STATE OF NORTH CAROLINA COUNTY OF WAKE		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
JERRY W. CONNER (NCDOC#0085045) and JAMES A. CAMPBELL (NCDOC#0063592), Petitioners, v. NORTH CAROLINA COUNCIL OF STATE, Respondent,	)	**07 GOV 0238**
JAMES EDWARD THOMAS and MARCUS ROBINSON and ARCHIE LEE BILLINGS, Petitioners, v. NORTH CAROLINA COUNCIL OF STATE, Respondent	)	**07 GOV 0264**

DECISION

These consolidated contested cases were heard on May 21, 2007, in Raleigh, North Carolina, before Fred G. Morrison Jr., Senior Administrative Law Judge, on Petitions for Contested Case Hearings regarding the North Carolina Council of State's February 6, 2007, approval of an Execution Protocol proposed by the North Carolina Department of Correction. Petitioners filed a proposed decision on July 16 2007. Respondent also filed its proposed decision on July 16, 2007.

APPEARANCES

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APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case:

N.C. Const. art. XI § 1 & 2
N.C. Gen. Stat. § 150B-1 et seq; § 90-2 & § 11-7
N.C. Gen. Stat. § 15-187-88, 190 (2006)
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ISSUE

Whether the Respondent's February 6, 2007, approval of an Execution Protocol substantially prejudiced Petitioners' rights and whether, in approving the protocol, the Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule.

WITNESSES FOR PETITIONERS

Philip G. Boysen
Kevin Concannon
David McCoy
Obi C. Umesi

WITNESSES FOR RESPONDENT

None

EXHIBITS RECEIVED INTO EVIDENCE

Petitioners

Exhibit Notebook containing Exhibits 1-27.

Respondent

Exhibit Notebook containing Items 1-18.

Based upon a preponderance of the substantial evidence admitted into the record, the testimony presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioners Jerry W. Conner, James A. Campbell, James Edward Thomas, Marcus Robinson, and Archie Lee Billings, are convicted first degree murderers in the custody of the North Carolina Department of Correction who have been sentenced to be executed by lethal injection.

2. Article XI, Section 2 of the North Carolina Constitution has provided for punishment by death where the General Assembly so enacts. The North Carolina General Statutes provide for the penalty of death for those convicted of first degree murder.

3. There have been three methods of execution since North Carolina assumed responsibility for capital punishment from the counties in 1909, including the electric chair, the gas chamber, and lethal injection.

4. In 1998, North Carolina established lethal injection as its sole method of performing prisoner executions. See Current Operations Appropriations and Capital Improvement Appropriations Act of 1998, 1998 N.C. Sess. Laws 212, amending N.C. Gen. Stat. §15-187-88, 190.

5. N.C. Gen. Stat. § 15-187 provides for prisoner executions through the administration of lethal drugs:

> Any person convicted of a criminal offense and sentenced to death shall be executed only by the administration of a lethal quantity of an ultrashort-acting barbituate in combination with a chemical paralytic agent.

6. Though it is not specified in N.C. Gen. Stat. § 15-187, the North Carolina Department of Correction also uses potassium chloride in its lethal injection protocol, thus we have a three-drug combination: sodium pentothal to render an inmate unconscious and unable to

feel pain; pancuronium bromide to paralyse the inmate and stop the breathing; potassium chloride to stop the heart. If the pentothal is not properly administered, an inmate could be conscious and suffer a very painful death from the other two lethal drugs. If not unconscious but paralysed, an inmate would not be able to move or scream while painfully suffocating or when the deadly, burning potassium chloride is injected into the veins causing more excruciating pain while stopping the heart.

7. N.C. Gen. Stat. § 15-188 further describes the manner and place of execution while § 15-190 provides for persons to be designated by the Warden of Central Prison to execute the death sentence, persons to supervise the execution, and persons to be present: "[a]t such execution there shall be present the warden or deputy warden or some person designated by the warden in the warden's place, and the surgeon or physician of the penitentiary."

8. Death sentenced inmates across the country have been challenging the constitutionality of lethal injection protocols. A number of North Carolina death row inmates have or have had lethal injection challenges pending in federal court pursuant to 42 U.S.C. § 1983. One such challenge was brought by death row inmate Willie Brown several months prior to his scheduled execution date in April 2006. Brown sought to enjoin his execution on the grounds that the existing lethal injection protocol created an unreasonable risk of a prolonged and torturous execution.

