

EXECUTION DATE INFORMATION: MAY 4TH, 2007, 12:01am

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

NORMAN TIMBERLAKE,
Plaintiff,

No. 1:06-cv-1859-RLY-WTL

v.

ED BUSS, Superintendent
Indiana State Prison,
Defendant.

DEATH SENTENCED PROSPECTIVE
INTERVENER DAVID LEON WOODS
EXECUTION DATE: MAY 4TH, 2007,
12:01 A.M.

APPLICATION FOR PRELIMINARY INJUNCTION

1.

Prospective intervener, David Leon Woods, is under a sentence of death. On March 26th, 2007, the Indiana Supreme Court ordered Woods' execution to take place on May 4th, 2007. Woods seeks preliminary injunctive relief to prevent Defendants from executing him by their proposed means of lethal injection pending the resolution of this action. Woods alleges that the Indiana Department of Correction's lethal injection protocol, as described in both Operation Directive ISP 06-26¹, which is attached as Exhibit 1, and Operation Directive ISP 02-04, which is attached as Exhibit 2, and whatever Operation Directive ISP may approve concerning specifically the execution of Woods, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth

¹ According to Defendant's Response to Discovery filed January 8th, 2007, Exhibit 3, Operation Directive ISP 02-04 is currently in place. Operation Directive ISP 06-26 is "a revised death penalty protocol" which has been "very recently submitted for approval by the administration of the Department of Correction but has not yet been approved." Exhibit 3, paragraphs 2 & 3.

Amendments because it creates a substantial and unnecessary risk that Woods will be fully conscious and in agonizing pain for the duration of the execution process.

2.

This application for a preliminary injunction is made pursuant to Federal Rule of Civil Procedure 65, and Woods is entitled to the relief he seeks under Eighth Amendment precedent. Woods will sustain irreparable harm if injunctive relief is not granted preventing the Defendant having the (1) execution team members listed in Exhibit 3, paragraph 4 insert catheters; (2) in accordance with either ISP 02-04 or ISP 06-26, or the “new-improved” protocol yet to be adopted by ISP (3) using the drugs and quantities listed in Exhibit 3, paragraph 3, or the quantities orally relayed to the Court as reflected in Part III of the Order entered April 16, 1007 regarding an April 13, 1007 pre-trial conference, Document 63. Woods is likely to prevail on the merits of the underlying action and the balance of hardships weighs decidedly in his favor. This application is based on the original Complaint filed Timberlake, by the following memorandum of points and authorities and the attached exhibits, including the declaration of Dr. Mark Heath which sets forth the specific deficiencies in the Defendants’ lethal injection protocol.

I. INTRODUCTION

3.

David Leon Woods, a death row inmate, is scheduled to be executed by Indiana State Prison Superintendent, Ed Buss by means of lethal injection. A rapidly growing body of evidence, including medical evidence, eyewitness observation and veterinary studies, persuasively demonstrates that the particular lethal injection protocol chosen by Defendant Buss risks, and has repeatedly resulted in, inmates failing to receive adequate anesthesia and remaining conscious during the administration of lethal drugs. Without adequate anesthesia, the inmate experiences first slow suffocation and then the extraordinarily painful activation of the sensory nerve fibers in the

walls of the veins that is caused by potassium chloride. Likewise, when individuals not appropriately trained in anesthesia are responsible for placement of the catheters for injection of the described drugs, unconscionable delays result in the execution preparation. Given the significant danger under the current protocol that Woods will be subjected to this excruciating mental and physical pain and torture, he seeks to prevent the Defendant from executing him in this manner.

4.

According to Exhibit 3, paragraph 3, the Defendant will use three drugs in succession to cause Woods' death: First, Sodium Pentothal, an ultra-short-acting barbiturate that under ideal conditions will cause the inmate to lose consciousness; second, Pancuronium Bromide, a neuromuscular blocking agent that paralyzes the muscles and has no apparent purpose other than to make the execution appear peaceful to witnesses; and finally, Potassium Chloride, which induces cardiac arrest. ISP Directive 06-26 and ISP Directive 02-04 establish the conditions under which these drugs are administered. It directs that the drugs be administered remotely, in the absence of trained personnel and with no monitoring of the inmate's condition once the procedure is underway. The combination of using these particular drugs, in the dosages described in Exhibit 3 and/or the dosages referenced in Doc. 63, Part III.(1)(a), under these conditions creates a serious risk that the drugs, particularly the critically important Sodium Pentothal, will not be properly administered. Administration errors could result, and demonstrably have resulted, in inmates retaining consciousness and suffering severe pain and torture during their executions.

5.

