

07CV003574

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

07 Cvs \_\_\_\_\_

2007 MAR -6 P 3: 14

WAKE COUNTY CSC

NORTH CAROLINA DEPARTMENT )  
OF CORRECTION, THEODIS BECK, )  
Secretary of the North Carolina )  
Department of Correction, in his official )  
capacity, and MARVIN POLK, Warden )  
of Central Prison, in his official capacity, )

Plaintiffs, )

v. )

NORTH CAROLINA MEDICAL )  
BOARD, )

Defendant. )

COMPLAINT

Plaintiffs, North Carolina Department of Correction, Theodis Beck, and Marvin Polk, ("Plaintiffs"), complaining of the Defendant, avers:

1. Plaintiff North Carolina Department of Correction is a department established by N.C.G.S. § 143B-260 and charged with the duties enumerated in Article 6 of the Executive Organization Act of 1973, as well as the department whose facilities, personnel and agents are to be utilized to carry out judicial executions by lethal injection.

2. Plaintiff Theodis Beck is the Secretary of the North Carolina Department of Correction and is specifically empowered by N.C.G.S. § 15-194 to schedule dates of execution to be carried out in accordance with Article 19 of Chapter 15 of the North Carolina General Statutes.

3. Plaintiff Marvin L. Polk is the Warden of Central Prison and is specifically empowered by N.C.G.S. § 15-187, -188, and -190 to provide the facilities, obtain the chemicals and

appliances, furnish qualified personnel, and devise procedures necessary to carry out executions by lethal injection of individuals sentenced to death in the State of North Carolina.

4. North Carolina General Statute § 15-188 requires Plaintiff Polk to provide the “necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks required” for an execution by lethal injection, and such provisions must be approved by the Governor and Council of State of North Carolina.

5. North Carolina General Statute § 15-190 provides, in part, that “the execution shall be under the general supervision and control of the warden of the penitentiary” and that at “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.”

6. Defendant the North Carolina Medical Board (“Defendant”) is a Board duly established by N.C.G.S. § 90-2 and empowered “to regulate the practice of medicine and surgery for the benefit of the citizens of the people of North Carolina.”

7. Neither the North Carolina General Statutes governing judicial executions in Article 19 of Chapter 15, those governing the practice of medicine in Article 1 of Chapter 90, nor those governing the provision of emergency medical services in Article 7 of Chapter 131E provide that judicial executions are medical procedures or constitute the practice of medicine and are thus subject to regulation and oversight by Defendant, regardless of the potential or actual involvement by a licensed physician or emergency medical technician paramedic.

8. On 18 January 2007, Defendant issued the Position Statement, a copy of which is attached hereto as Exhibit A, which announced that “physician participation in capital punishment

is a departure from the ethics of the medical profession” and which “adopt[ed] and endorse[d] the provisions of the American Medical Association Code of Medical Ethics Opinion 2.06.”

9. The Position Statement purports to recognize the requirement in N.C.G.S. § 15-190 that “the surgeon or physician of the penitentiary” be “present” for executions of condemned inmates and expressly sets forth that Defendant “will not discipline licensees for merely being ‘present’ during an execution in conformity with” N.C.G.S. § 15-190. However, the Position Statement further proclaims that “any physician who engages in any verbal or physical activity beyond the requirements of N.C. Gen. Stat. § 15-190 that facilitates the execution may be subject to disciplinary action by” Defendant.

10. On 6 February 2007, the Governor and Council of State of North Carolina considered and approved an Execution Protocol (“the Protocol”), a copy of which is attached hereto as Exhibit B, that provided, in part, as follows:

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 doctor shall also be responsible for certifying the death of the inmate at such time as he or she determines that the procedure has been completed as required by N.C.G.S. § 15-192.

11. The Position Statement issued by Defendant subjects physicians licensed to practice medicine in North Carolina and employed by or contracting with the North Carolina Department of Correction to threats of disciplinary action should they comply with the provisions of the Protocol approved by the Governor and Council of State.

12. Likewise, those physicians employed by or contracting with the North Carolina Department of Correction who might be required by virtue of their employment or contract status to participate in an execution in accordance with the provisions of the Protocol approved by the

Governor and Council of State are compelled by the force and effect of the Position Statement to choose between jeopardizing their employment or contract with the North Carolina Department of Correction or subjecting themselves to potential disciplinary action by Defendant.

