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

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

INTEVENOR LAMBERT'S MOTION FOR INJUNCTIVE RELIEF

This Court previously granted Lambert the opportunity to intervene. Lambert was the first party to move to intervene. Defendant Buss executed the other properly intervened party in early May 2007. Lambert moves for a preliminary injunction to prevent his execution. Lambert respectfully moves for injunctive relief pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. Alternatively and at the very least, Lambert requests this Court, in the event this Court declines to grant a preliminary injunction under Rule 65(a), pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651(a),[1] and the Anti Injunction Act, 28 U.S.C. § 2283, issue an order in aid and preservation of its jurisdiction in this § 1983 action prohibiting the defendant and the State of Indiana, and their and its agents, from proceeding with Lambert's execution by lethal injection that was sought by defendant, and was scheduled by the Indiana Supreme Court, in clear disregard of this Court's pre-existing and prior jurisdiction over Lambert and his constitutional challenges to the very lethal injection protocol the State plans to use executing Lambert.

[1] The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *In re Campbell*, 264 F.3d 730, 731 (7th Cir. 2001).

A. Lambert is Entitled to a Preliminary Injunction under Rule 65(a) of the Federal Rules of Civil Procedure.

Lambert is entitled to a preliminary injunction that prevents the defendants from executing him using the protocol described in Lambert's intervenor complaint before the merits of his pending civil rights complaint are fully adjudicated. In order to obtain a preliminary injunction, Lambert must show some likelihood of success on the merits and that if an injunction is not granted, it will suffer irreparable injury for which it lacks an adequate legal remedy. *See, e.g., Foodcomm Int'l v. Barry,* 328 F.3d 300, 303 (7th Cir. 2003). If Lambert establishes the prerequisites identified above, this Court then balances the harm risked by the moving party against that which the nonmoving party will suffer if the injunction is granted. *Foodcomm,* 328 F.3d at 303.

Lambert hereby incorporates by reference the now deceased Intervenor Wood's arguments regarding why injunctive relief is appropriate in this case. The expert medical testimony presented at the hearing more than rebuts the testimony of the non-medically licensed testimony of Defendant Warden. As noted by the Court in *Cooey, et al,.* v. *Taft, et al.*, Case No. 2:04-cv-1156 (S.D. Ohio May 31, 2007) (May 31, 2007) (Slip Op. p. 5) (Attachment 1), there is an ever "growing body of evidence calling the lethal injection protocol [] into question."

The Written Execution Protocol Of Indiana Department Of Corrections—Unlike That Of Missouri—Lacks Essential Safeguards Against A Substantial And Foreseeable Risk Of Gratuitous And Unnecessary Pain In Violation Of The Eighth Amendment

On June 4, 2007, the United States Court of Appeals for the Eight Circuit found that the revised execution protocol for the State of Missouri comported with the requirements of the Eighth Amendment. *Taylor v. Crawford*, ___F.3d ___, 2007 WL 1583874 (8th Cir. (Mo.)).

Several crucial aspects of the Missouri execution protocol — outlined in *Taylor* — stand in stark contrast to the protocol of the State of Indiana, and cast Indiana's Execution Protocol outside the parameters of the Eighth Amendment. The following elements of Missouri's written protocol were noted with particularity by the court in *Taylor* as reasons why the revised protocol comported with the Eighth Amendment:

1. A *physician, nurse or pharmacist prepares the chemicals*, which are injected by non-medical department employees. *Id.* at *9.

2. In addition, only a physician, nurse or emergency medical technician holding either an "EMT-intermediate or EMT-paramedic" certification is allowed to insert the intravenous lines, and the protocol further "requires that this individual be qualified with appropriate training, education, and experience to perform the IV placement procedure…" *Id.* The Court stated "it is imperative for the State to employ personnel who are properly trained and competent to carry out each medical step of the procedure." *Id.* at *11.

