

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

**FILED** IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

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ARCHIE LEE BILLINGS,

Plaintiff,

v.

ALVIN W. KELLER, JR., Secretary of  
the North Carolina Department of  
Correction, and GERALD J. BRANKER,  
Warden of Central Prison,

Defendants.

WAKE COUNTY, N.C.

07 CvS 1607

MARCUS ROBINSON and  
JAMES EDWARD THOMAS,

Plaintiff,

v.

ALVIN W. KELLER, JR., Secretary of  
the North Carolina Department of  
Correction, and GERALD J. BRANKER,  
Warden of Central Prison,

Defendants.

07 CvS 1109

JAMES A. CAMPBELL,

Plaintiff,

v.

ALVIN W. KELLER, JR., Secretary of  
the North Carolina Department of  
Correction, and GERALD J. BRANKER,  
Warden of Central Prison,

Defendants.

07 CvS 1411

## ORDER

This cause, coming on for hearing and being heard during the 12 December 2011 administrative session of Wake County Superior Court, the Honorable Donald W. Stephens, Chief Resident Superior Court Judge presiding, upon the parties' cross motions for summary judgment as well as Plaintiffs' Motion for an Evidentiary Hearing.

Since the filing of these now-consolidated actions in January 2007 seeking a stay of execution and assorted declaratory and injunctive relief, the Plaintiffs have twice amended their Complaint, most recently upon leave of this Court by Order dated 21 November 2011. As currently constituted, Plaintiffs have asserted claims for relief alleging violations by Defendants of the following statutory and constitutional provisions: (1) the Cruel and Unusual Punishment clause of the Eighth Amendment to the United States Constitution; (2) Article 1, § 27 of the North Carolina Constitution; (3) the Equal Protection Clause of the United States Constitution; (4) the First Amendment to the United States Constitution; (5) N.C. General Statute § 15-188; (6) N.C. General Statute § 15-190; (7) N.C. General Statute § 15-187; and (8) various provisions of Chapter 150B of the North Carolina General Statutes with respect to rule-making. Having reviewed the pleadings, the interrogatories of the Plaintiffs and Defendants' responses thereto, the deposition transcript of Plaintiffs' expert Dr. Mark J.S. Heath, the parties' evidentiary submissions, the parties' respective memoranda of law, and the arguments of counsel, the Court makes the following:

### FINDINGS OF FACT

1. Plaintiffs are death-sentenced prisoners condemned to die by virtue of their convictions for their respective offenses.
2. In N.C.G.S. § 15-187, the North Carolina General Assembly established that "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 barbiturate in combination with a chemical paralytic agent." That same statute permits the Warden of Central Prison to obtain and employ the drugs necessary to carry out a judicial execution by lethal injection.
3. Pursuant to N.C.G.S. § 15-188, "the punishment of death shall only be inflicted within a permanent death chamber . . . within the walls of the North Carolina penitentiary at Raleigh, North Carolina." Furthermore, N.C.G.S. § 15-188 requires the superintendent of the State penitentiary to "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."
4. N.C.G.S. § 15-190 provides that an execution "shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the

person, convict or felon against whom the death sentence has been pronounced to be executed as provided by this Article.” That section also provides that at any such execution, both the warden or a designee and the “surgeon or physician of the penitentiary” shall be present.

5. Under N.C.G.S. § 15-194, the Secretary of the Department of Public Safety shall schedule a date of execution to take place not less than 30 days and no more than 60 days from the receipt of written notification from either the Attorney General of North Carolina or the district attorney who prosecuted the case of the completion or waiver by the condemned prisoner of appellate or post-conviction review of the conviction and the imposition of the sentence of death.
6. Plaintiffs do not have scheduled dates of execution and their executions are not imminent. In addition, each Plaintiff has filed a separate action pursuant to the Racial Justice Act, which actions remain pending in the superior courts in which Plaintiffs were tried and convicted.
7. On 1 November 2011, the position of Warden of Central Prison was vacated as a result of the retirement of Defendant Branker. Effective 23 November 2011, Kenneth E. Lassiter officially assumed the position of Warden of Central Prison.
8. On or about 6 February 2007, the North Carolina Council of State approved an Execution Protocol (“the Protocol”) submitted by the North Carolina Department of Correction, setting out the general parameters for the administration of an execution by lethal injection in the State of North Carolina, including the types and quantities of the drugs to be administered intravenously to the condemned prisoner, the licensing and job classification criteria for the personnel who would carry out the execution, and the types of appliances permitted for the completion of the execution.
9. Subsequent to the approval of the Protocol, Defendants established an Execution Procedure Manual (“the Manual”). The Manual supplements the Protocol and provides additional and more specific guidelines and practices for the carrying out of an execution by lethal injection and the responsibilities of members of the Execution Team.
10. In an Order issued on 21 December 2009, this Court granted Plaintiffs’ Motion for Leave to File a Consolidated Amended Complaint and permitted Plaintiffs to serve on Defendants no more than fifty (50) interrogatories upon the then-current Warden of Central Prison, Defendant Gerald Branker. On 11 June 2010, Defendant Branker served his responses to Plaintiffs’ Interrogatories and included therewith a copy of the Manual. Plaintiffs subsequently moved to compel more complete responses to those interrogatories as well as for leave to pursue additional discovery in the form of additional interrogatories, requests for production of documents, and depositions. On 25 March 2011, Plaintiffs filed a Motion for Limited Additional Discovery in Light of National Sodium Thiopental Shortage seeking discovery into Defendants’ access to sodium thiopental and Defendants’ proposed alternative(s) in the event that sodium thiopental is unavailable. With the exception of this Court’s Order of 4 October 2011