13. As set forth in the Affidavit of Marvin L. Polk attached hereto as Exhibit C, Plaintiff Polk has solicited licensed physicians employed by or contracting with the North Carolina Department of Correction as well as with private entities who furnish licensed physicians under contracts with health care providers in an effort to locate a licensed physician who would be willing to participate in executions of condemned inmates in North Carolina despite the impending threat of disciplinary action by Defendant for violation of the Position Statement and the ethics of the medical profession.

14. As further set forth in the Affidavit of Marvin L. Polk, a copy of which is attached hereto as Exhibit C, the solicitation efforts of Plaintiff Polk have been unsuccessful as all licensed physicians contacted by Plaintiff Polk have advised that they refuse to subject themselves to disciplinary action by Defendant for participating in a judicial execution.

15. As a result of the inability of Plaintiffs to locate a licensed physician willing to be involved in a judicial execution by lethal injection for fear of disciplinary action by Defendant, Plaintiff Polk is unable to carry out those duties the laws of North Carolina empower and require him to complete.

16. In the cases of *Robinson et al. v. Beck et al.*, 07 CvS 1109, *Campbell v. Beck et al.*, 07 CvS 1411, and *Billings v. Beck et al.*, 07 CvS 1607, this Court entered preliminary injunctions on the grounds that Defendants had failed to obtain approval from the Governor and Council of State for any actions that would “significantly alter” the then-existing execution protocol. Now that the

Governor and Council of State have approved the Protocol in accordance with N.C.G.S. § 15-188, Plaintiffs could seek dissolution of the preliminary injunctions in those actions as well as proceed with the scheduled execution of Allen Holman, currently set for 2:00 a.m. on Friday, 9 March 2007, if not for the current controversy with Defendant and the impediment represented by the Position Statement.

**FIRST CLAIM FOR RELIEF**  
(Uniform Declaratory Judgment Act - N.C.G.S. § 1-254)

17. Plaintiffs reallege and restate the allegations contained in paragraphs 1 through 16 of the Complaint as if fully stated herein.

18. Pursuant to N.C.G.S. § 1-254, there exists an actual controversy between Plaintiffs and Defendant and Plaintiffs are entitled to a declaration of rights as to the effect of the Position Statement issued by Defendant on their ability to carry out the responsibilities and obligations imposed by N.C.G.S. § 15-187, -188, and -190.

19. Pursuant to N.C.G.S. § 1-254, there exists an actual controversy between Plaintiffs and Defendant and Plaintiffs are entitled to a declaration of rights as to whether a judicial execution is a medical procedure and thus outside both the scope of Chapters 90 and 131E of the North Carolina General Statutes and, therefore, the authority of Defendant to oversee or regulate, despite the involvement of a licensed physician.

**WHEREFORE**, Plaintiffs pray unto the Court as follows:

1. That the Court grant them permanent injunctive relief prohibiting Defendant from taking disciplinary action against licensed physicians employed by or contracting with the North Carolina Department of Correction who have been involved in past judicial executions by lethal injection as well as those who will be involved in future judicial executions by lethal injection in the

manner prescribed by the Protocol and approved by the Governor and Council of State of North Carolina and as necessary to permit Plaintiffs to carry out their obligations and duties in accordance with the provisions of Article 19 of Chapter 15 of the North Carolina General Statutes.

2. That the Court declare the rights and obligations of the Plaintiffs and Defendant with regard to the effect of the Position Statement issued by Defendant on Plaintiffs' ability to carry out the responsibilities and obligations imposed by N.C.G.S. § 15-187, -188, and -190.

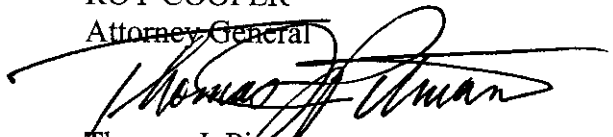
3. That the Court declare that a judicial execution is not a medical procedure, is outside the scope of Chapters 90 and 131E of the North Carolina General Statutes and thus is outside the authority of Defendant to oversee or regulate, despite the involvement of a licensed physician.

4. Such other and further relief as the Court may deem just and proper.

This the 6<sup>th</sup> day of March 2007.