Thus, Woods' suit is not premised on the possibility that some unforeseen error or unavoidable accident might cause him to be aware and in excruciating pain during his execution. Nor does he claim that execution by lethal injection is unconstitutional per se, regardless of the manner in which it is accomplished. On the contrary, he alleges that the significant risk of a botched

and inhumane execution is an entirely foreseeable consequence of the particular conditions unnecessarily imposed by, and the failings of, ISP Directives 06-26 and/or 02-04. It is surely unconstitutional for the State to choose an execution protocol that creates a significant risk of inflicting gratuitous suffering and excruciating pain. Woods therefore requests that the Court enjoin the Defendant from executing him by means of lethal injection as it is currently administered under ISP Directives 06-26 and/or 02-04.

II. **FACTUAL BACKGROUND**

6.

On March 28th, 1985, Woods was convicted and sentenced to death in the Boone Superior Court 1, located in Lebanon, Indiana.

7.

Woods appealed his conviction and sentence of death to the Indiana Supreme Court who affirmed his conviction and sentence by a published opinion on November 28th, 1989. Woods v. State, 547 N.E.2d 772 (Ind. 1989). Mr. Timberlake's petition for rehearing before the Indiana Supreme Court was denied August 30, 1990. Woods v. State, 557 N.E.2d 1325 (Ind. 1990). A Petition for Writ of Certiorari with the United States Supreme Court was denied June 28th, 1991. Woods v. Indiana, 501 U.S. 1259 (1991).

8.

On August 30th, 1995, Woods filed his amended petition for post-conviction relief in the trial court, Boone Superior Court I, Lebanon, Indiana. The petition was denied on April 15th, 1996 after an evidentiary hearing. Woods appealed the denial of his state petition for post-conviction to the Indiana Supreme Court. On November 27th, 1998, the Indiana Supreme Court affirmed the denial. Woods v. State, 701 N.E.2d 1298 (Ind. 1998). Woods' Petition for Writ of Certiorari with the United States Supreme Court was denied October 4th, 1998. Woods v. Indiana, 528 U.S. 861 (1999).

9.

Woods filed a petition for writ of habeas corpus under 28 U.S.C. §2254 on December 2nd, 1999 in the United States District Court, Southern District of Indiana. This petition was denied February 2nd, 2004. *Woods v. Anderson*, 302 F.Supp.2d. 915 (S.D. Ind., 2004). Woods appealed the denial of his petition to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the district court's denial of the petition on November 30th, 2005. *Woods v. McBride*, 430 F.3d 813 (7th Cir. 2005). A Petition for Rehearing and Rehearing En Banc of Denial Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 was filed in the United States Court of Appeals for the Seventh Circuit. Woods filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied October 10th, 2006. *Woods v. McBride*, 127 S.Ct. 391 (2006).

10.

On December 29th, 2006, Woods filed a petition for leave to file successive petition for post-conviction relief in the Indiana Supreme Court, Indianapolis, Indiana. No evidentiary hearing was conducted. On March 26th, 2007, Woods' petition was denied. On April 2nd, 2007, Woods filed a Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Indiana. *Woods v. Buss*, 1:07-cv- 00411- DFH-TAB. That petition is still pending.

11.

Woods sought a Stay of Execution in the Indiana Supreme Court, alleging that his execution under the existing protocol employed by Defendant would violate the Eighth Amendment prohibition against cruel and unusual punishment. [Exhibit 5, Motion for Stay, April 2nd, 2007]. On April 5th, 2007, the Indiana Supreme Court denied Woods' request for a stay. [Exhibit 6, Order]. Woods has therefore exhausted all remedies in state court prior to presenting this Motion.

12.

Woods has sought permission to join as intervener into the present suit on March 5th, 2007. Woods has been granted permission to join as intervener; however, the Court has elected to treat

Woods in an expedited fashion because of the imminent execution date. In response to Woods' Motion for Stay in the Indiana Supreme Court, Defendant argued that the Court should not grant a stay and defer a grant to the federal courts. [Exhibit 7 State's Verified Response to Motion for Stay of Execution]. In denying Woods' Motion for Stay, the Indiana Supreme Court denied noting that this exact claim is currently pending in federal court in the instant case.

III. ARGUMENT

13.

In moving for a preliminary injunction, Woods seeks only to preserve the status quo while he litigates his constitutional claims. Woods will likely succeed on the merits of this action, and will suffer irreparable harm in the absence of temporary relief. It is also in the public interest to grant temporary relief because doing so will allow the important question of the constitutionality of ISP Directive 06-26 or 02-04 to be fully and accurately resolved on the merits and will avoid inhumane, unconstitutional execution. This action was timely brought and the balance of the equities so favors Woods that both justice and controlling precedent require that the Court preserve the status quo until the merits of the matter can be determined.