allowing both Plaintiffs and Defendants to submit the “de bene esse” depositions of two expert witnesses, these motions for additional discovery were denied.

11. Plaintiffs thereafter deposed Mark J.S. Heath, M.D., an anesthesiologist and Plaintiffs’ retained expert, a transcript of which has been submitted to and reviewed by the Court. Defendants moved to quash Plaintiffs’ efforts to depose Defendant Branker, which motion was allowed by Order dated 21 November 2011.
12. On 22 September 2011, Plaintiffs also filed a Motion for Evidentiary Hearing requesting the opportunity to present evidence in the form of live testimony at the 12 December 2011 hearing on the issues raised in the pleadings. With the exception of the Court’s willingness, as expressed in its 4 October 2011 Order, to accept two “de bene esse” depositions of two expert witnesses for both Plaintiffs and Defendants, the motion for a full evidentiary hearing was also denied.
13. On 18 November 2011, Plaintiffs filed a Motion for Summary Judgment, arguing primarily that Defendants had failed to rebut the Plaintiffs’ proffered evidence, that there existed no genuine issues of material fact, and that Plaintiffs were therefore entitled to judgment as a matter of law. In the alternative, Plaintiffs renewed their request for an evidentiary hearing. Pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure, Defendants responded to Plaintiffs’ motion with a cross-motion for summary judgment, filed on 8 December 2011.
14. On 16 April 2008, the Supreme Court of the United States decided the case of *Baze v. Rees, et al.*, 553 U.S. 35, 170 L. Ed. 2d 420 (2008), a case challenging the constitutionality of the three-drug execution protocol employed by the Commonwealth of Kentucky. A plurality opinion by Chief Justice Roberts, joined by Justices Kennedy and Alito, concluded that an execution protocol is cruel and unusual if it poses a “substantial risk of serious harm” and a state has no “legitimate penological justification” for refusing to adopt an alternative procedure that is “feasibly, readily implemented, and in fact significantly reduce[s] that risk.” *Baze*, 553 U.S. at 52, 170 L. Ed. 2d at 434.
15. In upholding the constitutionality of the Kentucky execution protocol, the *Baze* plurality further held as follows:

A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

553 U.S. at 61, 170 L. Ed. 2d at 439.
16. The Protocol approved by the Council of State requires a series of intravenous injections

of three drugs, “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,” interspersed with injections of saline solution to flush the equipment.

