for Writ of Habeas Corpus. N.C. Gen. Stat. § 15-194(1). The excruciating pain that Plaintiff will suffer during his execution clearly constitutes irreparable harm. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (holding that continued pain and suffering resulting from deliberate medical indifference is irreparable harm). Moreover, Plaintiff will have no meaningful retrospective remedy, as he will no longer be alive. Indeed, the Fourth Circuit has recognized that, because of the absence retrospective remedies, the showing required for a preliminary injunction is less strict in cases involving an alleged violation of rights under Section 1983. *See Rum Creek*, 926 F.2d 353, 362 (4th Cir. 1991) ("[B]ecause current Supreme Court cases suggest that the only remedy available to a plaintiff who alleges that a State . . . has violated rights under § 1983 is an injunction and declaration against the State, the showing necessary to meet the irreparable harm requirement for a preliminary injunction should be less strict than in other instances where future monetary remedies are available.").

Plaintiff's evidence demonstrates that the properties of the chemicals used by Defendants to effectuate death – the conscious suffocation and masking effect produced by pancuronium bromide and the excruciating internal burn of potassium chloride – create a heightened need for proper administration of anesthesia. (*See* Heath Aff. ¶ 35; Concannon Aff. ¶ 12.) Yet, Defendants' current protocol calls for administration of anesthesia without medically appropriate criteria for assessing

level of consciousness, in the absence of medical personnel credentialed, licensed, and proficient in the practice of anesthesia, and without opportunities for direct monitoring of the inmate. These conditions create a serious risk that anesthesia will not be appropriately administered and the inmate will not be rendered fully unconscious by the time the other two drugs are administered.

Because Defendants' anesthesia protocol fails to ensure the proper administration of sodium pentothal, the risk of consciousness cannot be mitigated by the fact that the 3000 milligram dosage may be excessive in comparison to the dose that would be used in a surgical setting. Under Defendants' protocol, numerous opportunities for error can arise during the administration of sodium pentothal.[2] Although the full 3000 milligrams of sodium pentothal would almost certainly be sufficient to induce unconsciousness *if the dose is actually delivered into the inmate's circulation*, that fact is irrelevant in light of the substantial danger that the full dose of anesthetic simply will not reach the inmate.

The risk that inmates will be conscious during their executions is, in part, inherent in the use of sodium pentothal itself. This drug is an ultra short-acting barbiturate that, in medical situations, is used only for specific, expeditious tasks, and only by medical personnel who have considerable expertise in anesthesia. (Heath Aff. ¶¶ 28, 36.) In contrast, veterinarians typically administer pentobarbital, a longer-lasting barbiturate, for purposes of animal euthanasia. (Concannon Aff. ¶ 4.)

In light of the fact that sodium pentothal is an ultra short-acting anesthetic, it is particularly important that the inmate have an opportunity to alert execution personnel should he regain – or never lose – consciousness, and that execution personnel have the ability to ascertain whether the inmate is properly anesthetized. (*Id.* ¶ 35.) Yet, the use of pancuronium bromide in combination

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[2] Dr. Heath has identified the following thirteen opportunities for problems to occur in the administration of intravenous injections: (1) errors in preparation; (2) error in labeling of syringes; (3) error in selecting the correct syringe; (4) error in correctly injecting the drug into the intravenous line; (5) the IV tubing may leak; (6) incorrect insertion of the catheter; (7) migration of the catheter; (8) perforation or rupture or leakage of the vein; (9) excessive pressure on the syringe plunger; (10) securing the catheter; (11) failure to properly administer flush solutions between injections of drugs; (12) failure to properly loosen or remove the tourniquet from the arm or leg; and (13) impaired delivery due to restraining straps. (Heath Aff. ¶ 26(a)-(m).)

with sodium pentothal interferes with the assessment of consciousness. For example, in a recent article, the Robeson County, North Carolina, prosecutor was quoted regarding the 2003 execution of Henry Lee Hunt, at which he observed no outward signs of pain, specifically no grimacing, jerking or convulsing. Paul Woolverton, *Execution Objections on Rise*, Fayetteville Observer, Feb. 26, 2006, *available at* http://www.fayettevillenc.com/article?id=227272. However, according to Dr. Heath, "this prosecutor would have observed very similar if not identical circumstances if Mr. Hunt had been administered only pancuronium bromide and potassium chloride without any sodium pentothal and had consciously suffered the agony of suffocation and the excruciating pain that follows injection of potassium chloride." (Heath Aff. ¶ 21.) The paralytic effect of pancuronium bromide therefore creates a heightened need for anesthesia to be properly administered by medical professionals credentialed, licensed, and proficient in the practice of anesthesia.

1. Critical Deficiencies in Defendants' Anesthesia Protocol Subject Plaintiff to an Unnecessary Risk of Suffering Excruciating Pain.

