

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT**

ELECTRONICALLY FILED

THOMAS CLYDE BOWLING, <i>et al.</i>	)	
	)	
	)	
	Plaintiffs)	CIVIL ACTION # 3:07-cv-32
	)	
v.	)	
	)	
SCOTT HAAS, <i>et al</i>	)	CAPITAL CASE
	)	
	)	
	Defendants)	
	)	

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION
FOR A PRELIMINARY INJUNCTION
BARRING DEFENDANTS FROM EXECUTING PLAINTIFF
RALPH BAZE ON SEPTEMBER 25, 2007**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the All Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. §2283, Plaintiff Baze respectfully requests a preliminary injunction barring Defendants from carrying out his execution until this Court has the opportunity to decide the merits of this case.

INTRODUCTION

In *Moore v. Rees*,¹ this Court said “it 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.” Despite this strong warning in *Moore*, after requesting an extension of time to file a reply to the Plaintiffs’ response to this Court’s show cause order, Defendants are now attempting to circumvent this Court’s jurisdiction by executing Baze before this Court can decide the merits of this case. Indeed, general counsel for the Governor has

¹ No. 3:06-cv-22 (E.D.Ky.) [Record No. 34].

essentially stated that it is playing a cat and mouse game with the judicial system: “We have followed appropriate procedures . . . **No court has prohibited us from proceeding.**”² Simply, the Governor’s office seemingly thinks it can ignore pending court cases and set an execution date at any point unless a court stops it. By implementing that approach here, Defendants are and will continue to attempt to circumvent this Court’s authority by carrying out executions as soon as it appears they will have to litigate the merits of a case. Because of Defendants’ actions, this Court’s stern warning in *Moore* should be put into action in this case through injunctive relief in aid of its jurisdiction to decide this case on the merits.

Although the All Writs Act should be invoked to preserve this Court’s jurisdiction to decide this case on the merits while Baze is still alive, it is not the only basis for granting a preliminary injunction. If this Court does not grant an injunction to preserve its jurisdiction, this Court must consider the right of access to the courts and the traditional factors for granting an injunction that apply when an injunction is not necessary to preserve the court’s jurisdiction. Because a preliminary injunction is warranted to protect Baze’s First Amendment right of access to the court, and because the traditional factors to consider in determining whether to grant a preliminary injunction favor Baze, an injunction should be granted on these grounds if not granted under the All Writs Act.

² See, Associated Press, *Public Defenders’ Claim Baze Death Warrant Premature*, Lexington Herald-Leader, Aug. 23, 2007) (exhibit 2) (spokesperson for the Attorney General’s Office stating, “Baze has exhausted all the appeals that he is entitled to”; General Counsel to Governor Fletcher stating, “We have followed appropriate procedure. . . . **No Court has prohibited us from proceeding**”) (emphasis added).

RELEVANT FACTS AND PROCEDURAL HISTORY

This action was originally filed in January 2007, but was dismissed for failure to exhaust administrative remedies. Shortly after the Kentucky Department of Corrections denied the grievance (after taking more time to do so than its policy and procedures allow), on May 22, 2007, Plaintiffs refilled this action. This Court promptly issued an order to show cause as to why this action should not be dismissed for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted. Plaintiffs promptly complied.

Despite the show cause briefing, the 20 days for Defendants to file a responsive pleading to the Complaint continued to run. Rather than timely respond, Defendants filed a motion for a sixty day extension of time to answer the complaint. This Court denied that request granting Defendants seven days to file an answer. It also ordered Defendants to file a reply to Plaintiffs response to this Court's show cause order. Defendants have filed an answer to the Complaint but further delayed the case by asking for an extension of time to file a reply on the show cause order.

On August 10, 2007, the Attorney General of Kentucky asked the Governor to schedule Baze's execution. Five days later, on August 15, 2007, Defendants filed their reply to the response to the show cause order. Fully aware of the litigation pending in this case, Governor Fletcher set Baze's execution for September 25, 2007.³ As of the filing of this pleading, this Court has not ruled on this Court's jurisdiction to decide the merits of this case or whether Plaintiffs have stated a claim upon which relief can be granted. In expectation that this Court will rule in favor of Plaintiffs on this and in light of the urgency created by Baze's impending execution, Plaintiffs will soon file a motion for judgment on the pleadings.