9. On April 7, 2006, Judge Malcolm Howard found serious questions about the constitutionality of the lethal injection procedures that the State of North Carolina intended to use in Willie Brown's execution on April 21, 2006, and refused to allow Brown's execution until the State could ensure him that "there are present and accesible 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. Should plaintiff exhibit effects of consciousness at any time during the execution, such personnel shall immediately provide appropriate medical care so as to insure Plaintiff is immediately returned to an unconscious state."

10. In its response dated April 12, 2006, the State advised Judge Howard that it had changed its execution procedures to address his concerns. The protocol provided for a licensed registered nurse and a licensed physician to be available to observe and read the values of a BIS monitor, and thus, monitor the inmate's level of consciousness. The State's protocol further allowed for prison officials to administer additional quantities of sodium pentothal should the inmate not be unconscious based on readings of the BIS monitor after an initial 3000 mg injection of sodium pentothal.

11. In a Final Order dated April 17, 2006, Judge Howard denied Willie Brown's request for an injunction or stay of execution. "The State's use of the BIS monitor, the execution team's resulting awareness of the level of unconsciouness of the plaintiff, and the administration, if necessary, of additional quantities of sodium pentothal" satisfactorily addressed the Court's concerns "that improper techniques or other errors would lead to failed administration of sodium pentothal, rendering plaintiff paralysed but able to

perceive pain at later stages of the execution." Judge Howard's Final Order also contained the following: "The State has further provided that a licensed registered nurse and a licensed physician will be positioned in the observation room where they can both observe and read the values of the BIS monitor"; "The court is satisfied by the State's plan to use a licensed registered nurse and a licensed physician to monitor the level of plaintiff's consciousness"; and, "The court is also satisfied that the licensed registered nurse and licensed physician used by defendants in plaintiff's execution will be satisfactorily trained and fully capable of reading the BIS monitor and responding appropriately to the data they receive."

12. The Fourth Circuit Court of Appeals affirmed Judge Howard's Denial of a Preliminary Injunction and the State of North Carolina executed inmate Willie Brown as scheduled on April 21, 2006. The licensed physician present in the observation room during this execution was not asked to monitor the level of Brown's consciousness, did not do so, did not observe and read the values of the BIS monitor, and has never received any training on the use of the BIS monitor. The doctor stood almost as far away as possible from the observation room window through which he could have observed Brown.

13. On January 18, 2007, the North Carolina Medicial Board adopted a Position Statement "that physician participation in capital punishment is a departure from the ethics of the medical profession." According to its Position Statement, physicians may be "present" but may not "participate" in an execution. The Medical Board describes participation as "prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of techincal advice regarding execution." "Participation" does not include "witnessing an execution in a totally nonprofessional capacity", or "relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution."

14. The North Carolina Medical Board noted in its January 18, 2007, Position Statement that N.C. Gen. Stat. § 15-190 requires the presence of "the surgeon or physician of the penitentiary" during the execution; therefore, the Medical Board stated that it will not discipline licensees for merely being "present" during an execution in conformity with N.C. Gen. Stat. § 15-190, but "any physician who engages in any verbal or physical activity, beyond the requirements of §15-190, that facilitates the execution may be subject to disciplinary action by this board."

15. The Medical Board was created by the General Assembly to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina. It has 12 members appointed by the governor for three-year terms. Members take the following oath of office: "I do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support,

maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability, so help me God."

16. Prior to the filing of the petitions for contested cases that have been consolidated for hearing in this proceeding, Petitioners filed actions either in the Superior Court of Wake County, North Carolina, or in the United States District Court for the Eastern District of North Carolina, seeking a review of the means of execution employed by the State of North Carolina, alleging, among other things, that such means of execution were unconstitutional or otherwise unlawful.

17. On January 22, 2007, Petitioners Marcus Robinson and James Edward Thomas filed an action in Wake County Superior Court challenging North Carolina's lethal injection protocol and seeking injunctive relief. Robinson, et al. v. Beck, et al., Civil Action No. 07 CVS 001109 (Wake County Superior Court). Such action was brought as a result of the Position Statement issued by the North Carolina Medical Board on January 18, 2007, which sought to preclude the participation of a physician in a lethal injection as required by the protocol approved by Judge Howard in Brown. Counsel for state officials informed the judge that they were going to comply with the Medical Board's decision and that while physicians would be present, they would no longer participate during executions by supervising others or monitoring a prisoner's medical condition.