Despite all of the above-described risks generated by the chemicals Defendants have selected to effectuate Plaintiff's execution by lethal injection, Defendants' anesthesia protocol fails to account for and in many ways exacerbates the likelihood of conscious suffering.

a. <u>Defendants Fail to Employ Medically Appropriate Criteria for Monitoring the Inmate's Plane of Consciousness.</u>

Defendants' anesthesia protocol fails to set forth any medically appropriate criteria by which execution personnel are to verify that the inmate has been rendered unconscious by sodium pentothal before they administer the paralyzing pancuronium bromide and painful potassium chloride injections. There is no indication that Defendants' protocol calls for any delay after the sodium pentothal is injected for the purpose of assuring that the inmate is sufficiently anesthetized to proceed to the next step. Instead, the injections are administered one immediately after the other without any effort to confirm that the full dosage has been delivered into circulation and the prisoner is, in fact, unconscious.

However, even if a period of delay were observed under Defendants' protocol, it would be insufficient to ensure appropriate level of consciousness because the protocol is devoid of medically appropriate criteria to be applied in determining whether an inmate has achieved an adequate plane of anesthesia. Warden Polk is the individual at Central Prison who is charged with responsibility for carrying out executions. (Polk Dep. at 11.) Warden Polk has been involved in twenty-four executions as part of his official duties. (*Id.* at 39.) Warden Polk has no medical training. (*Id.* at 6-9.) When the Warden was questioned during his deposition in *Page v. Beck*, No. 5:04-CT-4-BO, as to how he is satisfied that an inmate is anesthetized at the time the execution team administers the chemical paralytic pancuronium bromide, he testified that the inmate begins to snore deeply after administration of the sodium pentothal, satisfying him that the inmate is sufficiently anesthetized when the pancuronium bromide is injected. (*Id.* at 39-41, Exhibit A to Errata Sheet at 1.)

In fact, as explained by Nancy Bruton-Maree, a Certified Registered Nurse Anesthetist, the fact that an inmate snores is actually evidence that the inmate is not anesthetized to a sufficient degree for the administration of pancuronium bromide or potassium chloride. "If an inmate is snoring deeply, he could not have been administered a full 3000 mg. of pentothal. If he had successfully received that dosage, he would not be breathing at all." (Maree Aff. ¶ 5.) In the course of her practice, Ms. Maree would administer a muscle relaxant or chemical paralytic only after the patient reaches a plane of anesthesia resulting in respiratory arrest. (Maree Aff. ¶ 7.) Only after the patient stops breathing and is mechanically ventilated would it be appropriate to administer such drugs. (*Id.*) According to Ms. Maree, the criteria for evaluating consciousness used by Warden Polk are entirely inappropriate because, "[i]f a person is snoring, they are still breathing, and if they are breathing, they have not suffered respiratory arrest." (*Id.*) Thus, contrary to the Defendants' assumptions, inmates executed under the North Carolina protocol may not be receiving the intended dosage of sodium pentothal.

Additionally, Dr. Kevin Concannon, who is a veterinarian and one of 175 diplomates of the American College of Veterinary Anesthesia, reports that the use of potassium chloride in a euthanasia protocol "requires a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." (Concannon Aff. ¶ 14.) The North Carolina lethal injection protocol does not include any testing of the inmate for loss of reflex muscle response or loss of response to noxious stimuli.

b. <u>Defendants Fail to Employ Individuals with Appropriate Training and Proficiency in the Induction and Monitoring of Anesthesia.</u>

The induction of anesthesia is a difficult and sensitive process that can be properly done only by persons with advanced training in this medical specialty. (Health Aff. ¶¶ 32-34.) In a surgical setting, the risks associated with a failure to properly administer anesthesia include death, brain damage, and a complication known as "interoperative awareness." (*Id.* ¶ 32.) Accordingly, the standards of medical practice in North Carolina and elsewhere require that general anesthesia is only "administered by physicians who have completed residency training in the specialty of Anesthesiology, and by CRNAs." (*Id.* ¶ 33.) Anesthesiologists must complete a three-year residency in Anesthesiology. (*Id.*) Similarly, a CRNA must graduate from an accredited advanced practice nursing education program, which entails participation in hundreds of cases under a variety of circumstances. (Maree Aff. ¶ 2, Ex. 2.)

The North Carolina Medical Board takes the position that a physician in the specialty of anesthesiology, or a CRNA supervised by a physician, must administer anesthesia in a procedure that requires deep sedation or general anesthesia. (Heath Aff. ¶ 34.) In a statement accompanying the release of a practice advisory on intraoperative awareness, the president of the American Society of Anesthesiologists, Orin Guidry, M.D., said that "the most important monitor in the operating room is the anesthesiologist, who has 12 years of medical training and a wealth of experience to draw on when deciding what is appropriate for each individual patient." Press Release, American Society of

Anesthesiologists, *Report on Awareness Under General Anesthesia Says Anesthesiologist Have Multiple Tools and Approaches for Minimizing Risks* (Oct. 25, 2005), *available at* http://www.asahq.org/news/news102505.htm.