3. In further addition, the physician, nurse or emergency medical technician must insert the intravenous lines, "establishing both a primary and a secondary IV (which must be a peripheral line ["the standard IV placement on the top of the hand" *Id.* at *4]) *Id.* at *9.

4. The protocol requires medical personnel "to attach and monitor an electrocardiograph during the execution procedure. *Id*. at *10

5. *Medical* personnel must supervise the injection of the contents of the syringes by department employees. *Id.*

6. Before the second and third chemicals (pancuronium bromide and potassium chloride) are injected, medical personnel must examine the condemned person *physically*, *using standard clinical techniques* to confirm that he is unconscious. *Id.*

Indiana's Execution Protocol Is Lacking In Critical Eighth Amendment Protections Against Substantial, Foreseeable Risks of Gratuitous and Unnecessary Pain

The Indiana Execution Protocol contains not one of the above-listed requirements.

First, unlike Missouri's protocol, no physician, nurse or pharmacist is required to mix the lethal chemical in Indiana's Execution Protocol. Non-credentialed, non-medical staff does this without supervision by appropriate medical personnel, but are "taught" by the physician.

Second, the Indiana protocol calls for a physician whose *only* duties "shall be to pronounce death after the execution has occurred and to perform a cut-down procedure should the I.V. technician be unable to find a vein adequate to insert the Angiocath." *Timberlake, Lambert, Woods v. Buss*, No. 1:06cv1859, Document 32-2, "Indiana Department of Correction Operation Directive ISP 06-26, March 6, 2007" [hereafter "Indiana Execution Protocol"] at 6. The physician appears to otherwise remain uninvolved; but seems to sometimes be involved in a shadowy, quasi-medical manner intentionally deprived of even the most rudimentary medical equipment.

No qualifications exist for the staff members who carry out the critical steps in the execution process. A vague mention in the Indiana Execution Protocol of "training" monthly in "cell extraction/restraint, protocols in starting I.V.'s" and lighting evaluation hardly compares with the defined medical qualifications that passed constitutional muster in Missouri: there, a physician, nurse or emergency medical technician holding either an "EMT-intermediate or EMT-paramedic" certification inserts the intravenous lines, and in

addition to these credentials, this individual must also be qualified with appropriate training, education, and experience to perform the IV placement procedure. No such requirements exist in Indiana. Indeed, Ed Buss, Superintendent of the Indiana State Prison in Michigan City, Indiana, in his testimony in the Preliminary Injunction Hearing in *Norman Timberlake, Michael Lambert, David Woods v. Ed Buss*, No. 1:06cv1859, on April 26, 2007, testified that none of the members of the IV team have taken training or courses in I.V. anesthesia. *See* Transcript of April 26, 2007 Preliminary Injunction Hearing ["Transcript"] at 86. Superintendent Buss indicated that IV Team members merely took a few hours course and, incredibly, he stated that they practiced starting IV's on him. The Superintendent testified:

> Q. Now your execution team practices on you every month?
> A. Me and other staff. By practicing, the IV team does.
> Q. And what they do is they stick a needle in your arm or somewhere on your body?
> A. Yes.
> Q. And do they inject any substance into your body?
> A. No.
> Q. Do they extract any blood from you?
> A. No.
> Q. So they're just sticking a needle into your arm?
> A. I'm going to explain that the best way I can. They give me what they call a flash so they know they can start an IV. But no, they don't go through and inject me with fluids or anything. Or anybody else for that matter.
> Q. They don't inject or withdraw?
> A. No, they don't withdraw.
> Q. So you're getting your vein stuck approximately nine times a month?
> A. Yeah. Actually I bruise easily too.

Transcript of Preliminary Injunction at 111-12.

Third, while Missouri requires that a physician, nurse or certified emergency medical technician insert the IV lines, Indiana is content with prison staffs that lack these qualifications. Moreover, the Indiana Execution Protocol—unlike Missouri's—does not

limit IV insertion to a peripheral line, but instead *requires* that if a peripheral line cannot be inserted, a cut-down *must* be performed. The Indiana DOC "Procedure for Venous Cut Down" describes in clinical terms an outmoded surgical procedure involving cutting through the skin, using "blunt dissection" to free a vein from its accompanying anatomical structures, and ultimately inserting an intravenous cannula to which an IV line is attached. *See* Indiana Department of Correction Operation Directive ISP 06-26, March 6, 2007, Appendix A, "Confidential Procedure for Venous Cut Down."

