RECORD NO. 06-9

In The

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

WILLIE BROWN, JR.,

Plaintiff-Appellant,

v.

THEODIS BECK, Secretary, North Carolina Department of Correction, and MARVIN POLK, Warden, Central Prison, Raleigh, North Carolina,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

BRIEF OF THE APPELLEES OPPOSING APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellant Willie Brown, Jr. initiated this action in the United States District Court for the Eastern District of North Carolina pursuant to 42 U.S.C. §1983, asserting federal question jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. Jurisdiction for this appeal is pursuant to 28 U.S.C. § 1292(a)(1), which authorizes this Court to review the denial of a motion for preliminary injunction by a district court of the United States. This Court has recognized its jurisdiction to "review the grant or denial of a preliminary injunction for abuse of discretion, recognizing that 'preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.'" *Microstrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001), quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1992)(internal quotation marks omitted).

STATEMENT OF THE ISSUES

I. This Appeal Should Be Dismissed Because Appellant Failed to Exhaust His Available Administrative Remedies Prior to Filing His Complaint, and His Amended Complaint Related Back to the Date of Filing of His Complaint.

II. This Court Should Deny Appellant's Motion for Preliminary Injunction Because it Is Not Likely That Appellant Will Succeed on the Merits of His Claim or That He Will Suffer Harm. On the Other Hand, the Equities Weigh Heavily in Appellees' Favor Because Unjustified Delay in the Administration of a Capital Sentence Is Harmful to the Public, Whose Interest Is in the Fair, but Expeditious, Rendering of Justice.

STATEMENT OF THE CASE

Appellant Willie Brown, Jr. ("Appellant") is scheduled for execution on 21 April 2006. On 27 February 2006, Appellant initiated this action by filing a Complaint ("Complaint") in the United States District Court for the Eastern District of North Carolina ("District Court") seeking a permanent injunction barring Appellees Theodis Beck, Secretary of North Carolina Department of

Correction, and Marvin Polk, Warden of Central Prison, ("Appellees") from executing him using an "inadequate protocol for inducing and maintaining anesthesia," a declaratory judgment that Appellees' "inadequate anesthesia protocol" would violate the Eighth Amendment prohibition against cruel and unusual punishment, and an award of reasonable attorney fees and costs. On 8 March 2006, following the denial of Appellant's grievance by the Inmate Grievance Resolution Board on 7 March 2006, Appellant filed his Amended Complaint ("Amended Complaint"). Appellant's Amended Complaint modified paragraph 6 in which he acknowledged that he had not fully exhausted his available administrative remedies prior to filing his Complaint. No other changes were evident in his Amended Complaint. On 17 April 2006, the District Court, the Honorable Malcolm J. Howard, following a hearing on 6 April 2006 and additional submissions by the parties, entered an Order ("Order") denying Appellant's Motion for Preliminary for Preliminary Injunction. Appellant filed a timely notice of appeal.

ARGUMENT

I. Appellant's Appeal Should Be Dismissed Because Appellant Failed to Exhaust His Available Administrative Remedies Prior to Filing His Complaint, and His Amended Complaint Related Back to the Date of Filing of His Complaint.

Appellant's Motion for Emergency Stay of Execution should be dismissed because Appellant has not complied with the requirements of the Prison Litigation Reform Act by exhausting his available administrative remedies prior to filing his Complaint and his filing of an Amended Complaint does not cure this defect.

Appellant's Amended Complaint relates back to the date of his 27 February 2006 Complaint, prior to his fully exhausting his available administrative remedies on 7 March 2006. "An amendment of a pleading relates back to the date of the original pleading when . . . the claim . . .

asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. Rule Civ. Proc. 15(c)(2)(2005). Relation back depends on the existence of a common "core of operative facts" uniting the original and newly asserted claims. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1246, 1259, n. 29 (9th Cir. 1982). The conduct, transaction, or occurrence defining Appellant's claims for relief in his Complaint were identical to those defining his claims for relief in his Amended Complaint save for his failure to fully exhaust, rather than *effectively* exhaust, his available administrative remedies.