Defendants' anesthesia protocol contains no description of the training, credentials, certifications, experience, or proficiency required of personnel involved in the administration and monitoring of anesthesia, notwithstanding the fact that it is a complex medical procedure requiring expertise in order to be performed correctly. Significantly, the protocol does not require the presence of any personnel who possess sufficient expertise to evaluate whether a prisoner is properly anesthetized before proceeding with the administration of pancuronium bromide and potassium chloride.

According to Defendants, "medically trained" individuals are responsible for inserting intravenous catheters, monitoring consciousness, and ensuring the flow of chemicals into the inmate. (Polk Dep. at 61-63.) Licensing documents produced in *Page v. Beck*, No. 5:04-CT-04-BO, indicate that the only individuals with professional health care training who have participated in executions since January 2004 are Registered Nurses and EMT-Paramedics. (Redacted NC Licensing Documents produced by Defendants, attached as Exhibit C; *see also* Polk Dep. at 63-64, Exhibit A to Errata Sheet at 2.) One EMT-Paramedic completed personnel paperwork indicating that he or she would receive on-the-job training. (*See* Exhibit C.) Another EMT-Paramedic indicated that he or she would receive instructions in the way the work was to be done but would not be given any training by the Department of Corrections. (*Id.*) One of the Registered Nurses who completed this paperwork indicated that he or she would not be given instructions in the way the work was to be done, would not be given training by the Department, and was not required to have a license to complete the work. (*Id.*)

Defendants' decision to hire registered nurses or EMTs to oversee anesthesia procedures creates a serious risk of complications and improper administration. While the registered nurses and

EMTs hired by the Warden for the execution team may have experience in starting intravenous lines, the Defendants do not hire physicians or CRNAs with the requisite degree of knowledge or training to induce and maintain anesthesia during the execution process.

The individuals responsible for administering the sequence of injections, including the sodium pentothal used to render the inmate unconscious prior to execution, possess no medical expertise or training in the field of anesthesia. (Polk Dep. at 103, Exhibit A to Errata Sheet at 3.) Instead, they are volunteers selected by the Warden from among his staff. (*Id.*) In order to prepare for an execution, these individuals participate in a minimum of two practice sessions, during which the "medically trained" personnel, presumably the Registered Nurses and EMT-Paramedics referenced above, explain "how to push the syringes and at what rate." (*Id.* at 102, Exhibit A to Errata Sheet at 3.) The Defendants' practice of having injections of sodium pentothal personnel administered by personnel who have no training or proficiency in the practice of anesthesia is directly contrary to accepted medical standards. Indeed, "the administration of anesthetic care is complex and risky, and can only be safely performed by individuals who have completed the extensive requisite training to permit them to provide anesthesia services." (Heath Aff. ¶ 32.)

Proper monitoring of the inmate requires that a person trained specifically in assessing anesthetic depth closely observe the inmate at all times after the sodium pentothal is administered. Only persons trained in anesthesia are able to properly assess whether the inmate has attained the degree of unconsciousness necessary to render him insensitive to pain. (Heath Aff. ¶¶ 33-35.) For this reason, the AVMA requires that persons euthanizing animals be "competent in assessing depth [of anesthesia] appropriate for administration of potassium chloride." *See 2000 Report of AVMA Panel on Euthanasia*, *available at* http://www.avma.org/resources/euthanasia.pdf. Similarly, North Carolina statute mandates that only licensed veterinarians perform acts producing an irreversible change in the animal, such as euthanasia. *See* N.C. Gen. Stat. § 90-187.6. (*See also* Concannon Aff. ¶ 7.)

According to Dr. Heath, "there is no justification for the apparent failure to provide to inmates undergoing lethal injection a practitioner with the same or higher level of training and credentialing as would be provided to any other prisoner who is about to undergo a procedure that is known in advance to be agonizing." (Heath Aff. ¶ 42.) Because Defendants' lethal injection protocol calls for the injection of two drugs, pancuronium bromide and potassium chloride, known to cause excruciating pain, there is a heightened need for anesthesia to be properly administered by trained and experienced practitioners. (*Id.* ¶ 35.) Defendants' protocol simply does not acknowledge, much less address, the significant risk that the injection of sodium pentothal will fail to render the inmate unconscious. The absence of personnel with the requisite degree of knowledge or training in anesthesia greatly exacerbates this risk.

c. Defendants Have Failed to Design an Appropriate Facility in Which to Conduct Anesthesia.

Even if the execution personnel were properly trained, the physical layout of the execution chamber further interferes with the necessary task of monitoring the inmate and the anesthesia process as a whole to ensure that the inmate in fact receives an adequate dosage of thiopental sodium. During an execution, the inmate is separated from the executioners by a curtain that runs between them. *See* North Carolina Department of Correction "Execution Method," *available at* http://www.doc.state.nc.us/dop/deathpenalty/method.htm. This configuration deviates from established medical practice and impedes the ability of personnel administering anesthesia to closely and directly monitor their subject.