ROY COOPER

~~Attorney General~~



Thomas J. Pitman

Special Deputy Attorney General

N.C. State Bar Number: 9629

North Carolina Department of Justice

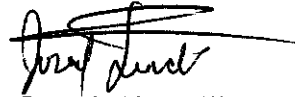
Post Office Box 629

Raleigh, NC 27602-0629

Telephone: (919) 716-6529

Facsimile: (919) 716-6765

E-Mail: [tpitman@ncdoj.gov](mailto:tpitman@ncdoj.gov)



Joseph Finarelli

Assistant Attorney General

N.C. State Bar Number: 26712

North Carolina Department of Justice

Post Office Box 629

Raleigh, NC 27602-0629

Telephone: (919) 716-6531

Facsimile: (919) 716-6761

E-Mail: [jfinarelli@ncdoj.gov](mailto:jfinarelli@ncdoj.gov)

Attorneys for Defendants Beck and Polk

# **EXHIBIT A**



## **Capital Punishment**

The North Carolina Medical Board takes the position that physician participation in capital punishment is a departure from the ethics of the medical profession within the meaning of N.C. Gen. Stat. § 90-14(a)(6). The North Carolina Medical Board adopts and endorses the provisions of AMA Code of Medical Ethics Opinion 2.06 printed below except to the extent that it is inconsistent with North Carolina state law.

The Board recognizes that N.C. Gen. Stat. § 15-190 requires the presence of "the surgeon or physician of the penitentiary" during the execution of condemned inmates. Therefore, the Board will not discipline licensees for merely being "present" during an execution in conformity with N.C. Gen. Stat. § 15-190. However, any physician who engages in any verbal or physical activity, beyond the requirements of N.C. Gen. Stat. § 15-190, that facilitates the execution may be subject to disciplinary action by this Board.

### **Relevant Provisions of AMA Code of Medical Ethics Opinion 2.06**

An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.

Physician participation in an execution includes, but is not limited to, the following actions: 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 technical advice regarding execution.

In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

The following actions do not constitute physician participation in execution: (1) testifying as to medical history and diagnoses or mental state as they relate to competence to stand trial, testifying as to relevant medical evidence during trial,

**testifying as to medical aspects of aggravating or mitigating circumstances during the penalty phase of a capital case, or testifying as to medical diagnoses as they relate to the legal assessment of competence for execution; (2) certifying death, provided that the condemned has been declared dead by another person; (3) witnessing an execution in a totally nonprofessional capacity; (4) witnessing an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity; and (5) 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.**

(Under Revision)

# **EXHIBIT B**

## Execution Protocol

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 a 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 a 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 a 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

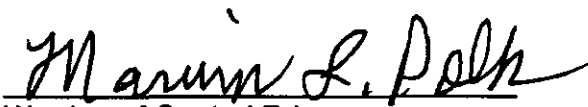
The Warden will acquire, from reputable manufacturers or suppliers, all appliances, equipment and other supplies as are required to carry out the administration of lethal drugs as described above. Such appliances, equipment and supplies shall include, at a minimum, the syringes, intravenous tubes and 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.

  
Warden of Central Prison

  
Secretary  
North Carolina Department of Correction

# **EXHIBIT C**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
07 CvS \_\_\_\_\_

NORTH CAROLINA DEPARTMENT )  
OF CORRECTION, THEODIS BECK, )  
Secretary of the North Carolina )  
Department of Correction, in his official )  
capacity, and MARVIN POLK, Warden )  
of Central Prison, in his official capacity, )

Plaintiffs, )

v. )

NORTH CAROLINA MEDICAL )  
BOARD, )

Defendant. )

**AFFIDAVIT OF MARVIN L. POLK**

**MARVIN L. POLK**, being first duly cautioned and sworn, states as follows

1. I am a named Plaintiff in the above-captioned action.
2. I am an adult over age 18, have never been adjudged incompetent, suffer from no mental or emotional illness, and make this affidavit of my own free will, stating facts of which I have personal knowledge.
3. I am currently employed by the North Carolina Department of Correction ("NCDOC") as the Warden of Central Prison in Raleigh, North Carolina. Prior to assuming the position of Warden on 1 August 2003, I had been the Deputy Warden of Central Prison since 1 August 1999.
4. Pursuant to N.C. Gen. Stat. § 15-190, as Warden of Central Prison I am charged with the duty of supervising and conducting the court-ordered sentence of execution on the date set by the Secretary of Correction. I am present at and directly supervise each execution. Previously, as



Deputy Warden, I also participated in conducting executions. During my tenures as Warden and Deputy Warden, NCDOC has carried out 31 executions by lethal injection.