The Prison Litigation Reform Act of 1995 ("PLRA") amended 42 U.S.C. § 1997e(a) to require a prisoner to exhaust available administrative remedies *before* filing a conditions-of-confinement suit. *Booth v. Churcher*, 532 U.S. 731, 733-34 (2001). Section 1997e(a) makes exhaustion of claims mandatory for all inmate suits about prison conditions, *Porter v. Nussel*, 534 U.S. 516, 514, 532. (2002). The PLRA applies with equal force to execution challenges as to any other prisoner § 1983 actions challenging conditions of confinement. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). There is no "futility" exception. *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2004). In *Anderson v. XYZ Correctional Health Services*, 407 F.3d 674 (4th Cir. 2005), this Court said the following:

> There is no doubt that the PLRA's exhaustion requirement is mandatory. *See Porter [v. Nussle*, 534 U.S. 516,] 524 ("Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory. All available remedies must now be exhausted; those remedies need not meet federal standards, nor must they be plain, speedy, and effective. Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit." (citations and internal quotation marks omitted)). The question we must answer is whether this exhaustion-of-remedies requirement is a pleading requirement as well, such that a complaint is subject to dismissal if it fails to include an allegation that the inmate has exhausted his

administrative remedies.

Id. at 677 (emphasis added.) This Court held exhaustion is not a pleading requirement, but dismissal is mandatory when the defendant has pleaded and proved failure to exhaust. *Id.* at 683. Appellant acknowledges that he filed his internal grievance, the initial step toward exhausting his available administrative remedies, but filed this action prior to final administrative action being taken on his grievance by the Inmate Grievance Resolution Board. (Amended Compl. ¶ 6.) The District Court denied Appellees' motion to dismiss, holding that with the filing of Appellant's Amended Complaint on 8 March 2006, following the decision of the Inmate Grievance Resolution Board on 7 March 2006, he had exhausted his administrative remedies.

The decision of the District Court is contrary to the plain language of Rule 15(c)(2) of the Federal Rules of Civil Procedure. The general rule of law for the concept of relating back was set down by the United States Supreme Court in *Baltimore & Ohio Southwestern Railroad Co. v. Carroll,* 280 U.S. 491, 495-496 (1930), which held that an amended complaint which introduced a new and distinct cause of action did not relate back to the date of the filing of the original complaint so as to avoid a statute of limitations bar. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) (Rule 15 is clear in its provisions in conveying the circumstances under which a pleading can be amended and directing how litigation will move forward following an amendment.)

Appellant does not deny that he is aware of the Administrative Remedy Procedure ("Procedure") published by the Division of Prisons of the North Carolina Department of Correction.[1]

[1] All inmates are informed of the Procedure as a matter of routine during initial screening into the Division of Prisons. Also, every inmate has assigned a case manager who can answer questions and assist him or her in following correct procedures should the inmate wish to file a grievance.

Appellees attached a copy of the Procedure as an exhibit to their memorandum in support of motion to dismiss. (Memo, pp. 8-16.) Section G.0307(f) of the Procedure summarizes the four steps and associated maximum time limits in the standard grievance process. A total of 85 days are provided for an inmate to receive a decision after his or her grievance is formally accepted following the standard process. (*Id.*, p. 11.)

Appellant requested emergency processing of his grievance without stating a reason or providing any justification for expedited processing. Section G.0308 sets forth the four bases for affording an inmate the privilege of emergency processing. Appellant does not meet any criteria for emergency handling, but was afforded such a privilege pursuant to section G.0308(a). (*Id.*, pp. 11-12.)

On 13 February 2006, Appellant submitted his single paged, hand-written grievance pursuant to the Internal Grievance Procedure of the North Carolina Department of Correction ("NCDOC"). In his statement of grievance, Appellant said "The people who give these injections do not have appropriate qualification, training and experience. The anesthesia procedures used by the prison before execution are not adequate to ensure that I will be unconscious and unable to feel pain when the other drugs are injected." Appellant proposed as the only remedy he believed would resolve his grievance "that the prison find a different way to carry out my execution by lethal injection that will ensure that I am completely unable to feel pain . . . ."

Appellant requested emergency handling of the grievance. Appellant's grievance was received on 13 February 2006, and screened as accepted on 14 February 2006.