Ms. Maree, who has toured the execution chamber, found that the setup of the chamber, and specifically the presence of a curtain between the inmate and execution personnel, would block visual access to the site of the intravenous line, thereby precluding anesthesia personnel from identifying and remedying potential problems. (Maree Aff. ¶ 9.) Specifically, the curtain prevents personnel from obtaining visual or other verification that the drugs are actually being administered to

the inmate, or that the sodium pentothal has taken effect. Proper monitoring of the flow of fluid into the vein requires a clear view of the IV site and also tactile examination of the skin surrounding the IV site to verify skin firmness and temperature. (Heath Aff. ¶¶ 38.) Because the site of IV insertion cannot be directly observed, "there is no assurance that the drug actually reaches the central circulation as intended" and "no way of knowing how much of the intended 1500 mg injections are actually infused into the prisoner." (Boysen Aff. ¶¶ 5, 6.) The presence of a sheet covering the inmate's body further impairs the ability of personnel to monitor the IV site. (Heath Aff. ¶ 30(e).)

Direct monitoring is crucial to a practitioner's ability to monitor the effect of the anesthetic on the patient and the level of consciousness. Dr. Concannon describes the many physical criteria that are assessed during the course of veterinary anesthesia:

> Determining level of consciousness is as much an art as it is a skill, and requires training and experience. There is no one monitor in animals or people that assesses degree of consciousness. Consciousness can be assessed in animals by observing: (1) muscle relaxation, (2) location of the pupils in the orbit, (3) absence or presence of eye movements, (4) respiratory rate, (5) heart rate, (6) blood pressure, (7) response to mildly painful stimulation, and (8) movement. I put my hands on the patient to help me assess these variables, and I rely upon monitors to help provide data such as blood pressure or heart rate. I believe to a reasonable degree of medical certainty that a veterinarian cannot accurately determine a patient's state of consciousness without seeing and feeling the patient.

(Concannon Aff. ¶¶ 8-9.)

The configuration of the execution facility and the use of physical barriers that prevent visual and tactile monitoring of the inmate increase the likelihood that Plaintiff will be not be properly anesthetized and will experience conscious suffering during the course of his execution. Although Defendants could mitigate this unnecessary risk of pain by having qualified personnel verify, visually and tactically, that the inmate is indeed anesthetized after the administration of sodium pentothal, they have taken no measures to lessen the dangers created by their protocol.

d. Defendants Fail to Make Provisions for Responding to Foreseeable Issues that May Arise During the Execution Process.

Despite the fact that Defendants' protocol does not provide for the presence of appropriately trained and experienced personnel capable of exercising competent medical judgment based on the situation at hand, the protocol includes no specific instructions indicating how execution personnel should react to problems during with drug administration; how to stop the execution should it become clear that the inmate is conscious; what to do if there is trouble finding an adequate vein; or how to compensate for equipment malfunctions. Similarly, Defendants' protocol does not attempt to account for other foreseeable issues that may arise when an inmate requires special consideration for any reason. The protocol makes no provision for individualized dosage calculations based on the inmate's size or health condition and does not consider mediations taken by the inmate that may interfere with the anesthetic. Such factors are likely to be present in the prison population and must be assessed in order to ensure proper dosing of a barbiturate anesthetic. (Boysen Aff. ¶ 7.)

2. The Risk Created by Defendants' Inadequate Anesthesia Protocol Has Been Realized in North Carolina.

Horrifying displays of suffering reported by execution witnesses indicate that Defendants' inadequate anesthesia protocol has caused some inmates executed in North Carolina to experience unnecessary pain during their executions. During the execution of Willie Fisher on 9 March 2001, attorney Cynthia Adcock observed the following:

> Shortly after 9:00, Willie appeared to lose consciousness. Instead of the quiet death I expected, Willie began convulsing. The convulsing was so extreme that Willie's cousin jumped up screaming. Willie appeared as if he was trying to catch his breath but he could not. I remember this because I was upset that he was suffering, and wanting to help him, I timed my breathing to his.

(Adcock Aff. ¶¶ 10-12.)

Ms. Adcock also witnessed the execution of Timmy Keel on 7 November 2003. (*Id.* ¶¶ 1, 15.) Ms. Adcock observed the following at Mr. Keel's execution:

> Timmy continued to mouth things to us after the drugs were administered. He stopped a couple of times to catch his breath. His desperation to communicate to us increased. While mid-sentence, Timmy gasped. His eyes became fixed and his mouth gapping [sic]. Timmy's body began twitching and moving about. I remember wishing he would go ahead and die so that his suffering would stop. This stage went on for approximately 10 minutes.

(*Id.* ¶¶ 17-19.)

