

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

NO. _____

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.

COMPLAINT

Plaintiff, Willie Brown, Jr., N.C. DOC #0052205, complaining of the Defendants, alleges and says:

NATURE OF THE ACTION

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. Plaintiff seeks preliminary and permanent injunctive relief to prevent the Defendants from executing him by means of lethal injection using the current North Carolina protocol. Plaintiff contends that the Defendants' protocol for anesthesia as a precursor to execution by lethal injection unnecessarily risks infliction of pain and suffering. Plaintiff further contends that the nature of the chemicals used by Defendants to effectuate death creates a heightened need for proper induction and maintenance of anesthesia. As a result of their failure to use medically approved procedures and properly trained personnel, Defendants have created an unacceptable risk that Plaintiff will suffer

excruciating pain during the course of his execution unless Defendants adopt safe and humane anesthesia protocols.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights violation), § 2201 (declaratory relief), and § 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

3. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that Plaintiff is currently incarcerated at Central Prison in Raleigh, North Carolina, which is located in this District. All executions conducted by the North Carolina Department of Correction occur at Central Prison. The events giving rise to this Complaint have occurred and will occur in this District.

THE PARTIES

4. Plaintiff Willie Brown, Jr. is a United States citizen and a resident of the State of North Carolina. Plaintiff is a death-sentenced prisoner currently being held in the custody of Defendants and under the supervision and control of the North Carolina Department of Correction. Plaintiff is held at Central Prison, 1300 Western Boulevard, Raleigh, North Carolina, 27606.

5. Defendant Theodis Beck is the Secretary of the North Carolina Department of Correction. Defendant Marvin Polk is the Warden of Central Prison in Raleigh, North Carolina, the facility at which Defendants plan to execute Plaintiff. These Defendants are citizens and residents of the State of North Carolina. Defendants Unknown Executioners are employed or contracted by the North Carolina Department of Correction and make preparations for and carry out the execution of Plaintiff. Plaintiff does not yet know, and it is Plaintiff's understanding that

Defendants will not reveal, the identities of these persons. All of the Defendants are being sued in their individual and official capacities.

EFFECTIVE EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. Plaintiff has effectively exhausted his administrative remedies. Plaintiff filed an emergency grievance with Central Prison officials on 13 February 2006. A copy is attached as Exhibit A. As of the date of filing of this Complaint, the Grievance Board has failed to act on Plaintiff's grievance despite Plaintiff's request that his grievance be treated as an emergency and despite his impending execution.

GENERAL ALLEGATIONS

7. At the 7 November 1983 Criminal Session of the Martin County Superior Court, Plaintiff was convicted of first-degree murder and robbery with a dangerous weapon and sentenced to death.

8. On 27 February 2006, the United States Supreme Court issued an Order denying Plaintiff's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, completing Plaintiff's federal habeas proceeding. Pursuant to N.C. Gen. Stat. § 15-194(1), following the denial of Plaintiff's Petition for Writ of Certiorari, Defendants may immediately schedule a date for carrying out Plaintiff's execution.

9. Defendants intend to execute Plaintiff by poisoning him with a lethal combination of chemical substances. Under North Carolina statute, death sentences shall 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. Further, 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. Each of these matters, and all other details of the execution process, are within the discretion of the Defendants.

10. Defendants' execution protocol 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 a total of 3000 milligrams of sodium pentothal, an ultra short-acting barbiturate. The second syringes contain saline to flush the IV line clean. The third syringes contain a total of 40 milligrams of pancuronium bromide (Pavulon), which paralyzes all voluntary muscles. The fourth syringes contain a total of 160 millequivalents of potassium chloride, an extremely painful chemical which activates the nerve fibers lining the prisoner's veins and interferes with the heart's contractions, causing cardiac arrest. The fifth syringes contain saline to flush the IV lines clean.

11. Sodium pentothal, also referred to as thiopental sodium, is an ultra short-acting barbiturate that is usually administered only during the preliminary phase of anesthesia. There is a reasonable likelihood that sodium pentothal, if ineffectively delivered, will not provide an appropriate plane of anesthesia for the duration of the execution process. Without adequate sedation, Plaintiff will experience excruciating pain as a result of the conscious asphyxiation caused by pancuronium bromide and the painful burn and cardiac arrest caused by the injection of potassium chloride.