14.

Woods further identifies the following problems with the rush to litigate this matter as a preliminary injunction request:

15.

1. The Indiana State Prison has yet to adopt the protocol it intends to utilize on Woods, making it difficult for him to accurately make complaints about that protocol; specifically making it impossible to attempt to exhaust any administrative remedies.

16.

2. The Indiana Death Penalty Assessment Team recently recommended a moratorium on executions based upon an examination of 12 issues identified by the American Bar Association as

central to the analysis of the fairness and accuracy of a state's capital punishment system. While the issue of lethal injection, *per se* is not a part of that report, the deficiencies in the Indiana system are substantial and directly affect Woods' eligibility for the death penalty when applied to his case. Correction of those inequities would render lethal injection, as administered by Indiana, for Woods decidedly cruel and inhumane

17.

3. The State of Indiana declared that the execution team for Woods has been "certified" by Kentucky. As of this writing, no further information has been provided by the State. We do not know who conducted the certification courses, if there were any courses. We do not know what the training consisted of, what the certification certifies the individuals to do, who (by classification rather than name) was certified; whether the certification was the same for everyone, etc. Under the court's current time constraints, Woods will likely be executed without knowledge of those items.

18.

4. The co-counsel in this case legitimately believe the case can be presented fully "this summer." The delay of four or five months is minuscule compared to the irreparable harm Woods will suffer if his execution is carried out without the ability of his counsel to conduct adequate discovery and/or to properly litigate the underlying claims.

THE LEGAL STANDARD

19.

In order to decide whether a preliminary injunction is appropriate, the Court "must exercise its discretion to determine whether the balance of harms weighs in favor of the moving party or whether the unmoving party or public interest will be harmed sufficiently that the injunction should be denied." Christian Legal Soc'y v. Walker, 453 F.3d 853, 859 (7th Cir. 2006). In the context of a capital case, where the movant is under a death sentence and the issuance of a preliminary injunction will have the effect of delaying a scheduled execution, the Court must also take into

account any unnecessary delay on the part of the prisoner in bringing his claim Nelson v. Campbell, 541 U.S. 637, 649-650 (2004); Hill v. McDonough, 547 U.S. (2006).

20.

The Eighth Circuit Court of Appeals performed this weighing of the equities in Taylor v. Crawford, 445 F.3d 1095, 1097 (8th Cir. 2006). See also, Taylor v. Crawford, No. 06-1397 (8th Cir. February 1, 2006)(en banc)(Order granting stay of execution). Plaintiff Taylor filed an action pursuant to 42 U.S.C. § 1983 challenging Missouri's lethal injection protocol on substantially the same grounds that Woods has challenged Indiana's procedure. See, Taylor, 445 F.3d at 1096. While the action was pending, the state scheduled Mr. Taylor's execution. Id. at 1097. The district court granted a preliminary injunction preventing the execution from proceeding before the merits of the action had been determined. Id. A panel of the Eighth Circuit initially reversed and ordered that an immediate, truncated hearing be conducted to allow the execution to proceed on schedule, Id., but on the subsequent appeal the en banc court granted rehearing and stayed Mr. Taylor's execution, Id. at 1098.

21.

Upon reconsideration the panel affirmatively acknowledged that the plaintiff's interest in having an evidentiary hearing on the merits of his claims prior to his execution was "equally [as] strong" as the State's interest in the prompt execution of its judgment. Id. at 1096. The court inquired of the parties how much time they would need to complete the discovery and evidentiary hearing that had previously begun, and ultimately granted the 60 days that plaintiff's counsel requested. Id. at 1098. This decision, then, stands for the proposition that a plaintiff who timely files a properly-pled 8th and 14th Amendment challenge to a state's lethal injection procedure under 42 U.S.C. § 1983 is entitled to an evidentiary hearing on the merits of his claims and, if the State schedules his execution in the interim, a preliminary injunction to prevent the State from proceeding

with the execution before the hearing can be completed. See also, Cooney v. Taft, 2006 WL 1207982 (S.D.Ohio); Jackson v. Taylor, 2006 WL 1237044 (D.Del.).

C.A PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

1.1 Plaintiff's Claim is Cognizable Under 42 U.S.C. §1983

22.