Petitioner's expert, Mark Heath, M.D., a Board Certified Anesthesiologist and Assistant Professor of Clinical Anesthesiology at Columbia University, stated in his March 6, 2007, Declaration that:

> [A] surgical cut-down on a condemned inmate in the event their injection team is unable to achieve peripheral venous access without first trying the less painful and less invasive method of percutaneous access represents a *profound departure from "standard medical methods"* that the IDOC purports to apply to venous access. It also constitutes a departure from the standard of care used in executions in other jurisdictions as I am not aware of *any other state in the country which now uses a cut down procedure to achieve venous access*.

Timberlake V. Donahue et al, No. 1:06cv01859 (S.D. Ind.), Document No. 40, Declaration of Mark Heath, M.D., at 4. [Petitioner at bar, Michael Lambert, is an Intervenor in the *Timberlake* case].

Strangely, the Indiana Execution Protocol merely requires the IV team to "Make four (4) attempts per arm to insert an Angiocath…." Then "if unsuccessful, the I.V. Team…will notify the [physician] to initiate cut-down procedures." This means that after these four attempts, *per arm*, cut down begins. No consideration is given to alternate sites or alternate procedures short of a painful and arguably barbaric cut-down:

> Cut down procedures are an outdated method of achieving venous access for the administration of anesthetic drugs. The cut-down procedure has been virtually

> completely supplanted by the "percutaneous" technique for achieving central venous access. The percutaneous technique is less invasive, less painful, less mutilating, faster, safer, and less expensive than the cut-down technique….That Indiana intends to use a cut down procedure on Mr. Timberlake if it can not successfully place peripheral IVs after 4 attempts is unconscionable. To use a cut-down as the backup method of achieving IV access would defy contemporary medical standards and would be a violation of any modern standard of decency. The ready availability of a superior alternative technique for achieving central IV access, should it be necessary, means that the IDOC's adherence to the outdated cut-down method would represent the *gratuitous infliction of pain and mutilation to the condemned prisoner.*

Declaration of Dr. Heath, *Id*. at 18. This mandated contingency procedure violates the Eighth Amendment prohibition against cruel and unusual punishment.

Fourth, Indiana requires *no* medical equipment to be attached to the condemned person or to be used to monitor the condemned person during the execution process. This is in sharp contrast to the practical use of an electrocardiograph, which Missouri's protocol requires medical personnel "to attach and monitor" during the execution process. Obviously, the absence of an electrocardiograph deprives Indiana executioners of objective medical information during the execution, and creates a substantial, foreseeable risk of unnecessary pain.

Fifth, the Indiana Execution Protocol fails to require that *medical* personnel supervise the injection of the lethal contents of the syringes by department employees. Rather, the "Injection Team" simply proceeds as follows: "The Injection Team then proceeds, advising the {deleted) by (deleted), after each syringe." Indiana Department of Correction Operation Directive ISP 06-26, March 6, 2007 at 11. This protocol procedure is at considerable and grave variance with Missouri's protocol, where the injection process is supervised by medical personnel to avoid errors that pose a substantial,

foreseeable risk of gratuitous and unnecessary pain. The source of this pain is explained in great detail in the Declaration of Mark Heath, M.D:

> Based on my research into methods of lethal injection used by various states and the federal government, and based on my training and experience as a medical doctor specializing in anesthesiology, it is my opinion stated to a reasonable degree of medical certainty that, given the apparent absence of a central role for a properly trained professional in IDOC's execution procedure, the characteristics of the drugs or chemicals used, the failure to understand how the drugs in question act in the body, the failure to properly account for foreseeable risks, the design of a drug delivery system that exacerbates rather than ameliorates the risks of error, the IDOC's lethal injection procedure creates medically unacceptable risks of inflicting excruciating pain and suffering on inmates during the lethal injection procedure.