The Step One - Unit Response was completed on 22 February 2006 recommending no further action be taken on the grievance. On 23 February 2006, Appellant elected to appeal to Step Two -

Area/Complex/Institution Response. The Step Two response upheld the Unit Response from Step One on 28 February 2006. On 1 March 2006, Appellant elected to appeal to Step Three - Inmate Grievance Resolution Board (hereinafter "Board"). The Board assigned a Grievance Examiner to investigate Appellant's concerns. The Board considered Appellant's arguments, reviewed the relevant statutes, case law and protocol of the Appellees, reviewed the results of the Grievance Examiner's investigation, and concluded that "the staff has adequately addressed this inmate's grievance concerns. . . [T]his grievance is considered resolved by DOC staff." The grievance was dismissed, finally exhausting Appellant's available administrative remedies on 7 March 2006, eight days after he filed his Complaint.

The failure of the District Court to enforce the mandatory exhaustion requirement could ultimately result in the further waste of the time and resources of the federal courts and of the parties should a final decision in this action be reversed on appeal because of Appellant's failure to exhaust administrative remedies.

II. This Court Should Deny Appellant's Motion for Preliminary Injunction Because the District Court Correctly Decided It Is Not Likely That Appellant Will Succeed on the Merits of His Claim or That He Will Suffer Harm. On the Other Hand, the Equities Weigh Heavily in Appellees' Favor Because Unjustified Delay in the Administration of a Capital Sentence Is Harmful to the Public, Whose Interest Is in the Fair, but Expeditious, Rendering of Justice.

The District Court correctly stated the issue before it as follows: "Will the State's execution protocol ensure that plaintiff is rendered unconscious prior to and throughout the period during which lethal drugs are injected into his bloodstream, such that he will be prevented from perceiving pain during his execution?" (Order, p. 2.) The District Court correctly answered that issue in the affirmative, and denied Appellant's motion for preliminary injunction. (Order, p. 7.)

An action to enjoin a capital judgment duly rendered and affirmed by State and Federal courts is not ordinary civil litigation between private parties. Indeed, a suit to prevent an execution is not a routine cause of action pursuant to 42 U.S.C. § 1983. The United States Supreme Court in *Nelson v. Campbell*, 541 U.S. 637 (2004), noted "the State's significant interest in enforcing its criminal judgments," *id.* at 650, and emphasized the Prison Litigation Reform Act directs that "'[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief.' 18 U.S.C. § 3626(a)(1) [18 USCS § 3626(a)(1)]; accord, § 3626(a)(2),'" *id.*

This Court first enunciated in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977) the four-part test for deciding whether to grant or deny a motion for preliminary injunction. The familiar elements of the test are

> (1) the likelihood of irreparable harm to the [Appellant] if the preliminary injunction is denied,
> (2) the likelihood of harm to the [Appellees] if the requested relief is granted,
> (3) the likelihood that the [Appellant] will succeed on the merits, and
> (4) the public interest.

Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991) (*citing Blackwelder*).

Given the State's significant interest in enforcing its capital judgment against Appellant, the District Court correctly focused its attention on the *likelihood* of irreparable harm to Appellant, not, as Appellant urged, on the speculative nature of the alleged harm – the minuscule possibility that if Appellant were not rendered unconsciousness by the administration of sodium pentothal he would suffer a painful death. That a perfectly pain-free process cannot be conceived and, consequently, there must exist an exiguous possibility of harm was conceded by Appellees. The issue is, however, not the *possibility* Appellant might suffer harm as he urged, but the *likelihood, i.e.*, the *probability* Appellant will suffer harm. Appellant offered no expert testimony at all on the probability that he

might be conscious at the time the injection of pancuronium bromide begins; rather his evidence was entirely directed at the possibility that some mishap in the administration of the sodium pentothal might occur and result in his experiencing pain. The testimony of Dr. Dershwitz and Warden Polk show that the likelihood of Appellant experiencing any pain during the execution is remote to non-existent.

Appellant offered the testimony of lay witnesses who had observed executions of five prisoners. Each of these witnesses, Cynthia F. Adcock, Heather Wells, and Kim Stevens, had served as counsel to one or more of the prisoners whose execution she witnessed.[2] Each testified about

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[2] The witnesses variously testify to having seen a prisoner "convulsing," trying to communicate but having to stop to catch his breath, (Adcock Aff. ¶¶17, 19), the prisoner's body being "relentlessly convulsed and contorted," (Wells Aff. ¶ 11), and the prisoner's convulsing, sitting up, and gagging. (Stevens Aff. ¶ 5). Warden Polk did not observe any body movements of the prisoners being executed (Polk Aff. ¶ 16), nor did *The* (Raleigh) *News and Observer* reports include similar observations from the five media witness present at each execution.