The Complaint does not challenge the legality of Woods' conviction or sentence, nor does it seek to prevent the state from executing him by lethal injection in a lawful manner. Woods' claim is therefore properly brought under 42 U.S.C. § 1983. Hill v. McDonough, 547 U.S. ___, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006). In accordance with its previous opinion in Nelson v. Campbell, 541 U.S. 637 (2004), the Court held that a claim challenging a method of execution as cruel and unusual punishment that "would not necessarily prevent the State from executing him by lethal injection," is proper under § 1983 and need not be brought in habeas. Hill, 165 L.Ed.2d 44, 45. As is clear from the Complaint, the instant lawsuit is just such an action. Woods has specifically alleged that there are readily available alternative methods of execution by lethal injection that would both comport with state law and pass constitutional muster. He brings this action simply to ensure that he is put to death in a humane manner.

1.2 Indiana's Lethal Injection Protocol Violates the Eighth and Fourteenth Amendments Because it Carries a Tremendous Risk of Unnecessary Pain During Executions

23.

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishments. U.S. Const. Amend. VIII. The prohibition includes the "infliction of unnecessary pain in the execution of the death sentence." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1974); see also, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (holding that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain"). Because it is impossible to determine with certainty before the fact whether a

particular inmate will suffer unnecessary pain during his execution, the question of whether a particular execution procedure will inflict unnecessary pain is fundamentally an inquiry as to whether the inmate is “subject to an unnecessary *risk* of unconstitutional pain or suffering.” Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir. 2004) (emphasis added); Fierro v. Gomez, 77 F. 3d 301, 307 (9 Cir. 1996) (“Campbell also made clear that the method of execution must be considered in terms of the *risk* of pain.” (emphasis in original)); Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994). “For any individual challenging a death sentence, evidence of botched execution can only be put in terms of probability.” J.D. Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause* 88 Iowa L. Rev. 1099, 1118-20 (2003).

24.

Of course, any medical or quasi-medical procedure inherently carries a risk that a mistake or accident might cause unforeseen pain. Thus, the Eighth Amendment does not require executioners to eliminate all possible risk of pain or accident from their execution protocols. See, Resweber, 329 U.S. at 464; Campbell, 18 F.3d at 687. A risk of pain becomes *unnecessary*, however - and unconstitutional - when experience with the execution procedure demonstrates that there are foreseeable problems that will result in the inmate suffering intense pain that alternative procedures do not engender.

25.

The assessment of the risks associated with a particular procedure is not static. Over time, our knowledge of the workings of the human body increases, technology advances, and new information comes to light and old information is more thoroughly understood and interpreted. Accordingly, methods of execution are developed, refined and abandoned. Execution by hanging, firing squad, gas chamber and electric chair, once standard, have all become virtually obsolete with

the passage of time. If a State opts to utilize capital punishment, the 8th Amendment imposes an obligation upon it to keep up with and respond to new developments and information and to ensure that they are using the most humane, least painful procedure available. Evidence is now overwhelming that the particular lethal injection protocol chosen and currently in use by the ADC is far from the most humane available; rather, it engenders serious risks of causing excruciating pain and torture that other available methods simply do not. See, Cooney v. Taft, No. 2:04-cv-1156, 2006 WL 1207982 * 5 (S.D. Ohio April 28) (noting “mounting evidence calling Ohio’s lethal injection protocol, and the same or similar protocols employed by other states, increasingly into question”).

b.a The Protocol Is Old And Was Ill-Conceived At The Outset

26.

Legislation directing a change in the method of execution from electrocution to lethal injection was passed in Indiana in 1983. As it does ~~to~~ this day, the statute left all decisions regarding the particular chemicals to be injected and the administration procedures to be employed to the discretion of the Department of Correction. See, Ind. Code § 35-38-6-1 (1983). From discovery provided by the Defendant, it appears that the protocol was designed with no input or advice from medically trained personnel. The ongoing changes with the protocol also appear to be designed with no input or advice from medically trained personnel, but instead rely upon prison officials in other states, whose focus is to carry out the execution.

27.

The Texas protocol, upon which the Indiana procedure was apparently modeled, was designed by lay corrections officials with no medical knowledge. Louisiana is another state that looked to Texas when it came time to figure out how to execute someone by lethal injection. When the chief legal counsel of the Louisiana Department of Corrections consulted with the warden of the

Texas Department of Corrections responsible for executions about the “medical portion” of the Texas protocol, she was told:

[T]hat the only thing that mattered was that the guy ended up dead and that he wasn't worried too much about the amount of medicine. He had certainly used the same types of medicine, but that he wasn't totally concerned about the amounts or what it may or may not do. They ended up dead, and that's all he was worried about. The rest of our conversation with him tracked that same thing. He was not terribly concerned about policy, procedure, or who did what, when, where. Just so the right result happened.'

28.