Declaration of Dr. Heath at 18-19. *See also* Declaration of Dr. Heath generally, especially p. 6-7 (Potassium Chloride Causes Extreme Pain), p. 7-10 (Administration of Neuromuscular Blocking Agents…Causes an Extreme Risk of Suffering). These sections of Dr. Heath's Declaration explain in detail the risks of inflicting excruciating pain and suffering that accompany the use of these drugs by untrained, non-medical personnel, as Indiana Operation Directive ISP 06-26, March 6, 2007 contemplates.

Sixth, there is no requirement in Indiana, unlike Missouri, that requires that *medical* personnel examine the condemned man *physically using standard clinical techniques* to confirm that he is unconscious after the injection of the first drug, thiopental [the drug intended to render the condemned man unconscious] but before the injection of the potentially excruciatingly painful second and third lethal drugs, pancuronium bromide and potassium bromide. Instead, Indiana's Execution Protocol recites that the physician [others deleted] and the [non-medical and non-medically trained] injection team will merely monitor the offender "to ensure the surgical depth or surgical plane is deep enough so that the offender feels no pain and is unconscious." The

Indiana Execution Protocol does not require *physical* monitoring, requires no equipment of any kind, and importantly does not call for the use of any *standard clinical techniques*, thus posing a substantial and foreseeable risk of gratuitous pain in the execution process..

In addition, the duties of the physician outlined at page 12 of the Indiana ISP 06-26 operative directive for execution is completely contradictory to the previously-described (at pages 6) role of the physician at this juncture. Page 6 of the operative directive indicates: "This physician's duties shall be to pronounce death after the execution has occurred and to perform a cutdown procedure should the I.V. technician be unable to find a vein adequate to insert the Angiocath." It is uncertain whether this physician in fact has a duty, under this ambiguous protocol, to monitor the level of consciousness of the prisoner, especially in the unexplained absence of any medical equipment that could make it medically possible for a doctor to assess levels of consciousness with any degree of medical competency. In fact, Superintendent Buss acknowledged that an anesthesiologist would need a lot of equipment to monitor for anesthetic awareness, "But that's a life preservation technique, a medical treatment technique for a process that isn't what the goal of our process is. Transcript at 219. And he also testified that once the witnesses have come into the observation room, the physician would not come out of the observation room unless "there was a problem with the IV."[2] (Transcript at 224) The physician obviously would not be available to act, as Missouri requires of medical staff, to "examine the prisoner *physically*, *using standard clinical techniques to confirm that he is unconscious."*

[2] In addition, Superintendent Buss testified that the physician goes into another room from the execution chamber, and does not come out once the blinds are open between the chamber and the witness viewing room. He noted that once the IV is started and the blinds are open and witnesses escorted in, absent an obvious problem, the doctor does not leave the other room he is in to recheck the IV site. Transcript at 212.

Ed Buss, also testified in the Preliminary Injunction Hearing that his "medical advisor" suggested that he use ammonia to determine that the prisoner is unconscious, and that he intended to use ammonia in future executions as his way of deciding that the condemned person is unconscious. Transcript at 219.

Dr. Heath, after hearing the Superintendent's testimony about ammonia, stated:

> I have never heard of any anesthesiologist ever using ammonia tablets to assess anesthetic depth or level of consciousness…It's also an ill-advised method in this context where if a person has a small amount of thiopental, the amount that might keep him asleep for 30 seconds, if you're testing with ammonia then, they wouldn't be breathing then. And the ammonia tablets work because when one breathes these noxious fumes into one's nasal passages where it burns and makes one cough and it's painful. And so if you're not breathing, then I think its efficacy would be very limited and questionable.
>
> If a person gets the wrong dose of thiopental because the IV is infiltrating, or what have you, they might be not be breathing for 30 seconds, you test their response to ammonia, no response, you go ahead and give pancuronium bromide, in the meanwhile they wake up. *That's why continuous monitoring of anesthetic depth is essential until the prisoner is actually dead.*

Testimony of Dr. Heath, Transcript at 241.