12. Pancuronium bromide or Pavulon paralyzes voluntary muscles, including the diaphragm, but it does not affect consciousness or the perception of pain. To the extent that the

first chemical, sodium thiopental, is improperly administered and fails to establish and maintain a sufficient plane of anesthesia, the pancuronium bromide serves only to mask Plaintiff's excruciating pain and suffering. Pancuronium bromide can result in a conscious individual appearing unconscious to observers. The use of pancuronium bromide masks the physical signs that would be relied upon by a properly trained observer to determine whether the prisoner had been sufficiently anesthetized.

13. Potassium chloride disrupts the normal electrical activity of the heart and stops it from pumping blood, thereby causing cardiac arrest. As it travels in the bloodstream from the site of injection towards the heart, potassium chloride activates all the nerve fibers inside the vein, causing a burning sensation as it courses through the body and ravages the internal organs. This causes excruciating pain that is agonizing for an inmate who is not properly anesthetized.

14. The American Veterinary Medical Association (AVMA) states that the use of neuromuscular paralyzing drugs, including pancuronium bromide, solely or in conjunction with other drugs, is unacceptable as a method of euthanasia. The AVMA further states that the use of potassium chloride in a euthanasia protocol requires a surgical plane of anesthesia, which is characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli. The AVMA recommends the use of a longer-lasting barbiturate for animal euthanasia. Pentobarbital, a longer-lasting barbiturate, is used for animal euthanasia rather than ultra short-acting sodium pentothal.

15. Defendants' selection of potassium chloride, which causes excruciating pain upon injection, to cause Plaintiff's death requires that Defendants employ an appropriate anesthesia protocol prior to its administration. Defendants' administration of pancuronium bromide interferes with a proper assessment of anesthetic depth and would result in the extreme terror and

suffering of conscious suffocation, thereby necessitating a heightened level of care to ensure that the appropriate plane of anesthesia is maintained.

16. The anesthesia practices and procedures adopted by Defendants are inadequate to ensure that an appropriate plane of anesthesia is induced and maintained prior to execution, creating an unacceptable and unnecessary risk that Plaintiff will experience excruciating pain during the course of his execution. North Carolina statutes do not prescribe or limit the specific chemicals, dosages, procedures, or manner of administering and maintaining anesthesia prior to execution by lethal injection; nor do the statutes prescribe any certification, training, or licensure required of those who participate in the anesthesia process. Each of these matters is within the discretion of the Defendants.

17. Defendants have never conducted any type of independent investigation into the appropriate standards of practice for inducing and monitoring anesthesia as a precursor to execution by lethal injection. Defendants have undertaken no independent research or review to ensure that a prisoner will not suffer a conscious and painful death under the current anesthesia protocol.

18. Defendants' anesthesia protocol lacks medically necessary safeguards, increasing the risk that Plaintiff will suffer unnecessary pain during the course of his execution. There is no standardized time to administer each of the three chemicals. The protocol identifies no procedures for ensuring that the anesthetic agent is properly flowing into the prisoner, and it identifies no procedures for ensuring that the prisoner is properly sedated prior to the administration of other chemicals, as would be required in any medical or veterinary procedure before the administration of a neuromuscular blocking agent, such as pancuronium bromide, or the administration of a painful potassium chloride overdose.

19. Defendants' protocol does not set forth any minimum qualifications or expertise required of the personnel who perform the tasks in the anesthesia and lethal injection processes. Defendants make no efforts to ensure that the individuals responsible for inducing and maintaining unconsciousness are credentialed, licensed, and proficient in the knowledge, skills, and procedures necessary to establish an appropriate plane of anesthesia throughout the lethal injection process.

20. 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 prior to execution, notwithstanding the fact that it is a complex medical procedure requiring expertise in order to be performed correctly. For example, Defendants' anesthesia 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 painful chemicals in the execution process.