5. As Warden of Central Prison, I am empowered by N.C. Gen. Stat. §§ 15-187, -188, and -190 to provide the facilities, obtain the chemicals and appliances, furnish qualified personnel, and devise procedures necessary to carry out executions by lethal injection of individuals sentenced to death in the State of North Carolina.

6. North Carolina General Statute § 15-190 provides, in part, that “the execution shall be under the general supervision and control of the warden of the penitentiary” and that at “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.”

7. With the involvement of a licensed physician, Plaintiffs have previously employed a constitutionally adequate execution protocol for past executions by lethal injection which rendered the condemned inmate sufficiently unconscious and unable to suffer or feel unconstitutional levels of pain. See *17 April 2006 Final Order, Brown v. Beck, 5:06-CT-3018-H, (E.D.N.C.) (Howard, J.); 5 May 2006 Order denying the plaintiff's Motion for Preliminary Injunction, Conner v. Beck, 5:06-CT-3032-D (E.D.N.C.) (Dever, J.); 25 July 2006 Order denying plaintiff's Motion for Preliminary Injunction, Flippen v. Beck, 5:06-CT-3062-H, (E.D.N.C.) (Howard, J.)*.

8. On 6 February 2007, pursuant to N.C. Gen. Stat. § 15-188, the Governor and Council of State approved an execution protocol for the North Carolina Department of Correction at the request of Plaintiffs, which protocol comported with the above opinions of the United States District Court for the Eastern District of North Carolina and provided for the involvement of a

licensed physician to insure a constitutionally adequate execution protocol for future executions by lethal injection that would continue to render the condemned inmate sufficiently unconscious and unable to suffer or feel unconstitutional levels of pain.

9. On 18 January 2007, the North Carolina Medical Board ("Board") issued a position statement ("Position Statement"), which states that "physician participation in capital punishment is a departure from the ethics of the medical profession." The Position Statement prohibits a variety of enumerated activities by a licensed physician in the course of a judicial execution. Further, the Position Statement provides guidance from the Board that licensed physicians who engage in such activities may be subject to disciplinary action by the Board.

10. The Position Statement adopts relevant provisions of the American Medical Association Code of Medical Ethics Opinion 2.06 which describes physician participation, in part, as "monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician, and rendering of technical advice regarding execution . . . , and consulting with or supervising lethal injection personnel."

11. The Position Statement subjects licensed physicians to potential disciplinary action for carrying out the duties and obligations required of those physicians by the United States District Court of the Eastern District of North Carolina and by the execution protocol approved by the Governor and Council of State.

12. Licensed physicians employed by or contracting with the North Carolina Department of Correction who might be required by virtue of their employment or contract status to participate or otherwise be involved in an execution in accordance with the provisions of the execution protocol approved by the Governor and Council of State are compelled by the force

and effect of the Position Statement to choose between jeopardizing their employment or contract with the North Carolina Department of Correction or subjecting themselves to potential disciplinary action by Board.

13. On behalf of Plaintiffs, I have solicited physicians licensed by the State of North Carolina and employed by or contracting with the North Carolina Department of Correction in an effort to locate a licensed physician who would be willing to participate or otherwise be involved in executions of condemned inmates in North Carolina despite the impending threat of disciplinary action by the Board for violation of the Position Statement and the ethics of the medical profession.

14. My solicitation efforts have been unsuccessful as all licensed physicians I have contacted, including current employees of the North Carolina Department of Correction, have advised that they refuse to subject themselves to disciplinary action by the Board for participating or otherwise being involved in a judicial execution.

15. The potential for disciplinary action against licensed physicians has prevented Plaintiffs from locating a licensed physician willing to be present for the execution of Defendant Allen Richard Holman or any other condemned inmate as required by N.C. Gen. Stat. § 15-190. Further, the absence of a licensed physician from an execution by lethal injection would violate N.C. Gen. Stat. § 15-190.

16. As a result of my inability to locate a licensed physician willing to participate or otherwise be involved in a judicial execution by lethal injection for fear of disciplinary action by the Board, Plaintiffs are unable to carry out those duties the laws of North Carolina empower and require them to complete.

Further, Affiant sayeth not.

This, the 6 day of March 2007.

*Marvin L. Polk*

Marvin L. Polk, Affiant

Sworn to and subscribed before me  
this, the 6 day of March 2007.

*Ann R. Harper*

Notary Public

My Commission Expires: 2-2-2008