Equities Lean More In Favor Of Lambert Than Woods

In addition, Equities lean more in favor of Lambert than Woods. He was the first party to intervene. Woods simply shadowed his movements. Lambert intervened while cert was still pending and before a properly filed request for a successor was filed with the Indiana Supreme Court. On May 21, 2007, such a request was denied by a 4-1 vote (*see Lambert v. State*, -- N.E.2d --, 2007 IND LEXIS 358 (Ind. 2007), **after this Court had set a firm week long trial date for the lethal injection proceeding**. Doc. 99 (May 18, 2007 Scheduling Order Setting Trial for 9/17/07).

This Court has proceeded with the assumption Lambert would be present, requiring the filing of the Case Management Plan and setting the matter for a week long

trial beginning September 17, 2007. If the trial is going to take a week, clearly the limited evidence presented at Woods' preliminary injunction hearing is not sufficient.

Because Lambert raises substantial questions concerning the constitutionality of Indiana's execution procedures for lethal injection, it is appropriate to maintain the status quo until the Court has a chance to consider his claim that the execution protocol lacks sufficient safeguards to ensure that he is not subject to either cruel or unusual punishment as prohibited under the Eighth Amendment during the execution process. "A death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983). This Court's setting the matter for a week long trial demonstrates that a substantial legal issue exists as to whether Indiana's lethal injection procedures constitute cruel and unusual punishment or create an intolerable risk of pain and suffering. This Court has not resolved the merits of Lambert's claims. "Approving the execution of [Lambert] before his [claim] is decided on the merits would clearly be improper, *Barefoot*, 463 U.S. at 890, particularly because any judgment in favor of Lambert after his execution would be ineffectual. Thus, Lambert "is entitled to a[n] [injunction] to permit due consideration on the merits." *Barefoot*, 463 U.S. at 889.

It is significant to note that because Lambert is farther along (and started sooner than Woods) that he will be deprived of his access to the Courts by Defendant Buss' actions. Additionally, the denial of injunctive relief will violate Lambert's first amendment and due process right of access to the courts. If this Court does not grant Lambert injunctive relief, he will be denied his First Amendment and due process right of access to the courts. Lambert filed this suit while his petition for a writ of certiorari was

pending before the United States Supreme Court and prior to the scheduling of his execution. At the time of filing, no impediments existed to the speedy resolution of the merits of Lambert's claim. Unless this Court grants a temporary injunction, Lambert's execution date bars his due process and First Amendment rights of access to the courts on his lethal injection claim.

Due process requires

> that prisoners be afforded access to the courts in order to challenge unlawful convictions and seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419 (1974). The First Amendment likewise confers to inmates a right of access to the courts.

Mere formal access to the courts does not comport with the First Amendment. Rather, inmate access to the courts must be adequate, effective, and meaningful. *Bounds v. Smith*, 430 U.S. 817, 822 (1977). That access to the courts cannot be accomplished when this Court has less than one month to give careful scrutiny to Lambert's lethal injection claim. By scheduling Lambert's execution despite knowledge of this suit, the Defendants attempt to truncate and negate these proceedings. Not granting a stay of execution would deny Lambert his First Amendment and due process right of access to the courts.

To preserve death row inmates' right of access to the courts in general, and Lambert's right of access to the courts in this particular case, this Court must grant injunctive relief that will remain in effect until it can reach the merits of Lambert's claim.

Defendant's attempt to prevent this court from reaching the merits of plaintiffs' claims should not be tolerated and constitutes grounds to issue a temporary injunction pending a ruling on the merits of plaintiffs' claims.