18. On January 25, 2007, Judge Donald W. Stephens of Wake County Superior Court issued a Preliminary Injunction staying the executions of Petitioners Marcus Robinson and James Edward Thomas. Judge Stephens ruled that in light of N.C. Gen. Stat. § 15-188, which specifically requires the Governor and Council of State to approve the Warden's provision of the necessary appliances for the infliction of the punishment of death and qualified personnel to perform all necessary tasks for an execution, the Department of Correction could not change the protocol approved in Brown until the Governor and Council of State had reviewed and approved the new protocol.

19. As a result of Judge Stephens' ruling, the North Carolina Department of Correction sought the approval of its proposed Execution Protocol by the Council of State.

20. Respondent North Carolina Council of State is composed of nine elected officers (Lieutenant Governor, Beverly Perdue; State Treasurer, Richard H. Moore; State Auditor, Les Merritt; Commissioner of Labor, Cherie K. Berry; Attorney General, Roy A. Cooper, III; Secretary of State, Elaine F. Marshall; Commissioner of Insurance, James E. Long; Superintendent of Public Instruction, June Atkinson; and Commissioner of Agriculture, Steve Troxler) and Governor Mike Easley. Their offices are created by our Constitution.

21. Respondent Council is an "Agency" of the executive branch of the government of this State as provided in N.C. Gen. Stat. § 150B-2(1a).

22. David McCoy, State Budget Director and Secretary to the Council of State, was authorized to seek information and ensure that the Council of State had adequate information with which to consider the proposed execution protocol.

23. On February 1, 2007, Petitioner Conner submitted a request for Rulemaking to the Council of State, requesting that the members adopt a rule banning the use of the bispectral index monitor ("BIS monitor") in carrying out sentences of death by lethal injection, which request had not been ruled on as of the date of the hearing in this matter.

24. Counsel for James Campbell made a request for allocation of time to address the Council of State at its February 6, 2007, meeting concerning the proposed Execution Protocol .

25. In a letter to Attorney Elizabeth Kuniholm dated February 5, 2007, Mr. McCoy denied the request to speak at the February 6, 2007, meeting. The Council of State has traditionally refused such requests and has excluded public comment at regular meetings.

26. On or about February 2, 2007, Central Prison Warden Marvin L. Polk and Secretary of the Department of Correction, Theodis Beck, filed a proposed Execution Protocol with the Council of State for approval at its meeting on February 6, 2007.

27. On or about February 2, 2007, the NC Academy of Trial Lawyers sent a binder (Resondent's Exhibit 1) of materials and information concerning the proposed lethal injection protocol to McCoy. McCoy relayed the material to the Governor's counsel who returned it to him on or about February 5th. McCoy did not share this data with other Council members. This information supports Petitioners' contentions in these cases.

28. On February 6, 2007, the Council of State considered the February 2, 2007, Execution Protocol proposed by the Department of Correction.

29. At the February 6, 2007, meeting, after the Department of Correction presented its submission, the Governor asked the Attorney General for the status of pending death penalty challenges, and also allowed counsel for the Department of Correction, who represents the Council of State and DOC in this matter, to present the proposed protocol to the Council of State and inform the members as to why the protocol should be approved. Petitioners' counsel were present, but were not recognized or permitted to address the Council of State regarding the protocol.

30. At the February 6, 2007, meeting, Respondent Council members primarily considered the Execution Protocol's requirement that a physician monitor the inmate in light of the Medical Board's position statement, and the protocol's consistency with recent federal court decisions. They did not discuss in any detail the types of drugs used, the purchase or use of the BIS monitor, or the prevention of an inmate's undue pain and suffering, nor did they reference any material that Petitioners or the trial lawyers had presented to Mr. McCoy. They seemed intent on approving the protocol and allowing the legislature and courts to further examine the issues involved.