So Long as They Die: Lethal Injections in the United States, 18 Human Rights Watch 1(G) at 16-17 (2006) (Exhibit 5). The Defendant has used the protocol adopted in this ad hoc , unscientific manner for all executions by lethal injection conducted in Indiana, and still uses that same procedure.

b.b The Protocol Arbitrarily Selects Painful Drugs And Fails To Ensure Adequate Anesthesia During Their Administration

29.

The Defendant does not provide the authority by which he uses the drugs and drug dosages listed in Exhibit 3, paragraph 3 or as may be used in Doc. 63, Part III1a. The first drug, Sodium Pentothal, is an anesthetic, intended to rapidly induce unconsciousness. The second active drug, Pancurorium Bromide, is a neuromuscular blocking agent that causes complete paralysis. Finally, Potassium Chloride is introduced to cause cardiac arrest.

30.

Potassium Chloride is a salt that naturally occurs in trace amounts in the human body. In large quantities, however, such as the 100 milligrams listed in Exhibit 3 at 3, it not only causes the heart to stop beating but also causes excruciating pain as it travels through the circulatory system. The drug activates the sensory nerve fibers of the insides of the veins as it courses through the body

from the injection site to the heart, causing a sensation that has been likened to fire scorching along the vessels. See, Exhibit 4 at ¶12 (Declaration of Dr. Mark Heath).

31.

The neuromuscular blocking agent Pancurorium Bromide stops all movement, including that necessary to breathe. The drug has no effect, however, on consciousness or the ability to perceive pain. If a prisoner is conscious when this drug is administered, he will feel the visceral pain and distress of slow suffocation, much like as if he were drowning or being crushed to death. Id. ¶15.

32.

Having made the choice to administer two drugs that cause excruciating pain and agony, a choice that was not required by either statute or practical considerations, the Defendant can only fulfill its responsibility under the 8th Amendment to avoid gratuitous and unnecessary pain and torture only if it ensures that the prisoner is adequately anesthetized at the time that those drugs are administered. In order to ensure that the prisoner does not feel pain a surgical plane of anesthesia, or that level of anesthesia that prevents conscious perception of noxious stimuli of the magnitude of surgical procedures, must be achieved and maintained throughout the execution procedure. However, the drug that is used induce anesthesia, administered in accordance with the procedures listed in Exhibit 3_3, is an exceedingly inferior choice for the task and fails to provide the necessary assurance of adequate anesthesia.

(2)1 Sodium Pentothal is an Ultra-Short-Acting Barbiturate Unsuitable for use as Sole Anesthetic Agent for Executions, Especially in the Dose the Defendant Plans to Use

33.

Sodium Pentothal is an ultra-short-acting barbiturate that is used for certain specific purposes in surgical anesthesia. Its effect has a rapid onset and then a rapid recovery; the patient becomes unconscious very quickly after the drug is introduced, and the effects begin to wear off very soon thereafter. Sodium Pentothal is therefore ideal for the provision of anesthesia during intubation at

the beginning of surgery, for example, because it induces deep anesthesia rapidly but if there are problems with the intubation the patient will regain consciousness and the ability to breathe independently very quickly. See, Exhibit 4 at ¶ 24-25 (Declaration of Dr. Heath).

34.

The reasons for the drug's utility in certain surgical contexts, however, are also reasons why Sodium Pentothal is decidedly *inappropriate* for use as the sole anesthetic agent during a lethal injection procedure. Id. at ¶ 26-27. Although the Indiana protocol calls for a dose of the drug that is large enough to be lethal if properly administered, any problems with the delivery of the full dose engender the serious risk that the inmate will receive an insufficient amount of the drug to induce a deep enough plane of anesthesia, or to maintain that degree of anesthesia throughout the execution process. In short, if the inmate does not receive the full amount of Sodium Pentothal, and there are many reasons why that can and apparently does happen, the anesthetic effect may wear off too quickly and the inmate may be conscious and suffering during the remainder of the procedure.

35.

The Defendant's protocol unnecessarily enhances these risks by its arbitrary and unnecessary adoption of 5 grams as the dose of Sodium Pentothal to be administered. The level of anesthesia, if any, achieved in each individual inmate depends on the amount that is successfully administered, although other factors such as the inmate's weight and sensitivity/resistance to barbiturates are also important. Many foreseeable situations exist in which human or technical errors could result in the failure to successfully administer the intended dose. If error occurs that results in the prisoner receiving less than the 5 gram dose, the prisoner be inadequately anaesthetized and therefore conscious and suffering. Exhibit 4 at 27 (Declaration of Dr. Heath).

36.