Heather Wells, an attorney who represented Eddie Ernest Hartman, witnessed Mr. Hartman's execution on 3 October 2003. (Wells Aff. ¶¶ 1-2.) Throughout the execution, Ms. Wells saw that "Eddie's eyes were partly open while his body relentlessly convulsed and contorted." (*Id.* ¶ 11.) She observed that "Eddie Hartman's dying process was clearly painful and his death prolonged." (*Id.* ¶ 17.) Specifically, Ms. Wells observed the following:

> When the execution began, I saw Eddie's eyes close briefly, and almost immediately I saw his eyes partially open. Eddie's throat began thrusting outward and collapsing inward. His neck pulsed, protruded, and shook repeatedly. Eddie's chest at first pulsated frequently, then intermittently, and at least twice I saw Eddie's chest heave violently.

(*Id.* ¶¶ 6-9.)

Attorney Kim Stevens represented John Daniels and witnessed his execution on 14 November 2003. (Stevens Aff. ¶ 2.) Ms. Stevens gave the following description of the execution:

> The warden came in and announced that the execution would proceed. The warden then left and the execution started. We thought [Mr. Daniels] was just going to go to sleep. Mr. Daniels lay still for a moment after the warden's announcement, and turned his face away from us. Then, all of a sudden, he started to convulse, violently. He sat up and gagged. We could hear him through the glass. A short time later, he sat up and gagged and choked again, and struggled with his arms under the sheet. He appeared to me to be in pain. He finally lay back down and was still. I left at that time because I thought he was suffering.

(*Id.* ¶¶ 4-5.)

According to Dr. Heath, "[w]itness accounts of writhing and convulsing during execution are not consistent with a sufficient dose of thiopental having been successfully delivered to the brain

such that the condemned inmate does not feel pain." (Heath Aff. ¶ 27.) A person who is properly anesthetized would not be expected to exhibit these physical symptoms. (*Id.*) Instead, the typical reaction to sodium pentothal is yawning, drawing one or two deep breaths or visibly exhaling so that the cheeks puff out, then becoming motionless. (*Id.*)

Evidence from other states that administer the same sequence of chemicals using similar anesthesia procedures provides further evidence that problems in the administration of anesthesia have resulted in prisoners remaining conscious during their executions. In California, execution logs[3] reveal significant delays in the cessation of respiration following the administration of sodium pentothal. *Morales v. Hickman*, 2006 WL 335427, at *5-6 (N.D. Cal. Feb. 14, 2006).[4] In evaluating these accounts, the court concluded that "evidence from eyewitnesses tending to show that many inmates continue to breathe long after they should have ceased to do so cannot simply be disregarded on its face . . . [This evidence] raises at least some doubt as to whether the protocol actually is functioning as intended." *Id.*at *6; s*ee also Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005) (stating that accounts of recent California executions are "extremely troubling" because they indicate "that there were problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions").

B. Little, If Any, Likelihood of Harm to Defendants

Defendants will incur minimal, if any, harm if they are enjoined from conducting Plaintiff's execution using their intended inadequate protocol. Plaintiff seeks only to enjoin Defendants from doing what they have no right or need to do – employing an inadequate protocol for inducing and maintaining anesthesia with blatant disregard for the conscious suffering and excruciating pain

[3] The execution logs reviewed by the court in *Morales v. Hickman* contained information regarding the time at which each of the three injections was administered and the time at which respirations ceased. To the best of Plaintiff's knowledge, execution logs of this nature have never been produced for executions conducted in North Carolina.

[4] Pursuant to Local Civil Rule 7.2(d), a copy of this unpublished decision is attached hereto as Exhibit D.

Plaintiff will experience as a result. Plaintiff does not seek to prevent Defendants from carrying out his execution, or even from carrying out his execution by lethal injection, a fact that minimizes any risk of harm to Defendants. *See Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers injury that can never be repaired.").

Plaintiff expressly acknowledges the availability of alternative protocols for inducing and maintaining anesthesia that will significantly mitigate the risk that he will consciously suffer excruciating pain during the course of his execution. The lethal medications prescribed by physicians under Oregon's Death with Dignity Act are long-acting barbiturate anesthetics including pentobarbital or secobarbitol. *See* Seventh Annual Report on Oregon's Death with Dignity Act at Table 4, *available at* http://egov.oregon.gov/DHS/ph/pas/docs/table4.pdf. In addition, the AVMA's Panel on Euthanasia prescribes an intravenous injection of pentobarbital, a long-acting barbiturate anesthetic. (Concannon Aff. ¶ 4.) In both protocols, the same substance, if properly administered, produces both unconsciousness and death, eliminating the risk that a patient will regain consciousness prior to death. (*Id.*) Pursuant to N.C. Gen. Stat. §§ 15-187 and 15-188, as interpreted by the North Carolina Supreme Court in *State v. Hunt*, 357 N.C. 454, 591 S.E.2d 502 (2003), it is within the Defendants' discretion to add a long-acting barbiturate to their anesthesia protocol in order to make the execution more humane, just as they previously added potassium chloride. Plaintiff only asks that Defendants adopt a protocol for anesthesia that affords him the same assurance of dying without conscious suffering of excruciating pain that is given to household pets.