17. The first injection is a dose of 3000 mg of the ultrashort-acting barbiturate, followed by an injection of not less than 30 mL of saline solution to flush the IV lines. The third injection is a dose of not less than 40 mg of a chemical paralytic agent, followed by a fourth injection of 160 mEq of potassium chloride. The final injection is a dose of not less than 30 mL of saline solution.
18. After the first two injections in the series, the Protocol requires the Warden to pause “the administration of the lethal chemicals and saline solution to verify that the output value displayed on the monitoring device, 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.” If a value reading below 60 is displayed, the series of injections described above resumes. However, if the BIS monitor displays a value reading of 60 or above, the Protocol calls for repeated identical injections of the ultrashort-acting barbiturate until a very high probability of unconsciousness is confirmed, such as by a reading of below 60 on a BIS monitor.
19. According to the expert report of Mark Dershwitz, M.D., Ph.D., a board-certified anesthesiologist and an expert for Defendants, the BIS monitor has been approved by the FDA as a monitor for the depth of anesthesia since 1996 and as a device for the prevention of intraoperative awareness since 2004. In the opinion of Dr. Dershwitz, “multiple clinical trials in humans have demonstrated a very high probability of unconsciousness, and a very low probability of awareness, during surgical procedures when the BIS value is below 60. In the two executions performed in North Carolina incorporating the use of the BIS monitor, the BIS value after the second injection (i.e., the first saline flush) was in single digits, indicating that the condemned prisoners were deeply unconscious and unable to perceive pain of any kind before the injection of either the chemical paralytic agent or potassium chloride.
20. The Protocol also states that the Warden of Central Prison will acquire the necessary appliances, equipment and supplies to carry out a lethal injection execution including “the syringes, intravenous tubes and related materials ordinarily used by medical personnel to administer intravenous fluids to human patients,” as well as “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.”
21. Under the Protocol, to carry out the functions related to the establishment of IV lines and the administration of the drugs, “[m]edical 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.”

22. As set forth in the Manual, registered nurses serve as both the Execution Team Leader and Assistant Leader and provide supervision of those portions of the execution process that require licensed, professional medical training and certification. Either the registered nurses or the emergency medical technician-paramedics (“EMT-Ps”) are responsible for inserting the IV catheters and establishing two IV lines, as well as connecting the leads from and monitoring the EKG/Defibrillator and the BIS monitor. Neither the Protocol nor the Manual identify the precise location within Central Prison where the IV lines are established.
23. Licensed medical personnel are also responsible for preparing the IV equipment, mixing the lethal injection drugs, preparing three complete sets of syringes, testing the operability of the EKG Defibrillator and BIS monitor, attaching the cardiac monitoring electrodes, stethoscope, and BIS monitor electrode strip to the condemned prisoner, and starting a saline solution drip into the IV lines to ensure their functionality.
24. According to the Manual, licensed medical professionals are required to examine the body and review the medical records of the condemned prisoner “with a focus on those venous access sites most frequently used in a medical or emergency setting.” If, during this assessment, special factors are identified that might affect the successful attainment of venous access during the condemned prisoner’s upcoming execution, the information is discussed with the members of the execution team who are also licensed medical professionals.
25. As required by N.C.G.S. § 15-190, the Protocol demands the presence of a “licensed medical doctor” during the execution who “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.”
26. The Manual states that any person serving as a member of the execution team “must undergo an interview with the Warden and such other persons that the Warden may designate,” must be “a mature, seasoned professional,” possessing “a sound mind and . . . sound judgment,” and “have no adverse actions, written warnings, or adverse documentation in their personnel or professional licensing records within an eighteen month period preceding a scheduled execution.” Moreover, any licensed medical professionals who wish to serve on the Execution Team must “provide evidence of a current professional license, a statement of good standing with their particular licensing authority, a record of their training, education, and licensure, and a detailed list of their work history. Prior to being selected, licensed medical professionals being considered for the Execution Team must also be interviewed by the Warden and any other medical professional that the Warden may designate.
27. According to the affidavit of Marvin Polk, the former Warden of Central Prison, licensed medical professionals wishing to serve on the Execution Team have historically been asked if they regularly insert IV catheters into multiple anatomical locations in the scope and course of their medical employment, and any medical professional who does not is eliminated from consideration.

