IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NORMAN TIMBERLAKE,	)	
	)	**Cause No. 1:06-cv-1859-RLY-WTL**
Plaintiff,	)	
	)	**HON. RICHARD L. YOUNG**
vs.	)	
	)	**MAG. WILLIAM T. LAWRENCE**
ED BUSS,	)	
	)	
Defendant.	)	

MOTION OF DAVID LEON WOODS TO INTERVENE
AS PLAINTIFF-INTERVENOR

David Leon Woods, by and through his undersigned counsel, hereby moves this Honorable Court pursuant to Rules 24(a)(2) of the Federal Rules of Civil Procedure, for leave to intervene in this action as of right. In the alternative, and pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure, Woods requests permissive intervention. As a death sentenced individual, Woods has a significant interest in the subject matter of this case and the existing parties may not adequately represent that interest. Further, the parties to these proceedings will not be prejudiced by this intervention. The reasons in support of this motion are more fully set forth in the attached Memorandum in Support which is fully incorporated herein.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF MOTION OF DAVID WOODS TO INTERVENE AS PLAINTIFF-INTERVENOR

Plaintiff Timberlake, an Indiana death row inmate, filed this action under 42 U.S.C. § 1983 for violations and threatened violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution. Proposed intervenor Woods is also an Indiana death row inmate awaiting execution of his death sentence, although an execution date has not been set. Woods filed a Petition for Leave to file Successor Petition for Post Conviction Relief on December 29, 2006. to date, the Indiana Supreme Court has neither granted or denied the Petition. Woods is a true party in interest because he is similarly situated and will assert the same causes of action as the Plaintiff. Further, Wood's intervention will not substantially impair the rights of the original parties to the pending action, in fact it will avoid piecemeal litigation of an identically situated plaintiff.

A. The Intervenor Satisfies the Requirements for Intervention as of Right as Set Forth In Fed. R. Civ. P. 24(a)(2).

Rule 24 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Upon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). The purpose of the provision is to avoid a rash of lawsuits on related questions "by involving as many apparently concerned persons as is compatible with efficiency and due process." *Coalition of Arizona/New Mexico Counties v. Department of the Interior*, 100 F.3d 837, 841 (10th Cir. 1996)(citing decisions by three Courts of Appeals). Therefore, "(t)he need to settle claims among a disparate group of affected persons militates in favor of intervention." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

In order to intervene as of right, Wood must satisfy four requirements: (1) the application must be timely; (2) "the applicant must claim an interest relating to the property or transaction which is the subject of the action"; (3) "the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) "existing parties must not be adequate representatives of the applicant's interest." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). As noted in *Sokaogon*, the test is essentialy that "at some fundamental level the proposed intervenor must have a stake in the litigation." *Id. at 946.* Woods satisfies each of the above criteria.

This Court should keep in mind that "In evaluating the motion to intervene, the district court must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group, Inc. v Egidi Dev. Group,* 715 F2d 1256, 1258 (7th Cir. 1983) *citing to Central States, Southeast and Southwest Areas Health & Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671, 679 (7th Cir. 1979). Further, "a motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts

which could be proved under the complaint." *Lake Investors*, at 1258. However, Requirements for intervention should generally be more liberal than those for standing to bring suit. *United States v Board of School Comm'rs*, 466 F2d 573 (7th Cir. 1972). That is because this Court should be "[m]indful of the Supreme Court's admonition [to] avoid rigid construction of Rule 24…" *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000) *citing to Missouri-Kansas Pipeline Co. v. United States*, 312 U.S. 502, 505-06 (1941).

1. Woods has Timely Filed His Motion.

The Supreme Court has held: "Timeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). Among the relevant factors is the stage of the litigation at which the intervention is sought. *NAACP*, at 366-369; *EEOC v. United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975).

Plaintiff Timberlake initiated his lawsuit on December 29, 2006. Minimal discovery has occurred, and the case appears to ready for a pretrial conference regarding how matters should proceed. Therefore, the proposed intervention will not impair the progress of proceedings or impact the interests of the original parties. *See Heartwood, Inc., et al. v. United States Forest Service*, 316 F.3d 694 (7th Cir. 2003) (Not timely when filed after settlement agreement); *Reid L. v. Illinois State Board of Education*, 289 F.3d 1009, 1017-1018 (7th Cir. 2002)(Ten years after suit and ten months after court approved settlement untimely).

Woods has acted with diligence – filing his motion to intervene two (2) months after the suit's original filing; prior to any discovery processes being completed; prior to any final pretrial conference; and well before any trial. In these circumstances, Lambert has timely moved to intervene.

2. Woods has a "significant legal interest" in this case.

The Seventh Circuit recognizes this element "has never been defined with particular precision." *Security Insurance Company of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995). The Supreme Court has embraced a broad definition of the requisite interest, *see Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), describing it as one which is "significantly protectable," *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Thus, this Court should apply a broad and general definition as to what constitutes an appropriate interest. *See, e.g.*, *Linton v. Commissioner of Health and Environment*, 973 F.2d 1311, 1319 (6th Cir. 1992)(economic interest sufficient for intervention); *Herdman v. Town of Angelica*, 163 F.R.D. 180, 183 (W.D.N.Y. 1995)(purity and integrity of local air and water and in the residential and rural character of a town); *Arizona/New Mexico*, 100 F.3d at 841-44 (interest of a naturalist photographer in the protection of an owl species).