31. Upon motion made and seconded at the February 6, 2007, meeting the Council of State approved the following "Execution Protocol" by a vote of 7-3 pursuant to N.C. Gen. Stat. § 15-188:

Chapter 15, Article 19, of the North Carolina General Statutes prescribes the manner and procedures through which the sentence of death shall be carried out through lethal injection by the State of North Carolina acting through the North Carolina Department of Correction and the Warden of Central Prison. Article 19 vests the Warden of Central Prison with direct responsibility for providing necessary drugs, appliances and qualified personnel to carry out the sentence of death in accordance with law and the Execution Protocol approved by the Governor and Council of State. The following Execution Protocol has therefore been developed by the Warden of Central Prison and approved by the Secretary of the North Carolina Department of Correction.

I. Lethal Injection

Death by lethal injection is caused by the administration of a lethal quantity of an ultrashort-acting barbiturate, such as sodium pentothal, in combination with a chemical paralytic agent, such as pancuronium bromide, and potassium chloride into the veins of a condemned prisoner. The condemned prisoner's level or state of consciousness during the execution process is observed visually and monitored utilizing an appliance, such as a bispectral index (BIS) monitor, from which the electrical activity in the condemned prisoner's brain can be interpreted

The lethal injection protocol ordinarily involves the successive, simultaneous slow intravenous administration of the three lethal chemicals and non-lethal saline solution into the body of a condemned prisoner through two IV lines by means of a series of five injections. The lethal injection protocol is composed of the following steps:

a) The first injection is an ultrashort-acting barbiturate, such as dose of not less than 3000 mg of sodium pentothal, which quickly renders the condemned prisoner unconscious.

b) The second injection is a dose of not less than 30 mL of a saline solution, which flushes the equipment used for the intravenous administration of the lethal chemicals and saline solution following the administration of the ultrashort-acting barbiturate.

c) The Warden of Central Prison pauses the administration of the lethal chemicals and saline solution to verify that the output value displayed on the monitoring appliance, such as a value reading on a BIS monitor below 60, confirms a reduced level of electrical activity in the condemned prisoner's brain sufficient to indicate a very high probability of unconsciousness.

d) If a very high probability of unconsciousness is confirmed, such as value reading on a BIS monitor below 60, the Warden resumes the injection of the remaining lethal chemicals and saline solution. However, if a very high probability of unconsciousness is not confirmed, such as value reading on a BIS monitor of 60 or above, repeated identical injections of the ultrashort-acting barbiturate, such as doses of not less than 3000 mg of sodium pentothal, will be administered until a very high probability of unconsciousness is confirmed, such as a value reading on a BIS monitor below 60, and the injection of the remaining lethal chemicals and saline solution is resumed.

e) The third injection is a chemical paralytic agent, such as a dose of not less than 40 mg of pancuronium bromide, which paralyzes the muscles of the condemned prisoner.

f) The fourth injection is a dose of not less than 160 mEq of potassium chloride, which interrupts nerve impulses to the heart causing the condemned prisoner's heart to stop beating.

g) The fifth injection is a dose of not less than 30 mL of a saline solution, which flushes the equipment used for the intravenous administration of the lethal chemicals and saline solution and completes the lethal injection protocol.

II. Appliances

The Warden will acquire, from reputable manufacturers or suppliers, all appliances, equipment and other supplies as are required to carry out the administration of lethal drugs as described

above. Such appliances, equipment and supplies shall include, at a minimum, the syringes, intravenous tubes and related materials ordinarily used by medical personnel to administer intravenous fluids to human patients. The Warden will also acquire and maintain such monitors or other equipment as shall be necessary to review human vital signs and functions, including cardiac activity, electrical activity in the brain, and respiration. The Warden will also be responsible for acquiring such other appliances, equipment, supplies or materials as medical personnel shall recommend for the purpose of ensuring that the sentence of death is carried out without exposing the condemned prisoner to a substantial risk of serious harm, pain or suffering and in accordance with constitutional requirements.

III. Personnel

The Warden shall ensure that the lethal injection procedure is administered by personnel who are qualified to set up and prepare the injections described above, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of Article 19 and this Execution Protocol. Medical doctors, physician assistants, advanced degree nurses, registered nurses, and emergency medical technician-paramedics, who are licensed or certified by their respective licensing boards and organizations, shall be deemed qualified to participate in the execution procedure. As required by Article 19, a licensed medical doctor shall be present at each execution. The doctor shall monitor the essential body functions of the condemned inmate and shall notify the Warden immediately upon his or her determination that the inmate shows signs of undue pain or suffering. The Warden will then stop the execution. The doctor shall also be responsible for certifying the death of the inmate at such time as he or she determines the procedure has been completed as required by N.C.G.S. §15-192.