Defendants moved to set Lambert's execution date and had it set while this litigation was pending and he had fully intervened. But, "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot*, 463 U.S. at 888. Therefore, it is only by granting injunctive relief that the effective presentation and resolution of Lambert's colorable claims can be ensured. *See In re Hearn*, 376 F.3d 447 (5th Cir. 2004)(Staying execution to allow investigation of mental retardation claim). Any other form of relief could result in the untenable situation where this Court finds in favor of Plaintiffs on the merits, but cannot grant any relief to Lambert because he was executed. Thus, this Court must grant a temporary injunction barring Lambert's execution until this Court can resolve the merits. *See Barefoot*, 463 U.S. at 889. Otherwise, as noted by District Court Judge Karen Caldwell of the Eastern District of Kentucky:

> The Court, of course, will not hesitate to exercise its authority to impose injunctive relief in aid of its jurisdiction to decide this case on the merits, and will not abide any effort to circumvent that jurisdiction. But the orderly discovery process contemplated by the Federal Rules of Civil Procedure is adequately adapted to all civil cases, including those related to the death penalty. The Court will therefore adhere to that structure in this case.

Moore v. Rees, et al., Case 3:06-cv-00022-KKC (E.D. Ky. June 13, 2006) (ECF Doc. 34) (Attachment 2).

Lambert also requests this Court to consider the recent stay grant (May 31, 2007) for an intervenor in *Cooey, et al,.* v. *Taft, et al.*, Case No. 2:04-cv-1156 (S.D. Ohio May

31, 2007) (May 31, 2007) (Attachment 1). Judge Gregory L. Frost granted a stay of execution to an intervenor in virtually the same procedural posture as Lambert. In *Cooey*, the intervenor intervened in February 2007 and the state set his execution date after he intervened. The equities more favor Lambert – he sought to intervene in a case months old, while in *Cooey* , the case has been pending since 2004. Further, unlike in *Cooey*, this Court has set the matter for a full trial and Indiana should not be allowed to knowingly take the steps to eliminate plaintiffs in a pending action set for trial in federal court.

B. At the Very Least, This Court Should Stay Lambert's Execution Pursuant to its Clear Authority to Do So Under the All Writs Act and the Anti-Injunction Act.

In Defendant's moving for an execution date after Lambert had intervened and the Indiana Supreme Court's setting of an execution date despite having first been informed that Lambert was now a plaintiff in this federal action, both the Defendant and the Indiana Supreme Court have interfered with this Court's jurisdiction over this litigation, has frustrated these proceedings, and has disrupted the orderly resolution of this action. The Indiana Supreme Court's order afforded no respect to this Court's prior order recognizing that Lambert could properly intervene and that matters will proceed to trial.

Thus, the order sought by Lambert under the All Writs Act, is necessary to preserve this Court's jurisdiction over a matter properly before it and to preserve the integrity of these proceedings, there is no requirement for the Court to evaluate the four factors applicable to traditional injunctions. *See, e.g. Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004)("The requirements for a preliminary injunction do not apply to injunctions under the All Writs Act because a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns.");

see also United States v. New York Tel. Co., 434 U.S. 159, 174 (1977) (affirming grant of injunction under the All Writs Act without regard to traditional four factors); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219 (1945) (stating, in reviewing a lower court's ruling concerning an injunction under the All Writs Act, that it is necessary to ascertain "what is the usage, and what are the principles of equity applicable in [this] case," without mentioning the traditional four injunction requirements);

The All Writs Act authorizes "[t]he Supreme Court and all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); . Courts have read the language of this statute broadly. The statute has been found to authorize the issuance of writs to protect "not only ongoing proceedings, but potential future proceedings, as well as already issued orders and judgments." *Klay*, 376 F.3d at 1099; *see also Adams v. United States*, 317 U.S. 269, 273 (1942). Indeed, unless specifically constrained by an act of Congress, the Act authorizes a court to issue writs any time "the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams*, 317 U.S. at 273.