Woods's shared and individual interests are far more urgent, direct, and addressable than what Rule 24(a) requires. *See South v. Rowe*, 759 F.3d 610, 612 (7th Cir. 1985) (Third party beneficiary -inmate using a library pursuant to a consent decree- has an interest.). Woods's interest in not being executed in violation of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution is the same legal and equitable interest as the original Plaintiff. *See Pure Oil Co. v. Ross et al.*, 170 F.2d 651, 653 (7th Cir. 1948) (intervention appropriate in property action to "prevent future litigation by taking away the necessity of a multiplicity of suits.") As in *South* and *Pure Oil*, Lambert's interest is sufficient to permit intervention.

3. Woods's ability to protect his interests will be impaired if he is not permitted to intervene.

Unless this Court grants intervention, Woods will be unable to protect his interests; his rights will be impaired. In this case, if Timberlake did not prevail, it would impair, if not completely destroy, Woods's ability to advance his arguments and put forth evidence in a separate action in this Court. The Seventh Circuit finds that "impairment" exists if the decision of a legal question would, as a practical matter, foreclose rights of the proposed intervenor in a subsequent proceeding; foreclosure is to be measured in terms of *stare decisis. Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). If there were not a commonality of issues and Timberlake were not raising all arguments (all of which Woods seeks to join), then intervention would not be appropriate. *See EEOC v. United Air* Lines, 515 F.2d 946, 950 (7th Cir. 1975). However as in *Meridian* and unlike in *EEOC*, Petitioner can show impairment because there is an absolute commonality of issues and arguments.

Further, the time-sensitive nature of Woods's claims makes intervention necessary for the protection of his interests. If Timberlake prevails after Woods is executed, Woods's rights will have been denied without recourse. *See South v. Rowe*, 759 F.3d at 612 (Third party beneficiary -inmate using a library pursuant to a consent decree- has establishes an impairment when proposed cessation of consent decree would deny him usage to library under desolved decree); *see cf. Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F. 2d 303, 305-06 (6th Cir. 1990)(where intervenor sought to display a menorah on public property during Chanukah, and the extra time involved in initiating a lawsuit could have pushed resolution of the question beyond the coming Chanukah season, intervention was granted).

Thus, Woods will be unable to protect his interests and his rights will be impaired absent his intervention.

4. Timberlake cannot adequately protect the applicant's interests, which are wholly dependent upon the timeline of applicant's case.

The inadequate representation prong of the test requires only a minimal and hypothetical showing:

> The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972). Therefore, applicants "should be allowed to intervene unless it is clear that [Timberlake] will provide adequate representation." 7C Wright, Miller, and Kane, Federal Practice and Procedure at 319 (2d ed. 1986).

The nature of Woods's claims makes intervention necessary to protect his interests because Timberlake's litigation does not contemplate Lambert's independent schedule, which may end in his execution on a different date than Timberlake. Since it is clear that Timberlake cannot adequately represent Woods, he has the right to represent himself.[1]

[1] As an alternative, Woods requests this Court to allow conditional intervention subject to a future showing that Timberlake is not adequately representing Woods's interests. *Solid Waste Agency of N. Cook County v. U.S. Army corps of Eng'rs* 101 F.3d 503, 508-09 (7th Cir. 1996).

B. *Alternatively,* The Intervenor Satisfies the Requirements for Permissive Intervention as Set Forth In Fed. R. Civ. P. 24(b)(2).

As noted above, Woods clearly has a direct and substantial interest in the outcome of this matter. Woods's interests and Timberlake's interests both share the same questions of law and fact. The Seventh Circuit recognized the correctness of permissive intervention when an intervenor presented "common questions of law and fact." *Crumble v. Blumthal,* 549 F.2d 462, 468 (7th Cir. 1977). Not only does Woods present "common" questions, but he presents identical questions of law and fact. Indeed, as noted by the Seventh Circuit in affirming permissive intervention, "[i]n this case, denial of intervention would in all likelihood have created additional litigation and the possibility of conflicting results." *Security Insurance Company of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995).

Because this case has not proceeded past its infancy, the proposed intervention will not prejudice or delay the rights of any of the original parties. *Cf. Bethune Plaza, Inc. v. Lumpkin,* 863 F.2d 525, 531 (7th Cir. 1988) (expressing concern that intervenors might interfere with settlement possibilities). In no manner will either party be prejudiced, in that the parties have not completed the discovery process, there has only been limited discovery, and there has been no final pretrial conference.

Woods therefore requests that the Court grant permissive intervention under Civil Rule 24(b), should the Court decide not to grant intervention as of right.

CONCLUSION

For the foregoing reasons, proposed Intervenor David Leon Woods respectfully requests that his motion be GRANTED and that he be permitted to intervene in the instant action.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2007, a copy of the foregoing **MOTION OF DAVID LEON WOODS TO INTERVENE AS PLAINTIFF-INTERVENOR** was filed electronically. Notice of this filing will be sent to the following persons by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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