It is the intent of this Execution Protocol to carry out the sentence of death as required by the North Carolina General Statutes in accordance with all constitutional requirements as determined by the courts of North Carolina and the United States.

32. Prior to its February 6, 2007, meeting, the Council of State had never approved any execution protocol. It had not and has not approved any purchase of a BIS Monitor.

33. The most crucial point during an execution by lethal injection under the approved protocol would occur when the Warden pauses the process after pentothal is injected to determine whether the inmate is unconscious and unable to feel pain. A doctor and nurse

as approved by Judge Howard should assist the Warden in determining the level of consciousness before the lethal drugs are injected. It would be dangerous to rely upon the BIS Monitor alone to make this determination for it is not a stand-alone 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 anesthetic management is not recommended by its manufacturer. Surgical patients with BIS readings of 40, 45, and 50, after awakening, have noted some awareness during the procedure. To the extent that pancuronium bromide paralyzes the inmate and lowers the BIS reading, the BIS monitor cannot solely determine an inmate's level of consciousness with the reliability necessary to ensure an inmate will not suffer undue pain during the execution. Trained medical personnel should be available to observe the inmate and measure vital signs, including heart rate, blood pressure, and breathing. Had Dr. Scott Kelley, Vice President of Aspect Medical Systems, Inc., known that the State planned to use his company's BIS Monitor in executions, he would not have sold the product to the State. Pancuronium bromide, administered while the inmate is conscious, would result in conscious paralysis and excruciating pain. Potassium chloride, likewise, would cause excruciating pain and burns if administered to a conscious inmate. In either case, the inmate would not be able to inform execution personnel of his suffering due to the paralytic effects of the pancuronium bromide; nor could an observing doctor or nurse notice signals of pain or suffering from a paralysed inmate as there could be none given.

34. The American Veterinary Medical Association (AVMA) has explicitly concluded 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 of animals.

35. In executions prior to use of the BIS monitor, the physician would wait downstairs in the Warden's office during the execution. The Warden would determine an inmate was unconscious upon hearing the inmate's "snoring." Afterwards, the physician would certify the inmate's death. The BIS could be as misleading as snoring if not used appropriately by trained personnel in conjunction with other indicators of consciousness.

36. In previous executions where the BIS monitor was used, the physician was merely "present" and did not monitor the patient. Dr. Obi Umesi was never trained or asked to read and interpret the BIS monitor or EKG during the two executions with the BIS monitor for which he was present. Dr. Umesi stood in the observation room in a position making it "practically impossible to monitor the inmate's pain and suffering." Dr. Umesi would not perform the monitoring function required by the current protocol, more likely than not because of the position statement from the Medical Board.

37. Veterinarian Kevin Concannon would not use the approved Execution Protocol in his hospital, nor would he recommend the protocol for euthanasia. According to Concannon, the BIS monitor is inadequate to solely determine a patient's state of consciousness. Because the combination of drugs used under the protocol increases the probability of pain and distress, Concannon opined that it is essential that a physician be in direct contact with the inmate.

38. Considering the toxicity of the drugs involved, trained medical personnel should be in direct view of the inmate to observe any extravasation that may occur during the IV and injection process.

39. From the observation room adjacent to the execution chamber, a physician appropriately positioned can see the inmate(covered by a sheet)lying on the gurney, the BIS monitor, and the electrocardiogram (EKG). The IVs in an inmate's arms cannot be seen.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C. Gen. Stat. § 150B-23.

2. The North Carolina Administrative Procedure Act confers upon any "person aggrieved" the right to commence an administrative hearing to resolve a dispute with an agency involving the person's rights, duties, or privileges. N.C. Gen. Stat. § 150B-23(a); See also Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 584 (1994).

3. A "person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision. N.C. Gen. Stat. § 150B-2(6).

4. Petitioners, as human beings sentenced to die according to the method described in the Execution Protocol, are persons aggrieved within the meaning of the statute. They are entitled to the presence of medical personnel who are appropriately placed, trained and qualified to help ensure that they are unconscious and unable to feel pain prior to and at the time of the administration of any pancuronium bromide or potassium chloride. Although a sentencing court has determined that Petitioners have no right to life, they retain a right to die without the risk of undue pain and suffering.