The following are references to newspaper accounts of executions noted by Appellant's witnesses and of all executions since September, 2004. Except as noted below, in none of the accounts do the articles refer to the appearance of the prisoner during the execution. If such body movements as described by Appellant's witnesses were apparent, its is likely they would have been described in the newspaper articles.

Pre-2004 Revision Executions described by Appellant's witnesses:

Zane Hill, executed August 12, 1998, http://archives.newsbank.com, News and Observer Archives.
Willie Ervin Fisher, executed March 9, 2001, http://archives.newsbank.com, News and Observer Archives.
Joseph Timothy Keel, executed November 7, 2003, http://archives.newsbank.com, News and Observer Archives.
Edward Ernest Hartman, executed October 3, 2003, http://archives.newsbank.com, News and Observer Archives.
John Dennis Daniels, executed November 14, 2003, http://archives.newsbank.com, News and Observer Archives.

Post-2004 Revision Executions:
Sammy Crystal Perkins, executed October 8, 2004, http://archives.newsbank.com, News and Observer Archives. ["Compared to previous executions I've witnessed, Mr. Perkins went into a deep sleep very quickly. [There was] no convulsing." David Crabtree, WRAL News.)
Frank Chandler, executed November 12, 2004, http://archives.newsbank.com, News and Observer Archives.
William Dillard Powell, executed March 11, 2005, http://archives.newsbank.com, News and Observer Archives.
Earl Richmond, executed May 6, 2005, http://archives.newsbank.com, News and Observer Archives.

executions that took place *before* the revision of the execution protocol in September 2004. None of Appellant's witnesses testifies to having observed an execution later than November 2003. Therefore, it is presumed that Appellant had no evidence of prisoner body movements in executions after the 2004 protocol revision.

On the basis of the extremely remote chance that Appellant may not be fully unconscious before the injection of pancuronium bromide or potassium chloride, he urges the Court to impose a perhaps impossible requirement – that the State have a physician anesthesiologist or nurse anesthetist present during the execution process to declare that a condemned prisoner is unconscious after the administration of the sodium pentothal and remains so until pronounced dead. The presence of such a medical specialist is unnecessary.

The protocol is a simple one, requiring for the most part only trained and experienced correctional personnel to administer. The catheters through which the drugs will be administered are inserted by registered nurses ("RNs") or Emergency Medical Technicians ("EMTs"). Insertion of a intravenous catheter is a routine procedure, one which RNs and EMTs learn to perform in the ordinary course of their training, and routinely perform in the scope and course of their professional practice. If because of some problem peculiar to the condemned prisoner being executed (such as a prior history of heavy, intravenous drug use), venous access proves beyond the capability of these

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Steven McHone, executed November 11, 2005, http://archives.newsbank.com, News and Observer Archives.
Elias Syriani, executed November 18, 2005, http://archives.newsbank.com, News and Observer Archives.
Kenneth Boyd, executed December 2, 2005, http://archives.newsbank.com, News and Observer Archives.
Perrie Dyon Simpson, executed January 20, 2006, http://archives.newsbank.com, News and Observer Archives.
Patrick Lane Moody, executed March 17, 2006, http://archives.newsbank.com, News and Observer Archives.

medical professionals, such procedure as may be required to gain access will be performed by an appropriate medical professional with the necessary skills and training. ([1st] Polk Aff. ¶ 14.) However, Appellant has neither alleged nor shown that venous access would be a problem in his case. (See [1st] Burton-Marce Aff.)

All parties agree that 3000 mg. of sodium pentothal properly administered will cause total unconsciousness. ([1st] Dershwitz Aff. ¶ 10; [1st] Heath Aff. ¶ 13). Appellant does not contend that the amount of sodium pentothal should be increased. Dr. Dershwitz testifies that "the dose of thiopental sodium used by North Carolina would render most people unconscious within 60 seconds from the time of the start of administration. By the time all 3000 mg of thiopental sodium solution are injected . . . 99.99999999% of the population would be unconscious." ([1st] Dershwitz Aff. ¶ 10.)