³ Exhibit 1 (Statement of Governor Fletcher accompanying his notice of intent to sign death warrant on Ralph Baze, which notes the pending litigation in this case but says he intended to disregard it by signing a death warrant).

GROUND FOR GRANTING A PRELIMINARY INJUNCTION

“A death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding.”⁴ Yet, that is exactly what the Commonwealth of Kentucky is attempting to accomplish by scheduling Baze’s execution despite a full awareness of this pending case. This circumvention of this Court’s jurisdiction and authority cannot be tolerated, particularly in light of the substantial issues raised in this case - - whether Defendants are about to violate federal law by injecting Baze and similarly situated death-sentenced inmates with controlled substances obtained and administered in violation of a federal statute.

Once substantial legal issues are raised, a petitioner is “entitled to a stay of execution to permit due consideration of the merits” if the claims cannot be resolved prior to the scheduled date of execution.⁵ Resolve means to carefully scrutinize colorable claims of violations of federal and state law.⁶ Because this Court has yet to even decide if it has jurisdiction over the action, it is unlikely that this Court will be able to scrutinize the claims in this case in the approximately 30 days that remain before Baze’s execution. Thus, this Court should invoke the All Writs Act to enjoin Baze’s execution so this Court maintains jurisdiction over this case as it relates to Baze and can issue merits rulings that can be applied to Baze.

The traditional test for granting a preliminary injunction also favors Baze. Irreparable injury is self-evident. The minimal amount of harm the Commonwealth of Kentucky may suffer from not carrying out the execution on September 25, 2007, is self-inflicted and outweighed by the harm to Baze and the harm to the judicial system if this Court’s ability to decide this case on

⁴ *Barefoot v. Estelle*, 463 U.S. 880 (1983).

⁵ *Id.* at 889.

⁶ See *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

the merits is circumvented by executing one of the parties. Thus, even aside from granting an injunction under the All Writs Act, an injunction is warranted under the traditional test.

Finally, because this action has been pending in this Court for nearly three months without an impending execution date, allowing Baze to be executed during the pendency of this litigation will deprive him of his First Amendment and due process rights of access to the courts. As discussed in more detail below, each of these reasons are grounds why this Court should issue a preliminary injunction barring Defendants from executing Baze on September 25, 2007.

I. A preliminary injunction under the All Writs Act is necessary to prevent this Court from circumventing this Court's jurisdiction by carrying out Baze's execution before this Court can rule on the merits of the case.

Because this Court is unlikely to be able to decide the merits of this case in the approximately 30 days that remain before his execution, a preliminary injunction under the All Writs Act is necessary to preserve the integrity of these proceedings and this Court's jurisdiction to decide this case (including deciding whether it has jurisdiction to reach the merits), and so this Court can enforce its judgment. The need for this Court to issue an injunction to preserve its jurisdiction distinguishes an injunction under the All Writs Act from other injunctions in that this Court can grant the injunction without evaluating the four factors applicable to traditional injunctions.⁷

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

⁷ 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 the traditional four fact test to determine whether to grant an injunction); *De Beers Consol Mines, Ltd. v. United States*, 325 U.S. 212, 219 (1945) (stating, in reviewing a death 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).

agreeable to the usages and principles of law.”⁸ The Supreme Court of the United States has interpreted the All Writs Act to allow federal courts to “avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.”⁹ 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.”¹⁰

The Anti-Injunction Act, 28 U.S.C. § 2283, serves as a check on the broad authority recognized by the All Writs Act. It recognizes and embraces a federal court’s ability to issue injunctive relief “where necessary in aid of its jurisdiction. . . .”¹¹ “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.”¹² Thus, in assessing the propriety of an injunction entered to stop a state action, 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 action 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.¹³ An injunction under these circumstances may be directed toward not only the

⁸ 28 U.S.C. §1651(a).

⁹ *United States v. New York Telephone Co.*, 434 U.S. 159, 172-73 (1977).

¹⁰ *Adams v. United States*, 317 U.S. 269, 273 (1942).

¹¹ 28 U.S.C. § 2283.

¹² *Burr & Forman v. Blair*, 470 F.3d 1019, 1027-28 (11th Cir. 2006) (internal citations omitted).