5. As persons aggrieved by Respondent's decision to approve the protocol, Petitioners bear the burden of proving by the preponderance or greater weight of the evidence that in making its decision the Respondent: (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23.

6. Petitioners failed to persuade me that Respondent exceeded its statutory authority or jurisdiction; acted arbitrarily or capriciously; or failed to act as required by law or rule in approving the Execution Protocol. Pursuant to N.C. Gen. Stat. § 15-188, the Governor and Council of State have the authority to approve the warden's provision of 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…"

7. Respondent's decision to approve the Execution Protocol was not erroneous for including limited involvement of a doctor in the face of the Medical Board's Position Statement. Angel of mercy, not agent of harm, is the role inmates seek for the doctor. They want help, not harm, from a doctor. Palliative care from a doctor to prevent unnecessary suffering, prior to a person being injected with lethal drugs which can cause excruciating pain, is not unprofessional or unethical. To threaten to discipline a doctor for helping in this manner is not regulating medicine for the benefit and protection of the people of North Carolina. The oath of office taken by members of the North Carolina Medical Board binds them to support our constitutions and constitutional authorities(the Council of State). Our state and federal constitutions authorize the death penalty. Our General Assembly has authorized it for those convicted of first degree murder. It is part of North Carolina's public policy, which is not to be stymied by a non-binding position statement.

8. Petitioners persuaded me that it was erroneous to approve the provision in the protocol allowing the warden to determine unconsciousness after injection of pentothal solely upon a reading of 60 or below on a BIS Monitor, especially without involvement and consultation with a licensed registered nurse and licensed physician as approved by Judge Howard. Unless a nurse and doctor fully trained on the BIS Monitor are participating in the Warden's decision, the later sentence in the protocol stating that the doctor will monitor the prisoner for signs of undue pain or suffering could be meaningless for if the inmate remains conscious and is paralysed he or she could not show or send such signs.

9. Petitioners persuaded me that it was erroneous to include the sentence "The Warden will then stop the execution." under Section III of the protocol, especially without further explanation. The Warden is not given such authority as G. S. § 15-188 says in part "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**." The Warden could pause the process so medical personnel could return an inmate to an unconscious state per Judge Howard's ruling. There is no need for a recovery room or crash cart.

10. ESSE QUAM VIDERI is our North Carolina State Motto—"**To be, rather than to seem**". Prison officials through their attorneys seemed to be telling a federal judge that a licensed registered nurse and licensed physician would be: observing the inmate lying on the gurney while also monitoring vital signs via BIS and other monitors to be sure of unconsciounsness before injection of painful drugs. This persuaded the judge to let them execute Willie Brown. The doctor did not observe the inmate nor did he monitor vital signs. The proposed protocol seeks to modify what was presented to Judge Howard. Petitioners have persuaded me that the proposed protocol does not ensure that inmates will be rendered unconscious prior to and throughout the period during which lethal drugs are injected into their bloodstream, such that they will be prevented from perceiving pain during their execution.

11. The essence of due process is the right to be heard. It was not proper procedure to consider only documents and comments from those proposing the protocol and not hear

from counsel for the condemned inmates. This error can be corrected by members of the Council of State reviewing this Decision, the Transcript of the May 21st hearing, Exhibit notebooks introduced by Petitioners and Respondent, as well as Exceptions and written arguments filed by the parties, prior to making their final agency decision.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned renders the following:

DECISION

That the Council of State reconsider its approval of the Execution Protocol.

ORDER AND NOTICE

The North Carolina Council of State is the agency that will make the Final Decision in this contested case. Prior to the issuance of its Final Decision, the Council of State is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to the members of the Council of State who will make the Final Decision. N.C. Gen. Stat. § 150B-36(a).

N.C. Gen. Stat. § 150B-36(b), (b)(1), (b)(2), and (b)(3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge. The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

Pursuant to N.C. Gen. Stat. § 150B-36(b)(3), the agency is required to serve a copy of its Final Decision upon each party personally or by certified mail and to furnish a copy to each attorney of record and the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714.

This the 9th day of August, 2007.

_____

Fred G. Morrison Jr.
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

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