Additionally, the Defendant's protocol fails to even require that additional Sodium Pentothal be available in the execution chamber in the event that problems with delivery of the dose are detected and more of the anesthetic agent is determined to be necessary. Because of its instability, the drug is distributed in powder form and must be placed into solution before it may be injected. Id., at ¶ 27 (a). There is no directive that requires even that extra Sodium Pentothal powder be on hand, much less extra syringes of the drug already mixed into solution, and so in the event that execution personnel were to detect signs of inadequate anesthetic depth or possible consciousness once the execution process was under way, the protocol ensures that there is nothing they could do about it. As noted, the circumstances under which a failure to achieve and maintain adequate anesthesia may occur are many, varied and common.

(2)2 Obtaining IV Access for Execution Purposes Requires Training and Skill that the Defendant's Execution Personnel Lack

37.

Establishing peripheral intravenous access to an inmate to facilitate the administration of the lethal drugs called for by Exhibits 1 (ISP 06-24) 2 (ISP 02-04) is a complex and risky medical procedure that should only be performed by properly medically trained and qualified personnel. The process is fraught with the potential for error. Under the best of circumstances, it is vital that the IV set-up be assembled properly and securely. The set-up consists of multiple parts and pieces of tubing, which may leak or otherwise fail to permit the unobstructed flow of chemicals into the inmate's circulatory system if not correctly attached. *See* Exhibit 4 at ¶ 27(e) (Declaration of Dr. Heath).

38.

The tourniquet that is applied to facilitate access to the peripheral vein must be removed once IV access is achieved; failure to do so will obstruct the flow of the anesthetic agent into the inmate's

body. See, Id. at ¶ 27(k). Placement of the extensive restraining straps that the Defendant uses to tie the inmate down to the gurney may cause the same problem. See Exhibit 7 at ¶ 27(l) (Declaration of Dr. Heath).

39.

It is critical that the catheter be inserted into the vein in a precisely correct fashion in order to ensure that the full dose of the anesthetic drug is delivered into the inmate's circulatory system. If the catheter is inserted incorrectly, the drug will go into the tissue surrounding the vein rather than into the vein itself. See, Id. at ¶ 27(f). This condition, known as infiltration, is not uncommon. Id. Uncorrected, it will result in a failure of the anesthetic to reach the central nervous system and a failure to render the inmate unconscious. Id. Once properly inserted, the catheter must be adequately secured with tape or by other means, or else it may shift and result in infiltration. Id. at ¶ 27(j).

40.

Even finding a suitable peripheral vein into which the catheter may be placed can be a medically complex and difficult endeavor. See Exhibit 6 (News Rpt of Marvin Bieghler Execution), Exhibit 7 (News Rpt of Tommy Smith Execution). Due to a variety of conditions, including obesity, prior intravenous drug use, corticosteroid treatment and even just naturally small or deep veins, obtaining peripheral IV access may be difficult or even impossible. Id. at ¶ 36. The very nature of the execution process may exacerbate this problem, because the autonomic manifestations of the anxiety associated with impending death include constriction or narrowing of the veins. Id. at ¶ 41.

41.

In the event that peripheral IV access proves impossible to obtain, Indiana's protocol calls for the use of dramatically more medically complex, risky and invasive procedure of a cut-down, which entails making a deep incision into the inmate's skin in order to access a vein that is not accessible from the surface, or a central line, which requires insertion of the catheter into a large

vein such as the subclavian vein in the chest or the femoral vein in the groin. See, Exhibit 8 (Cut-down photos).

42.

Both procedures have been conducted in Indiana by the Defendant and his predecessors. See Exhibits 9 (Post mortem photos of Tommy Smith). Despite the complexity of and risks associated with these types of procedures neither Exhibit 1 nor 2 set forth any procedures governing the use of these techniques. The protocol fails to specify how they are to be conducted or to set forth the qualifications required of the personnel who will actually perform them. Given the nature of the procedures it is unacceptable that they be performed by anyone except for medically trained personnel possessed of adequate skill and experience, but the protocol fails to require any particular knowledge or ability at all. Emergency medical training is insufficient for the performance of such medical procedures.

(2)3 Maintenance of Adequate Anesthesia Throughout the Execution Process Requires Training and Skill that the Defendant's Execution Team Lacks

43.

Even once peripheral IV access has been established and the catheters are properly inserted, there are still a large number of problems that may arise which can interfere with the proper delivery of anesthesia. It is critical, therefore, that inmates be closely monitored by medically trained and experienced personnel throughout the execution process in order to detect problems as they occur and ensure that the inmate is maintained on a sufficiently deep plane of anesthesia. See, Exhibit 4 at ¶¶ 31-32 (Declaration of Dr. Heath). Even most qualified nurses and paramedics are not trained in the use of ultra-short-acting barbiturates; these drugs are used only by anesthesiologists and a very select group of nurse who have obtained significant experience in intensive care units and as nurse anesthetists. Id. at ¶ 30. Training equivalent to that of an anesthesiologist or a CRNA is minimally required in order to ensure that an execution using the drugs and procedure set out humane. Id.