¹³ See, e.g., *Altantic 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.”); *Brother Records, Inc. v. Jardine*, 432 F.3d 939, 944-45 (9th Cir. 2005) (ruling that the purpose of the “in aid of jurisdiction” exception is “to

immediate parties to a proceeding (such as the Defendants in this case), but to “persons who, though not parties to the original action or engaged in any wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.”¹⁴ 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 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.”¹⁵ A preliminary injunction under the All Writs Act is necessary to preserve this Court’s jurisdiction, and to avoid disruption with the orderly resolution of litigation pending before this Court.

This suit was filed nearly three months before Baze’s execution date was set. The Governor of Kentucky was fully aware of this litigation when he set an execution date. Indeed, he mentioned it in a statement he released signing the death warrant, in which he referred to this litigation as “extraneous.”¹⁶ At the time the death warrant was signed, this case was proceeding in an orderly pace. This Court required Defendants to promptly file an answer when they had refused to do so within twenty days of service of the complaint. This Court also issued a show cause order, noting that while it appeared to this Court that it did not have subject matter jurisdiction and that the complaint did not state a claim upon which relief could be granted, counsel were permitted to convince this Court otherwise. Plaintiffs’ response to the show cause order seemingly persuaded this Court that it was at least arguable that it had jurisdiction and that relief could be granted on the merits for it issued an order for Defendants to reply. The order

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 the case”).

¹⁴ *New York Tel. Co.*, 434 U.S. at 174.

¹⁵ *Klay*, 376 F.3d at 1102.

¹⁶ See exhibit 1.

noted that this Court would benefit from hearing Defendants on the issue. Rather than promptly file a reply so that this Court would have adequate time to rule on the issue before an execution date, Defendants sought and obtained an extension of time that ended up meaning that its reply was filed after an execution date on Baze was requested and only a week before Baze's execution warrant was signed. As a result, a preliminary injunction under the All Writs Act is not only necessary to decide the merits of the underlying action, but also for this Court to decide this Court's jurisdiction over the entire suit. Thus, this Court must issue a preliminary injunction to avoid disruption with the orderly resolution of this case, which has been pending for nearly three months before an execution was requested and set.

II. Because the traditional equitable factors for granting a preliminary injunction favor Baze, this Court must issue a preliminary injunction barring his execution.

The United States Court of Appeals for the Sixth Circuit has articulated four factors that this Court must balance in determining whether to grant an injunction: 1) whether the movant would suffer irreparable injury without the injunction; 2) whether the public interest would be served by issuance of the injunction; 3) whether the issuance of the injunction would cause substantial harm to others; and, 4) whether the movant has a strong likelihood of success on the merits.¹⁷ In addition, when the movant seeks an injunction barring carrying out a death sentence, this Court must consider the extent to which the inmate has delayed unnecessarily in bringing the claim.¹⁸

These factors are not weighed equally. "Simply stated, more of one excuses less of the other."¹⁹ In other words, "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay." *Id.* If the

¹⁷ *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2006); *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc).

¹⁸ *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

¹⁹ *Michigan Coalition of Radioactive Materials Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, the movant only needs to establish “serious questions going to the merits.”²⁰ Finally, granting injunctive relief is particularly appropriate, where necessary, to preserve a court’s ability to render a meaningful decision on the merits.²¹ Balancing these factors establishes that Baze is entitled to a preliminary injunction until this Court can decide the merits of this case.

A. Moore will suffer irreparable injury if a preliminary injunction is not granted.

The first factor clearly favors granting a temporary restraining order and preliminary injunction. In evaluating the harm that will occur if a stay is not granted, this Court must consider: 1) the substantiality of the injury alleged; 2) the likelihood of its occurrence; and, 3) the adequacy of the proof provided.²² These factors clearly establish that Moore will suffer irreparable injury if an injunction is not granted.

Without this Court’s intervention, Baze will be executed on September 25, 2007, despite this claim proceeding forward on behalf of other plaintiffs in this action. There is little doubt that a prisoner facing execution will suffer irreparable injury if an injunction barring the execution is not granted. A possible remedial final judgment, entered after the execution, is meaningless to Baze. Numerous other courts have also recognized that death by execution easily satisfies the irreparable injury requirement.²³ This is particularly so when Defendants have

²⁰ *Id.* at 153-54.