The Anti-Injunction Act serves as a check on the broad authority recognized by the All Writs Act, 28 U.S.C. § 2283. It recognizes and embraces a federal court's ability to issue injunctive relief "where necessary in aid of its jurisdiction…."28 U.S.C. § 2283. "The All Writs Act and the Anti-Injunction Act are closely related, and where an injunction is justified under one of the exceptions to the latter a court is generally empowered to grant the injunction under the former." *Burr & Forman v. Blair*, 470 F.3d 1019, 1027-1028 (11th Cir. 2006)(citation omitted); *Winkler v. Eli Lilly & Co.*, 101 F.3d

1196, 1202-03 (7th Cir. 1996)(same). Thus, in assessing the propriety of an injunction entered to stop a state court proceeding, the relevant inquiry is whether the injunction qualifies for the exceptions to the Anti-Injunction Act.

Among the circumstances in which federal courts may apply the All Writs Act and the Anti-Injunction Act to enjoin a state court proceeding, or some aspect of a state court proceeding, is when an injunction is necessary: (1) to preserve the federal court's jurisdiction, (2) "to protect the integrity or enforceability of existing judgments or orders," and/or (3) to avoid disruption with the orderly resolution of litigation pending before the federal court. *See, e.g., Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970)("Both exceptions to the general prohibition of [the Anti-Injunction Act] imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998); *Brother Records, Inc. v. Jardine*, 432 F.3d 939, 944-45 (9th Cir. 2005)(the purpose of the "in aid of jurisdiction" exception is "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.").

This Court should follow and cite with approval the Seventh Circuit's actions in *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196 (7th Cir. 1996). In *Winkler*, the Seventh Circuit approved of an injunction issued by a district court to protect a discovery order. The Seventh Circuit noted "the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of

their rulings, including pre-trial rulings like discovery orders, as long as the injunctions are narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly." *Winkler*, at 1203. Similarly, this Court should act to protect the integrity of its pre-trial rulings; the defendant by urging an execution warrant after Lambert had entered these proceedings and obtaining that warrant after the setting of the trial date by this Court should not be able to influence or manage the litigation by deciding which plaintiffs make the trial date.

Thus, under the All Writs Act as constrained by the Anti-Injunction Act, the federal court may issue such orders as are necessary to enjoin state actors (such as the defendants in this case), who are proceeding under the authority of state court orders, from taking action "which, left unchecked, would have…the practical effect of diminishing the [federal] court's power to bring the [federal] litigation to a natural conclusion." *Klay*, 376 F.3d at 1102; *see also Winkler*, 101 F.3d at 1203 (used to "prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly.")

At the very least, and even if it denies Lambert's motion for a preliminary injunction under Rule 65(a), this Court should issue a limited injunction under the All Writs Act and the Anti-Injunction Act. Such injunction should prohibit the defendant and the State of Indiana, and their and its agents, from proceeding with Lambert's execution until such time as the proceedings relating to the lethal injection challenge have been concluded.

C. Conclusion.

Important issues of federal constitutional law are involved in this case. Lambert intervened in a timely manner, before he was already under a death warrant. For all of the above reasons, and in the interests of justice, Lambert respectfully requests that his motion be granted and that this Court grant Lambert a preliminary injunction prohibiting the defendant from executing him until this action is finally resolved. The equities demonstrate that this Court should enter injunctive relief to prevent Lambert's execution. Further, because this Court is unable to resolve the merits of Lambert's claims prior to his execution, because the matter has been set for a lengthy trial set for September 17, 2007, a denial of a temporary injunction will result in a violation of Lambert's due process and First Amendment right of access to the courts. At the very least, and certainly in the event a preliminary injunction is denied, the Court should issue a limited injunction under the All Writs Act and the Anti-Injunction Act prohibiting the defendant and Indiana, and their and its agents, from proceeding with Lambert's execution until such time as the trial is completed and the merits are fully considered.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2007, a copy of the foregoing **INTEVENOR LAMBERT'S MOTION FOR INJUNCTIVE RELIEF STAYING HIS EXECUTION** 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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