However, Indiana's protocol fails to provide for any monitoring of the inmate during the execution process, much less monitoring by individuals competent in the provision of general anesthesia.

44.

Errors and problems are potentially rife beginning at the stage of preparation of the lethal drugs. Sodium Thiopental is unstable in solution, and is therefore distributed by the manufacturer in powder form. Before it may be injected intravenously, the powder must be mixed with liquid, a process that requires knowledge of pharmaceuticals and familiarity with terminology and abbreviations. *Id.* at ¶ 27(a). The Defendant apparently provides no guidance to execution personnel on this issue.

45.

Indiana's protocol sets out that the "injection team prepares two (2) sets of seven (7) syringes to be used during the execution." Exhibit 1 (ISP 0624). There is no indication that the contents of the syringes be marked on the syringes, which means that if a drug is erroneously placed in a syringe, the error is likely to go undetected and the drugs will be administered in the wrong order. Such lack of labeling is far below the appropriate medical standard of care and would never be permitted in the clinical context. Administration of the drugs in the wrong order may also result from the fact that each syringe is a separate unit that must be attached in series to the IV set up by hand. The protocol fails to guard against the possibility that the executioner might select the incorrect syringe, or to provide for monitoring of the inmate to ensure that such an error is immediately detected if it occurs, or to prescribe the steps to be taken if such a situation is detected.

46.

If the lethal drugs are administered in the wrong order a range of negative consequences may ensue. Several of the syringes are supposed to contain saline solution to be administered between drugs in order to flush the IV lines of all traces of the preceding agent. Of primary importance is

the fact that, if mixed with Pancurorium Bromide outside of the body, Sodium Pentothal will precipitate, i.e. solids will form in the solution, impairing or preventing delivery of the full dose of anesthetic agent. Hence, if error in the selection of syringes results in the introduction of Pancurorium Bromide before the line has been flushed with saline solution, inadequate anesthesia may result.

47.

Indiana's lethal injection protocol requires that the executioners who inject the lethal drugs into the IV set up be located in a room that is apart from the execution chamber where the inmate is placed on the gurney, separated by a window with a hole in it for the IV lines to pass through. Because of the distance between the inmate and the executioners that this procedure necessitates, extended IV tubing is required. The introduction of extra length and components to the iv set-up not only increases the number of sites where leakage may occur, see, Exhibit 4 at ¶ 27(e) (Declaration of Dr. Heath), but also increases the risk that the tubing may coil or kink.

48.

Even when properly placed initially, the tip of an IV catheter may migrate during the course of the execution so that it is outside of the vein at the time of the introduction of the anesthetic agent and infiltration occurs. See, Exhibit 4 at ¶ 27(g) (Declaration of Dr. Heath). Although the catheter appears to be securely and properly placed, too, the process of inserting it may weaken or damage the vein wall such that the vein ruptures when the administration of the lethal drugs begins. Id. at ¶ 27(h). This risk is increased by the fact that inexperienced, untrained personnel may exert excessive pressure on the syringe plungers, increasing the velocity of the administration of the drug and consequently the pressure that is placed on the vein walls Id. Indeed, excessive pressure on the plunger can lead to tearing or rupture of the vein even in the absence of damage caused by the initial insertion of the catheter. Id., at ¶ 27(I).

49.

Because of each of these potential problems and more, constant, close monitoring of the inmate's plane of anesthesia throughout the execution process by individuals who are properly trained and skilled in anesthesiology is indispensable. And yet, the Defendants' protocol fails to provide for any monitoring at all once the execution is underway, much less monitoring by personnel who have the requisite knowledge and experience to detect and rectify any problem that may arise.

(2)4 Even if Defendant's Execution Team Were Qualified to Administer IV Anesthesia, the Use of Pancurorium Bromide and the Physical Arrangement of the Execution Chamber Preclude Effective Monitoring

50.

Not only does Indiana's lethal injection protocol fail to provide for monitoring of the inmate by persons qualified in assessing anesthetic depth, it calls for a physical arrangement of inmate and executioners that would unnecessarily hinder effective monitoring even if it were attempted. As noted, the protocol requires that the executioners who inject the lethal drugs into the iv set-up be located in a room that is apart from the execution chamber where the inmate is placed on the gurney, separated by a window with a hole in it for the iv lines to pass through. The persons who control the administration of the drugs, then, are the furthest away of any execution chamber personnel and their line of sight to the inmate is impeded. The distance entirely precludes the close monitoring of the diagnostic signs of anesthetic depth that are constantly checked during surgical procedures.