Appellees, in their Notice and Response to 7 April 2006 Order ("Response"), "have: (1) purchased a bispectral index monitor ("BIS monitor"), a diagnostic device approved by the Food and Drug Administration ("FDA") that is used extensively in clinical settings to insure the unconsciousness of surgical patients; (2) revised the execution protocol to utilize the BIS monitor to measure the [Appellant's] level of consciousness throughout the execution procedure; (3) revised the execution protocol[3] to provide for the administration of additional quantities of sodium pentothal

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[3] On 12 April 2006, Warden Polk revised the execution protocol for Appellees as follows:

> Death is caused by the administration of lethal quantities of sodium pentothal, pancuronium bromide and potassium chloride. The condemned prisoner's level of consciousness will be monitored during the execution procedure utilizing a bispectral index (BIS) monitor.
>
> 1. The lethal injection process involves the successive, simultaneous slow pushing into two IV lines, each leading into two separate body locations, of the chemical mixtures contained in two identical sets of five (5) individual syringes that are prepared in advance, and each syringe of each set contains only one (1) of the

beyond the initial dose of not less than 3000 mg, if the [Appellant], based on the readings of the BIS monitor, has not been rendered unconscious; and (4) revised the execution protocol to insure that [Appellant] is in fact unconscious, as measured by the BIS monitor, prior to the administration of any pancuronium bromide. (Response, p. 2.) These further safeguards diminish to infinitesimal the probability of Appellant's being conscious after the effective administration of 3000 mg of sodium pentothal.

The District Court correctly recognized the distinction between a judicial execution and the practice of medicine promoted by Appellant and his expert witnesses in finding that:

> It is now clear that [Appellant] will not be satisfied with anything less than an experienced, licensed, board certified anesthesiologist standing at his bedside in plain view of attending witnesses.

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drugs.

2. The first syringe in each set contains not less than 1500 mg, for a total dose of not less than 3000 mg, of sodium pentothal, which upon information and belief is an ultra short acting barbiturate that quickly puts the inmate to sleep.

3. The second syringe in each set contains a saline solution and not less than 30 mL is injected into each IV line to flush it after administration of the sodium pentothal.

4. The third syringe in each set, which will not be given until after the value reading on BIS monitor falls below 60, contains not less than 20 mg of pancuronium bromide, for a total dose of not less than 40 mg, which upon information and belief is a chemical paralytic agent.

5. The fourth syringe in each set contains not less than 80 mEq of potassium chloride, for a total does of not less than 160 mEq, which upon information and belief, at this dosage level, interrupts nerve impulses to the heart causing the heart to stop beating, if it has not already.

6. The fifth syringe in each set contains a saline solution and not less than 30 mL is injected into each IV line to flush it after the administration of pancuronium bromide and the potassium chloride.

7. In the event the value reading on the BIS monitor does not fall below 60 following the 3000 mg dose of sodium pentothal, additional sodium pentothal be given until the value reading on the BIS monitor does fall below 60.

(2d Polk Aff. ¶ 6.)

> [Appellant] attempts to force a conflict of medical ethics by taking the issue of the positioning of medical professionals in and around the execution chamber, and dressing it in constitutional clothes.

(Order, pp. 4-5.) The requirement that a physician anesthesiologist or nurse anesthetist be present injects foreseeable, and likely insurmountable, difficulties, primarily in obtaining the services of such specialized medical professionals. There is great controversy about whether medical professionals ethically should play any role in an execution. Even though North Carolina law permits them to participate in executions,[4] it is most likely that few, if any, medical professionals would be willing to do so. First, medical ethics may inhibit the willingness of medical professionals to participate in executions.[5] While this Court will recognize the fine distinction in the choice of language between "should" rather than "shall" as used in both the American Medical Association policy and North Carolina Medical Society resolution, few laypersons will acknowledge such interpretation in light of the extreme emotions generated by the issue. Few, if any, medical professionals would risk

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[4] The relevant statutes provide in pertinent part:

> The warden of Central Prison may obtain and employ the drugs necessary to carry out the provisions of this Article, regardless of contrary provisions in Chapter 90 of the General Statutes.

N.C. Gen. State 15-187 (2006), and

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

N.C. Gen. State 15-188 (2006).

[5] 1992 American Medial Association Policy E-206 states:

> A physician . . . *should* not be a participant in a legally authorized execution.

Similarly, the Resolution of the North Carolina Medical Society amended 11/16/03 states:

> A physician . . . *should* nat be a participant in a state execution.

opprobrium of their peers by participating. Few would risk being subjected to charges of unethical conduct filed with the professional organizations that license and regulate doctors and nurses. Lawsuits against medical personnel brought by those seeking the end of the death penalty would be inevitable.[6] In light of these challenges, Appellees devised an execution protocol that does not require anesthesiologists or nurse anesthetists, yet still permits the State to execute Appellant as painlessly, humanely and quickly as possible and enforce its lawful judgment.