28. The Manual also provides that all Execution Team members must attend a briefing held at least annually to discuss the execution process and, among other things, the responsibilities of the all Execution Team members and the subjects discussed in the Manual. In addition, the Manual states: “[p]rior to each scheduled execution date, and at such other times as the Warden shall require, Execution Team members will rehearse their individual roles in the execution process by participating in a simulated execution by lethal injection.” These rehearsals are designed to ensure that each Execution Team member understands his/her own role as well as the roles of each other member of the Execution Team. Finally, the Manual provides that “rehearsals will be conducted no less than once every month.”
29. For at least some time during the pendency of this action and additional litigation related both to the approval of the Execution Protocol and Plaintiffs’ pending claims under the Racial Justice Act, an Execution Team has not been assembled, nor has it conducted any of the execution rehearsals called for in the Manual.
30. In *Baze*, the Supreme Court examined the 2004 version of Kentucky’s execution protocol (“the Kentucky Protocol”) which, like the Protocol approved in North Carolina, provides for the administration of the same three drugs used in this State – 3000 mg of sodium thiopental, 50 mg of pancuronium bromide, and 240 mEq of potassium chloride. The Kentucky Protocol calls for the preparation of two sets of the lethal injection drugs before the execution begins.
31. The Kentucky Protocol does not specify any particular professional classifications or level of experience for the members of the execution team with the exception of those members of the IV team. To qualify for the IV team, members must have at least one year of professional experience as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman. IV team members must also remain certified in their respective professions and must fulfill any applicable continuing education requirements. In addition to the requirements in the Kentucky Protocol, the *Baze* Court noted that “Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky’s prison population.” *Baze*, 553 U.S. at 55, 170 L. Ed. 2d at 436.
32. Under the Kentucky Protocol, members of both the IV team and the execution team itself must have participated in at least two practices prior to participating in an actual execution, and the entire execution team “shall practice at least ten (10) times during the course of one (1) calendar year,” with each practice consisting of “a complete walk through of an execution including the siting of two (2) IVs into a volunteer.”
33. The Kentucky Protocol provides that a physical examination of the condemned prisoner is conducted no later than 7 days prior to the scheduled execution date. On the day of the execution, the IV team members are required to insert one primary IV line and one backup IV line in a location deemed suitable by the IV team members. However, the Kentucky Protocol does identify an order of preference for the site of the IV insertion as

follows: arms, hands, ankles and/or feet, neck. The IV team members are given 1 hour to secure one or more IV sites; if unsuccessful, a request shall be made to the Governor that the execution be scheduled for a later date.

34. Under the Kentucky Protocol, once the warden gives the order to proceed with the execution, a designated team member first injects 3 grams of sodium thiopental. After the completion of that injection, the Kentucky Protocol states that, “[i]f it appears to the Warden that the condemned is not unconscious within 60 seconds to his command to ‘proceed,’ the Warden shall stop the flow of Sodium Thiopental in the primary site and order that the backup IV be used with a new flow of Sodium Thiopental.”
35. The areas in which the Protocol (as supplemented by the Manual) and the Kentucky Protocol are similar in the following meaningful ways:
  - a. The condemned prisoner is executed using a three-drug protocol involving the injections (in similar quantities) of a barbiturate, a chemical paralytic agent, and potassium chloride;
  - b. Multiple IV lines are established;
  - c. Medical professionals are responsible for mixing the drugs, preparing the syringes, preparing the IV tubing and lines, inserting the IV catheters, observing the inmate for signs of IV infiltration, and setting up the monitoring equipment to ensure it is operable;
  - d. Members of the execution team who are medical professionals are selected based on applicable and documented work experience and after confirmation that the member is professionally licensed and has maintained his or her professional certification;
  - e. The execution team members must participate in at least one simulated execution before they can participate in an actual execution;
  - f. The execution team is required to conduct periodic rehearsals at least six times per year, with the rehearsals intended to simulate an actual execution;
  - g. The protocols both provide for observation of the condemned prisoner to identify problems with IV infiltration;
  - h. The protocols both contain a mechanism by which the warden pauses the execution to determine that the condemned prisoner is sufficiently unconscious before proceeding with the injections of the chemical paralytic agent and the potassium chloride;
  - i. Neither the Protocol nor the Kentucky Protocol require medical professionals to actually administer the drugs nor do they specify the specific rate of injection or the size or gauge of the needles, syringes, and IV tubing;
  - j. Neither protocol requires the use of a trained anesthesiologist or other personnel trained to establish and maintain a surgical plane of anesthesia as is typically found in a clinical, medical procedure; and
  - k. Neither protocol, on its face, precludes the use of a central line or a surgical cut-down procedure to obtain intravenous access.
36. The Protocol (as supplemented by the Manual) exceeds the Kentucky Protocol in the



following meaningful ways:

- a. The Protocol provides for the use of a licensed physician during the execution process, in particular to monitor the essential body functions of the condemned prisoner and notify the Warden of any signs that the condemned prisoner is experiencing pain and suffering; the participation of a physician in Kentucky is expressly prohibited by statute;
  - b. Those Execution Team members responsible for inserting the IVs are either registered nurses or EMT-Ps, whereas the Kentucky Protocol requires only a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman to perform this task;
  - c. The Execution Team contains five licensed, certified, and medically-trained individuals – one physician, two registered nurses, and two EMT-Ps; the Kentucky Protocol only requires the two members of the IV team to have medical training
  - d. The Protocol incorporates the use of a BIS Monitor as an additional assessment of the condemned prisoner's level of unconsciousness, subsequent injections are not administered until the BIS monitor value reading is below the clinically-accepted level of 60, and a failure of the BIS monitor to display a value below 60 requires the administration of additional sodium thiopental; in Kentucky, the warden and deputy warden merely visually observe the inmate for 60 seconds after the administration of sodium thiopental and look for signs of consciousness; and
  - e. The training and rehearsals conducted in North Carolina involve not only the practicing of the Execution Team member's assigned role in a simulated execution but also an explanation of the roles and responsibilities of all other Execution Team members as well as the interaction between the member's assigned role and the roles of fellow team members; Kentucky's training and rehearsals consist of a simulation of an execution, but no discussion of the roles of other execution team members or the interplay between roles.
37. Plaintiffs and Defendants agree that a successful administration of a full dose of sodium pentothal will render any person unconscious and unable to feel pain and, therefore, that the proper implementation of the Execution Protocol will result in a humane execution of the Plaintiffs.
38. The vast majority of the 36 states that employ lethal injection as a mandatory or alternative method of judicial execution use a three-drug protocol similar to the Execution Protocol approved in North Carolina and the Kentucky Protocol approved by the Supreme Court of the United States in *Baze*. Three states – Ohio, Washington, and Arizona – have adopted a one-drug protocol involving a single, lethal dose of the barbiturate pentobarbital. During oral argument, counsel for Plaintiffs asserted that Washington has carried out 1 execution using a one-drug protocol, while Ohio has carried out at least 10 such executions. No evidence has been presented to the Court regarding whether Arizona has yet to carry out a single-drug lethal injection execution.
39. In their evidentiary submission to this Court, Plaintiffs provided assorted newspaper

articles containing witness accounts and general descriptions of single-drug lethal injection executions in the Washington and Ohio since *Baze* was decided. Plaintiffs did not, however, present any medical study or other scientific evidence showing that a one-drug method is “an equally effective manner of imposing a death sentence.” *Baze*, 553 U.S. at 57, 170 L. Ed. 2d at 437.

Based on the foregoing findings of fact, the Court makes the following:

### CONCLUSIONS OF LAW

1. While there is an inherent risk of error in any human endeavor, the Protocol does not pose an objectively intolerable or substantial risk of harm to the Plaintiffs that they will suffer an inhumane and torturous execution and, therefore, be subjected to cruel or unusual punishment in violation of the United States and North Carolina Constitutions.
2. The Protocol, in conjunction with and supplemented by the standards and practices set forth in the Manual, is not only substantially similar to but also, in many respects, actually exceeds the Kentucky Protocol and the safeguards identified by the Supreme Court in *Baze* as important to help ensure a humane and painless execution.
3. Plaintiffs’ anecdotal evidence – consisting of newspaper articles containing witness accounts and general descriptions – of single-drug lethal injection executions in Washington and Ohio is inadmissible hearsay and has not been considered by the Court. To the extent that such anecdotal evidence is competent and admissible, the Court finds it unpersuasive in that it fails to demonstrate that a “one-drug method of execution is . . . so well established that [North Carolina’s] failure to adopt it constitutes a violation of the Eighth Amendment.” *Baze*, 553 U.S. at 57, 170 L. Ed. 2d at 437. Plaintiff has submitted no other evidence that would permit this Court to make such a finding.
4. Although certain aspects of the lethal injection process possess characteristics similar to those seen – and involve equipment utilized – in the practice of medicine and, specifically, surgical procedures, execution by lethal injection is not a medical procedure that requires the same or similarly-trained personnel or equipment as would typically be found in a medical or surgical setting.
5. Defendants failure to continuously train members of the Execution Team does not violate the Plaintiffs’ rights to equal protection under the law and Plaintiffs have failed to present any competent evidence that they will be executed by an Execution Team that is improperly or insufficiently trained despite any current disruption in the execution training and rehearsals provided for in the Manual.
6. Plaintiffs’ equal protection claim premised on the theory that they are treated differently than other inmates undergoing anesthesia in the course of a medical procedure fails to identify a similarly situated group of inmates with whom Plaintiffs

can be legitimately compared. Plaintiffs and inmates who will undergo anesthesia in medical procedures performed in this State are not similarly situated.