Moreover, there is no statutory provision setting forth the particular practices and procedures to be followed when inducing anesthesia, nor the minimum professional qualifications of the personnel charged with administering anesthesia as a precursor to lethal injection. Therefore, it is clearly within Defendants' discretion to establish appropriate protocols for monitoring Plaintiff level

of consciousness prior to injection of other chemical; to require the presence of medical personnel credentialed, licensed, and proficient in the practice of anesthesia to ensure that a proper depth of anesthesia is maintained throughout the lethal injection process; to eliminate unnecessary physical barriers to direct visual and tactile monitoring of Plaintiff; and to make provisions for responding to foreseeable issues that may arise during the execution.

In *Morales v. Hickman*, the court identified two ways in which the California Department of Corrections could modify its lethal injection protocol to correct the flaws identified by the inmate – flaws which are strikingly similar to those raised in Plaintiff's Complaint. First, the defendants could "use only sodium thiopental or another barbiturate or combination of barbiturates in Plaintiff's execution." 2006 WL 335427, at *8; *see also Morales v. Hickman*, No. 5:06-CV-00219-JF, Order on Def.'s Mot. to Proceed with Execution Under Alternative Condition to Order Denying Prelim. Inj. (N.D. Cal. Feb. 21, 2006) (clarifying protocols to be followed by the California Department of Corrections in carrying out this option) (attached as Exhibit D). Alternatively, the defendants could "[a]gree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that Plaintiff in fact is unconscious before either pancuronium bromide or potassium chloride is injected." 2006 WL 335427, at *8.

There is no obstacle, other than Defendants' own refusal, to the adoption of these alternative procedures or other measures that would ensure proper induction and monitoring of anesthesia throughout the course of the lethal injection process. The inconvenience and limited expense of complying with the Eighth Amendment prohibition against cruel and unusual punishment simply does not approach the magnitude of irreparable harm Plaintiff will suffer if the Court does not issue a preliminary injunction.

Finally, Plaintiff's lack of undue delay in bringing this claim further tips the equitable balance in Plaintiff's favor. *See Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). From the time of his conviction until the denial of his Petition for Writ of Habeas Corpus on 27 February 2006, Plaintiff has continuously pursued state and federal appeals and post-conviction proceedings in an effort to obtain a new trial or sentencing hearing. In fact, in 2003, the Fourth Circuit concluded that Plaintiff was entitled to a new sentencing hearing because of constitutional errors affecting his death sentence. *Brown v. Lee*, 319 F.3d 162 (4th Cir. 2003). Due to an intervening decision of the United States Supreme Court, his Petition was subsequently dismissed without re-sentencing. Any challenge to Defendants' anesthesia protocol prior to the denial of his federal habeas petition would have been premature, given that a favorable habeas ruling would have mooted a claim under Section 1983 and rendered any ruling on this matter advisory. *See Beardslee*, 395 F.3d at 1069 n.5 (suggesting that a condemned inmate's challenge to lethal injection protocols may not become ripe for judicial review until the inmate's execution is imminent).

After the United States Supreme Court denied certiorari with respect to Plaintiff's habeas petition, eliminating all legal barriers to the State's ability to schedule Plaintiff's execution, Plaintiff moved promptly to assert his claim, filing his Complaint the same day the Supreme Court's order was issued and before an execution date was set.

III. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

Plaintiff satisfies the first two factors of the *Blackwelder* analysis and should be granted a preliminary injunction if he "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Rum Creek*, 926 F.2d at 359. The facts detailed above regarding the significant deficiencies and unnecessary risks created by Defendants' anesthesia protocol raise serious questions going to the merits of Plaintiff's claims and warranting the issuance of preliminary injunctive relief.

A. Plaintiff's Claim is Cognizable Under Section 1983

As previously stated, Plaintiff does not challenge the legality of his conviction or sentence, nor does he seek to prevent the State from executing him in a lawful manner. Plaintiff's challenge relates to the anesthesia protocol used by Defendants as a medical precursor to execution. This claim therefore arises under 42 U.S.C. § 1983. *See Nelson v. Campbell*, 541 U.S. 637, 647 (2004) (focusing on whether the petitioner's challenge "would *necessarily* prevent" the state from carrying out the execution); *Reid v. Johnson*, 105 Fed. Appx. 500, 503 (4th Cir. Aug. 2, 2004) (concluding, in light of *Nelson v. Campbell*, that the appellant's challenge to "the particular lethal injection protocol the State plans to use" was cognizable under Section 1983).[5]

B. Defendants' Anesthesia Protocol Violates the Eighth Amendment

Although the United States Supreme Court has determined that the punishment of death itself does not violate the Eighth Amendment proscription against cruel and unusual punishment, it has held that the Eighth Amendment prohibits "the infliction of unnecessary pain in the execution of the death sentence." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain"); *Fierro v. Gomez*, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (execution by lethal gas in California held unconstitutional where evidence indicated "death by this method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather . . . inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face" and "during this period of consciousness, the condemned inmate is like to suffer intense physical pain"), *aff'd*, 77 F.3d 301, 308 (9th Cir. 1996), *vacated on other grounds by* 519 U.S. 918 (1996). This is consistent with the long-standing principle that "[p]unishments are cruel when they involve . . . a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890).