21. North Carolina law provides that only a licensed veterinarian may perform an act producing an irreversible change in an animal, such as euthanasia. Defendants' anesthesia protocol includes no comparable requirement; in fact, it does not include any requirements for the credentials, certifications, experience, or proficiency of the personnel who administer anesthesia prior to execution.

22. The absence of medical personnel credentialed, licensed, and proficient in the field of anesthesiology greatly increases the risk that a prisoner will not receive the necessary amount of anesthetic prior to being paralyzed by the pancuronium bromide and then experiencing the painful internal burn of the potassium chloride.

23. Defendants' failure to require sufficient training, credentials, certification, experience, or proficiency of the personnel involved in the administration of anesthesia greatly increases the risk that a conscious prisoner will experience excruciating pain and suffering.

24. The physical layout of the execution chamber increases the risk that Plaintiff will not be properly anesthetized prior to execution. The presence of a curtain separating anesthesia personnel from the inmate and a sheet covering the inmate's body block visual access to the site of the intravenous lines and impede the ability of personnel to closely and directly monitor the inmate. Defendants' execution facility deviates significantly from medically-accepted practices and impairs the ability of anesthesia personnel to ensure the inmate in fact receives an adequate dosage of sodium pentothal and is rendered and remains unconscious.

25. Defendants' protocol includes no guidelines upon which the personnel participating in executions can rely if they are required to exercise their discretion during the process. Defendants' protocol fails to address any reasonably foreseeable complications with an appropriate medical response.

26. As a result of the Defendants' failure to employ appropriate criterion for administering and monitoring anesthesia and failure to require that the individuals participating in anesthesia be appropriately credentialed, licensed, and proficient, Defendants have likely administered pancuronium bromide and potassium chloride to inmates who have not achieved an adequate plane of anesthesia.

27. Witnesses to a number of executions carried out in North Carolina by Defendants have reported seeing what appear to be horrific displays of pain and suffering. Reports of prisoners writhing and convulsing during execution are inconsistent with the proper administration of a full dosage of sodium pentothal.

28. The lack of adequate standards for administration of the chemicals, the lack of qualifications of the personnel involved in the process, and the combination of the three particular drugs used in Defendants' protocol create a grave and substantial risk that Plaintiff will be conscious throughout the execution process and, as a result, will experience an excruciatingly painful and protracted death.

CAUSE OF ACTION

**VIOLATION OF THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL
PUNISHMENT PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION**

(42 U.S.C. § 1983)

29. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 28.

30. Secretary Beck, Warden Polk, and Unknown Executioners are acting under color of North Carolina law in undertaking to execute Plaintiff by lethal injection using an insufficient, improperly designed and improperly administered protocol for inducing and maintaining anesthesia, such that Plaintiff will unnecessarily suffer an excruciating death in violation of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

31. Although it is possible to conduct executions in a constitutionally compliant manner, Defendants have chosen not to do so. Defendants could choose to use alternative or additional chemicals that pose a lower risk of administration error yet do not cause extraordinarily grave consequences to the inmate if improperly administered; instead they have knowingly or recklessly chosen to use three chemicals that pose a high risk of administration error and risk of excruciating pain to Plaintiff. Moreover, Defendants have taken no precautions to ensure that the personnel who administer the lethal injection chemicals possess the training,

credentials, certification, experience, and proficiency needed to administer those chemicals properly. Thus, while it is possible for Defendants to select additional or alternative chemicals and/or retain qualified personnel to administer its chosen chemicals to ensure the constitutionality of its lethal injection procedure, Defendants have acted with deliberate indifference and failed to do so. Defendants' current protocol violates evolving standards of decency.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Willie Brown, Jr. prays that:

1. This Court grant preliminary and permanent injunctive relief to enjoin Defendants from executing Plaintiff using an inadequate protocol for inducing and maintaining anesthesia;
2. This Court enter a declaratory judgment that Defendants' inadequate anesthesia protocol violates the Eighth Amendment prohibition against cruel and unusual punishments;
3. This Court grant reasonably attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States, as well as costs of suit; and
4. The Court grant any further relief as it deems just and proper.

Respectfully submitted this the 27th day of February 2006.

/s/ J. Donald Cowan, Jr. _____

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N.C. State Bar No. 0968

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