7. Defendants' use of the chemical paralytic agent pancuronium bromide in the series of injections provided for in the Protocol does not impinge on Plaintiffs' rights to express to witnesses to the execution that the Plaintiffs might be suffering pain.
8. While the insertion of IV catheters into a condemned prisoner must occur before a lethal injection execution can proceed, that step is not part of the execution itself. The Manual identifies the insertion of IV catheters as a "Pre-Execution Procedure"; the Protocol provides that the execution commences with the injection of 3000 mg of an ultrashort-acting barbiturate. Contrary to Plaintiffs' contentions, N.C.G.S. § 15-188 does not require that the insertion of the IV catheters be performed in the death chamber. Similarly, because the execution process does not begin until the injection of the barbiturate, N.C.G.S. § 15-190 does not require that the insertion of IV catheters be performed in front of the witnesses to the execution identified in that section.
9. N.C.G.S. § 15-188 does not require that an Execution Team be continuously and permanently designated. In that statute, the General Assembly has required the Warden of Central Prison, in part, to "cause to be provided, in conformity with this Article and approved by the Governor and Council of State, . . . 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." The Protocol, which includes the job classifications of those personnel identified by the Warden as qualified to complete these tasks, has been approved by the Governor and Council of State. N.C.G.S. § 15-188 cannot be read to require that an Execution Team be continuously and permanently designated.
10. Similarly, N.C.G.S. § 15-190 does not require that an Execution Team be continuously and permanently designated. In fact, the statute provides that "the warden of the penitentiary, [ ] **shall from time to time**, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be executed as provided by this Article and all amendments thereto." (Emphasis added). The plain language of N.C.G.S. § 15-190 expressly contradicts and simply cannot be read to support Plaintiffs' interpretation.
11. Plaintiffs' claim that the absence of a warden, in and of itself, constitutes a violation by Defendants of N.C.G.S. §§ 15-187, -188, and -190 also fail. Plaintiff's Supplement to Consolidated Amended Complaint asserts that "Defendants are thus in violation of §§ 15-187, 15-188, and 15-190 – as well as Art. I, §§ 19 and 27 of the North Carolina Constitution and the Fifth, Eighth, and Fourteenth Amendment to the United States Constitution – until they have demonstrated that a warden is in place and in a position to carry out the statutory responsibilities related to lethal injection." In their Answer to Plaintiffs' Supplement to Consolidated Amended Complaint,

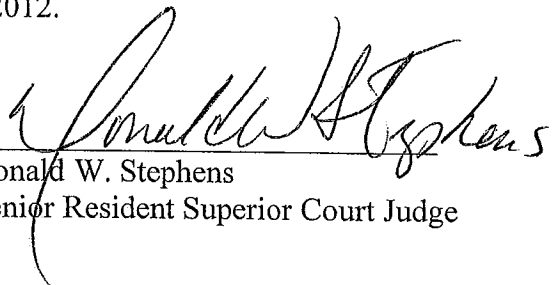
Defendants have averred that the position of Warden was filled effective 23 November 2011 by Kenneth E. Lassiter. Accordingly, Plaintiffs' claim is moot.

12. Plaintiffs' claim that the execution protocol is invalid until Defendants issue it in accordance with the rule-making provisions of Chapter 150B of the North Carolina General Statutes is also without foundation. N.C.G.S. § 150B-1(d)(6) provides that the Division of Adult Correction of the Department of Public Safety – the Department into which the previously-existing North Carolina Department of Correction was recently consolidated – is exempt from rule making “with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.” Because it provides the method for and procedures by which condemned prisoners such as Plaintiffs are to be executed pursuant to Chapter 15 of the General Statutes, the Protocol relates solely to prisoners and, so, is exempt from the rule making provisions of Chapter 150B.

WHEREFORE, it is ordered adjudged and decreed that:

1. Plaintiffs' Third Claim for Relief alleging violations by Defendants of the Equal Protection Clause by virtue of Defendants' failure to continuously train execution team members is dismissed without prejudice.
2. As to the remaining Claims for Relief asserted by Plaintiffs in the Consolidated Amended Complaint and the Supplement thereto filed on 21 November 2011, there being no genuine issues of material fact, Defendants' are entitled to judgment as a matter of law. Accordingly, Defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' Motion for Summary Judgment is DENIED.

So ordered, this the 9 day of March, 2012.

  
Donald W. Stephens  
Senior Resident Superior Court Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing document was served on the parties listed below by mailing and/or hand-delivering a copy thereof to each of said parties, addressed, postage prepaid, as follows:

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This, the 12<sup>th</sup> day of March, 2012.

A handwritten signature in cursive script that reads "Terri Stewart". The signature is written in black ink and is positioned above a horizontal line.

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Terri Stewart  
Judicial Assistant  
Wake County Superior Court Judges' Offices