Some activities associated with a judicial execution are consistent with the practice of medicine, specifically with the practice of anesthesiology. However, the District Court clearly recognized that the desired and expected results of each process were irreconcilable. The practice of anesthesiology seeks to sedate a patient to unconsciousness for the length of time a medical procedure is being performed and return the patient to consciousness for recovery. A judicial execution rather seeks to carry out the capital sentence of the court in an efficient, painless, humane, and speedy manner.

The Legislature of North Carolina also recognized that judicial executions were not the practice of medicine when it enacted the provision allowing medical personnel to be employed to perform executions "regardless of contrary provisions in Chapter 90 of the General Statutes." N.C. Gen. Stat. § 15-187 (2005). Chapter 90, entitled Medicine and Allied Professions, governs the practice of medicine and similar professional practices, establishes the various professional licensing

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[6] The District Court was strongly influenced by the actions of the District Court in California, which ordered the State to have anesthesiologists both present during the execution to monitor the prisoner's plane of consciousness and participate in the execution in their professional capacity as medical specialists. The District Court noted that the anesthesiologists employed by the State of California walked off the job when they learned they would be called on as medical practitioners to respond if the prisoner appeared to be conscious after the administration of the thiopental sodium. *Morales v. Woodford*, Case No. C 06-0219 (JF)(RS) (N.D. Ca.) This proved to be an adequate signal of the problems inherent in redefining a judicial execution as a medical procedure and requiring anesthesiologists or anesthetist to participate in an execution in their professional status as medical practitioners.

boards, and empowers the societies that regulate these professions. One of the professional societies created in Chapter 90, the North Carolina Medical Society, defines and sets the appropriate standards for the practice of medicine.

The statute prescribing lethal injection as the sole form of capital punishment in North Carolina, N.C. Gen. Stat. § 15A-188, has been in effect since 1988. Appellant elected not to challenge the State's method of execution until a few days before the State set the date for his execution. Such a deliberate dilatory tactic by a criminal defendant is a ground for denying equitable relief. *Nelson*, 541 U.S. at 649; *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004). Such tactics irreparably harm the State and are contrary to the public interest. Appellees, therefore, request this Court to deny Appellant's motion for preliminary injunction.

Appellant continues to assert righteously his claim pursuant to 42 U.S.C. § 1983, purportedly abhorring any suggestion that his claim merely is a collateral attack on his sentence of death. However, he attempts to avoid well-established rules of law relating to allegations of the deliberate indifference to a serious medical need by stressing that his execution is imminent. Appellant, who must bear the burden of proof, has failed to show that Appellees acted or intend to act with deliberate indifference to his serious medical needs. *Williams v. Benjamin,* 77 F.3d 756, 761 (4th Cir. 1996). He has failed to prove that his alleged medical need was both apparent and serious, and that Appellees' alleged denial of that need was both deliberate and without a penological objective. *Grayson v. Peed,* 195 F.3d 692, 695 (4th Cir. 1999). Likewise, he has failed to show that Appellees' alleged denials were the result of either actual intent to cause harm or the reckless disregard of the risk of harm. *Miltier v. Boem,* 896 F.2d 848, 851 (4th Cir. 1990). Finally, he fails to show that Appellees knew of the substantial risk to his health or safety and consciously disregarded that risk.

Farmer v. Brennan, 511 U.S. 825, 836-37 (1994). With a ruling in Appellant's favor, this Court would overrule the entire body of well-established law relating to the deliberate indifference of a serious medical need. Appellees, therefore, request this Court to dismiss Appellant's appeal.

CONCLUSION

For the foregoing reasons, Appellees request this Honorable Court to dismiss Appellant's appeal and deny Appellant's motion for preliminary injunction, allowing his execution currently scheduled for 21 April 2006 and to proceed.

Respectfully submitted, this the 18th day of April 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 18 April 2006, I electronically filed the foregoing Brief of Appellees Opposing Appellant's Motion for Preliminary Injunction concurrently with the Clerk of Court for the Fourth Circuit Court of Appeals and upon counsel for Appellant by electronic transmission addressed to:

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Respectfully submitted,

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