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[5] Pursuant to Local Civil Rule 7.2(d), a copy of this unpublished decision is attached hereto as Exhibit D.

Indeed, punishment is particularly constitutionally offensive if it involves the *foreseeable* infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273 (1973) (citing *Resweber* and finding that, had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status"). Where the measure of pain inflicted in executing a condemned prisoner results from an unusual circumstance that involves "something more than the mere extinguishment of life," the Eighth Amendment's prohibition against cruel and unusual punishment is implicated. *See id.* at 265 (quoting *Kemmler*, 136 U.S. at 447).

Accordingly, Defendants' selection of potassium chloride, which causes excruciating pain upon injection, to cause Plaintiff's can only be constitutionally sound if Defendants employ an appropriate anesthesia protocol prior to its administration. Pursuant to the "deliberate indifference to serious medical needs" framework established in *Estelle v. Gamble*, 429 U.S. 97 (1976), and its progeny, Plaintiff's challenge to Defendants' anesthesia protocol should be analyzed just as an inmate's challenge to an anesthesia protocol as a precursor to medical treatment would be analyzed. *See Nelson v. Campbell*, 541 U.S. 637, 644-45 (2004). Defendants intend to employ an inadequate anesthesia protocol that will subject Plaintiff to an objectively serious risk of suffering excruciating pain and that Defendants are acting with deliberate indifference to the inadequacies of the anesthesia protocol and resulting risk of harm to Plaintiff. Plaintiff has raised serious questions going to both the subjective and objective prongs of the deliberate indifference analysis, warranting entry of a preliminary injunction.

For all of the reasons previously discussed, Defendants' anesthesia protocol creates an objectively serious risk that Plaintiff will fail to receive adequate anesthesia and will be conscious for the duration of his execution, causing him to suffer excruciating pain upon injection of pancuronium bromide and potassium chloride. The evidence available at this time also demonstrates that Plaintiff will be able to prove the subjective component of his Eighth Amendment claim by showing

deliberate indifference by Defendants. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). "[D]eliberate indifference entails something more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id*. at 835. This claim requires that a prison official know of and disregard an objectively serious condition, medical need, or risk of harm. *See id.* at 837; *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003); *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995).

Evidence that an official is aware of a risk of harm, but chooses to ignore it, is sufficient to establish deliberate indifference. *Odom v. South Carolina Dep't of Corr.,* 349 F.3d 765 (4th Cir. 2003). The *Odom* court reversed summary judgment for defendant in a Section 1983 case where the plaintiff produced evidence that prison officials were aware of the risk posed to him by other inmates but disregarded his request for help. The plaintiff had complained to prison officials that the other inmates were threatening him. The court found this to be evidence of deliberate indifference and allowed the plaintiff to proceed to trial. *Id.*; *see also LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (finding prison officials' conduct in ignoring or postponing response to a known medical need "out of mere convenience or apathy" to be deliberate indifference).

Plaintiff's suit is not premised on the possibility that some unforeseen error or unavoidable accident might cause him to be aware and in excruciating pain during his execution. On the contrary, he alleges that the significant risk of botched executions is an entirely foreseeable consequence of the conditions imposed by, and failings of, Defendants' inadequate execution protocol. Defendants have instituted an anesthesia protocol that creates a significant risk of inflicting excruciating pain and have deliberately chosen to ignore that risk.

The fact that Defendants' protocol calls for the administration of sodium pentothal, a barbiturate anesthetic, prior to the injection of pancuronium bromide and potassium chloride demonstrates an awareness that anesthesia is a necessary element of a humane execution protocol. Yet, despite this awareness, Defendants have adopted an anesthesia protocol that deviates

significantly from accepted medical practices – particularly in the areas of monitoring, qualifications and training of personnel, and facilities used for administration of anesthesia. (Heath Aff. ¶¶ 24-27, 30-42, 45-48; Boysen Aff. ¶¶ 5-11; Maree Aff. ¶¶ 7-11.) By failing to design a protocol for inducing and monitoring anesthesia adequate to ensure that sodium pentothal will, in fact, be properly administered into circulation, Defendants have disregarded a foreseeable and known risk that inmates will remain conscious and suffer excruciating pain before their deaths.