51.

The announcement by the Attorney General contained in Doc. 63 Part III 1b that "the wheels of the gurney on which the condemned is to be placed have been removed. At the time of this writing, Woods has no further information regarding this claim. He does not know what the theory behind the claim is, whether any prior executions suffered problems relating to the wheels of the gurney, what other portions of the protocol will have to be altered in order to accommodate the change

and what the implications are for the potential that he will be subjected to unnecessary and needless pain. In previously filed protocols (Docs 1, 2 and 3), the condemned was to be placed on the gurney and secured in a place other than the execution chamber, then wheeled into the chamber. We do not know how he will be placed on the gurney, what measures will be used to secure him, or how his remains will be removed.

**WOODS WILL SUFFER IRREPARABLE HARM
IF A PRELIMINARY INJUNCTION IS NOT GRANTED**

52.

If the Defendant is not enjoined from executing him in accordance with Exhibit 1 (ISP 06-24), Woods will likely suffer irreparable harm. Being forced to endure excruciating pain during the execution process clearly constitutes irreparable harm. See, Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (holding that continued pain and suffering resulting from deliberate medical indifference is irreparable harm). As is clear from the foregoing, there is ample evidence that Defendants' proposed method of execution carries a significant and unacceptable risk that Woods will indeed suffer that harm. The threat of harm is both "real and immediate," and thus the situation is one that is "ripe for injunctive relief." See, Goff v. Harper, 60 F.3d 518, 521 (8th Cir. 1995). Moreover, Mr. Woods will have no retrospective remedy for the constitutional violation, as he will no longer be alive.

THE BALANCE OF HARMS STRONGLY FAVORS WOODS

53.

In contrast, the harm to the State and the Defendant that will result from the entry of a preliminary injunction is slight. The State undoubtedly has a strong interest in the prompt execution of its judgments. The delay resulting from granting the temporary relief sought herein, however, will have little adverse effect upon that interest. See Gomez v. U.S. Dist. Ct. for Northern Dist. of Ca., 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of

writ of mandate) (“The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.”). The balance of harms tips sharply in favor of entering a preliminary injunction.

GRANTING TEMPORARY RELIEF IS IN THE PUBLIC INTEREST

54.

Whether the State is executing its prisoners in a way that subjects them to an excruciatingly painful, torturous death is clearly a matter of vital public interest. The standards of decency and humanity in a society such as ours are gravely offended by such practices, and so it is affirmatively in the public interest to address and resolve the merits of the Woods’ claim in order to identify and put an end to unnecessary procedures that pose a risk of causing gratuitous suffering. Indeed, the citizens of the State of Indiana, through their elected representatives, have expressly acknowledged the importance of conducting executions as humanely as possible by changing the method from electrocution to lethal injection as a result of the belief that the latter reduces unnecessary suffering.

55.

There is now compelling evidence that Indiana’s lethal injection protocol creates a significant and unacceptable risk of, and on multiple occasions has actually resulted in, the infliction of unnecessary pain. As noted above, the claim does not become ripe for resolution until an execution is imminent but, if a preliminary injunction is not granted, the execution will necessarily take place before the issues can be adjudicated. In light of the importance of the questions involved, it is clearly in the public interest that temporary relief be granted in the instant case to solve this dilemma and permit a definitive determination of the merits to be made. “[T]he public interest only is served by enforcing constitutional rights and by the prompt and

accurate resolution of disputes concerning those constitutional rights. By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights." Cooey v. Taft, 2006 WL 1207982 at *6 (S.D.Ohio).

56.

Counsel for lead plaintiff, Norman Timberlake, counsel for Plaintiff Intervenor Lambert and counsel for defendant all represented to the Court, during a telephonic pre-trial conference, that the case could be tried, if necessary, during the summer of 07. That brief of a delay, given the irreparable harm Woods if one is not rendered, is not unreasonable.

CONCLUSION

57.

The purpose of this lawsuit is not to prevent the State from executing Woods. It is to prevent it from executing him in a manner that subjects him to excruciating pain and torture that is gratuitous and unnecessary and in violation of the Constitution. To avoid the risk that his execution will be performed in such a manner, Woods is entitled to relief under 42 U.S.C. § 1983. In order to allow him an opportunity to prove that entitlement, and to obtain an adjudication of the merits of his claim Woods respectfully requests that the Court issue a preliminary injunction preventing the Defendant from executing him by means of lethal injection under the protocol currently in effect in the State of Indiana.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing has been served electronically the following this 18th day of April, 2007:

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