Moreover, Defendants have failed to conduct any type of independent investigation into the appropriate medical standards of practice for administering and monitoring anesthesia and have refused to consider available alternative protocols, such as the use of long-acting barbiturate and the presence of medical personnel credentialed, licensed, and proficient in the practice of anesthesia, as discussed in Section II.B, *supra* pp. 21-22.

Even if Defendants' experiences with their anesthesia protocol did not reveal grave risks of improper administration and resulting suffering, which seems particularly unlikely given the glaring absence of safeguards in Defendants' protocol, the grievances and lawsuits filed by North Carolina inmates have brought to Defendants' attention the very issues raised in Plaintiffs' Complaint. (*See* Compl., Ex. A; Page, Rouse, and Perkins Grievance Documents, attached as Exhibit A.) *See also* *Rowsey v. Beck*, No. 5:04-CT-04-BO;[6] *Perkins v. Beck*, No. 5:04-CT-643-BO. Defendants have been on notice of deficiencies in their anesthesia protocol at least since the filing of the *Rowsey v. Beck* litigation in January 2004. To date, Defendants have consistently refused to modify their protocol to remedy the inadequate monitoring practices, the absence of appropriately credentialed, licensed, and proficient anesthesia personnel, and the unnecessary physical barriers that give rise to a foreseeable risk of conscious suffering during execution by lethal injection.

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[6] Following the execution of Plaintiff Raymond Rowsey, the title of this action was changed to reflect Plaintiff George Page's name and is now *Page v. Beck*, No. 5:04-CT-04-BO.

The choices made by other state correction departments and legislatures highlight the irresponsibility of the Defendants' protocol. For instance, Connecticut's protocol is developed in consultation with the Commissioner of Public Health. *See* Conn. Gen. Stat. § 54-100. Other states have mandated that the execution process must comply with accepted medical standards or be humane. *See* Idaho Code § 19-2716 (requiring executions to be conducted "in accordance with accepted medical standards" with "expert technical assistance" to ensure that death does not cause "unnecessary suffering"); Kan. Crim. Pro. Code Ann. § 22-4001 (requiring that drug combinations be "sufficient to cause death in a swift and humane manner"). Defendants could commit themselves to ensuring a humane process, but they have chosen not to do so, electing instead to deviate from accepted medical practices. Given the information available to Defendants, this course of action shows a conscious disregard for an objectively serious risk of harm to Plaintiff.

IV. THE PUBLIC INTEREST FAVORS THE GRANTING OF A PRELIMINARY INJUNCTION

The final factor of the *Blackwelder* test also supports the entry of a preliminary injunction in this case. The public interest lies in avoiding the unnecessary infliction of conscious suffering of excruciating pain. Because Plaintiff alleges that the Defendants will violate his Eighth Amendment rights by executing him in accordance with their intended inadequate anesthesia protocol, it is paramount to the public interest that Plaintiff's claims be resolved on the merits. "In considering an Eighth Amendment claim the court must be mindful that it embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *LaFaut v. Smith*, 834 F.2d 389, 391 (4th Cir. 1987) (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976)).

Lethal injection became the predominant method of execution because it was previously perceived to be the most humane form of execution. To the extent the North Carolina General Assembly selected lethal injection on the assumption that it was painless, this selection demonstrates an intention to employ the most humane method of execution possible. However, there is now

compelling evidence, in the form of eyewitness accounts and medical evidence and opinion, that anesthesia protocols used in connection with lethal injunction, like the one used in North Carolina, create a significant and unacceptable risk of inflicting unnecessary pain. Definitively resolving the important and pressing question of the constitutionality of Defendants' anesthesia protocol serves the public interest.

There are no countervailing considerations suggesting that entry of a preliminary injunction would hurt the public interest. Plaintiff has not engaged in abusive delay, nor is this suit an attempt simply to put off his execution. Where an inmate presents a meritorious challenge of constitutional dimension and is not attempting to manipulate the judicial process, it cannot be in the public interest to allow Defendants to execute him using the very flawed procedures that he challenges.

CONCLUSION

Plaintiff respectfully requests that the Court issue a preliminary injunction enjoining Defendants from using their inadequate protocol for inducing and maintaining anesthesia during the course of his execution because it unnecessarily places Plaintiff at serious risk of consciously suffering excruciating pain in violation of his Eighth Amendment right to be free from cruel and unusual punishment. In light of Plaintiff's imminent execution, Plaintiff further requests that expedited consideration be given to his Motion for Preliminary Injunction.

Respectfully submitted this the 28th day of February 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was served upon Defendants by hand-delivering a copy to the follow address:

Lavee Hamer
General Counsel
North Carolina Department of Correction
200 W. Jones Street
Raleigh, NC 27699

This the 28th day of February, 2006.

/s/ J. Donald Cowan, Jr.
J. Donald Cowan, Jr.
Attorney for Plaintiff