²¹ *United Food & Comm. Workers’ Union, Local 1099 v. Southwest Ohio Reg. Trans. Auth.*, 163 F.3d 341, 348 (6th Cir. 1998).

²² *Michigan Coalition of Radioactive Materials Users*, 945 F.2d at 154; *Celebrezze v. Nuclear Regulatory Commission*, 812 F.2d 288, 290 (6th Cir. 1987).

²³ *See Wainwright v. Booker*, 473 U.S. 935 n. 1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if a stay is not granted); *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (holding, in regard to a death-sentenced inmate, that “the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident”); *Harris v. Johnson*, 325 F.Supp.2d 797 (S.D.Tex. 2004), *stay vacated on other grounds by*, 376 F.3d 414 (5th Cir. 2004); *Oken v. Sizer*, 321 F.Supp.2d 658 (D.Md.

created the urgency by disregarding the pendency of this case and asserting that it is meaningless by scheduling the execution.²⁴ Because, without an injunction, Baze will be executed before the merits of his case are decided, he has satisfied the irreparable injury prong for obtaining an injunction.

B. The public interest favors granting an injunction.

Granting Baze an injunction will serve the public interest. “Executions are unquestionably matters of great public importance,” for the public has an interest in the finality of a judgment and the carrying out of a legally imposed sentence.²⁵ This action, however, was filed approximately three months before an execution date was set and without any clear expectation that one would be set soon. So, while the public’s interest in finality is weighty, there is no indication that the public expected Baze’s execution before the conclusion of this litigation, or that there is great interest to the public in carrying it out before the conclusion of this case. Rather, the public’s interest is better served by allowing this litigation to continue with Baze remaining a party.

The public has an interest in making sure that lethal injection chemicals are not being obtained and administered in violation of federal statutes. This interest will be vindicated in this case even if Baze is executed, but the public interest surely is not served by allowing an execution to be carried out only to find out a short time later that a ruling of this Court establishes that the execution was carried out in violation of federal law.

2004), stay vacated on other grounds by, *Sizer v. Oken*, 542 U.S. 916 (2004); see also, *Commonwealth, et al. v. Picklesimer*, 879 S.W.2d 482, 484 (Ky. 1994) (holding that a Circuit Court finding that prohibiting a duly elected Property Valuation Administrator from taking office constituted “irreparable injury” was not “clearly erroneous”).

²⁴ See, Associated Press, *Public Defenders’ Claim Baze Death Warrant Premature*, Lexington Herald-Leader, Aug. 23, 2007) (exhibit 2) (spokesperson for the Attorney General’s Office stating, “Baze has exhausted all the appeals that he is entitled to”; General Counsel to Governor Fletcher stating, “We have followed appropriate procedure. . . . **No Court has prohibited us from proceeding**”).

²⁵ *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 981 (9th Cir. 1998)

Just as important, the public has an interest in ensuring that one branch of the government does not overstep the authority of another and that the executive branch is not allowed to moot out litigation by taking actions to eliminate a party before the litigation can be decided. Thus, the public's interest is also served by not allowing Defendants and the Governor of Kentucky to interfere with this Court's authority to decide this case, and essentially impose their judgment that this case is of no value, by carrying out Baze's execution before this Court can reach the merits.

C. Granting Baze an injunction will cause no substantial harm to third parties.

This prong has little if any bearing here. To the extent that this prong includes the public interest, it has been discussed immediately above. To the extent it involves harm to Defendants, it will be discussed in the section analyzing the lack of undue delay by Baze.

D. "Serious questions going to the merits" exist.

Because the irreparable injury prong and the public interest prong of the injunction standard weigh heavily in favor of Baze, he need not establish a strong likelihood of success on the merits. Rather, he needs to establish only that serious questions going to the merits exist. That is easily accomplished.

Two serious types of questions remain outstanding in this case. First, whether this Court has subject matter jurisdiction over the action and whether the complaint states a claim upon which relief can be granted. Second, whether Defendants are in violation of the Federal Controlled Substances Act and the Federal Food, Drug and Cosmetic Act. Each of these questions needs to be resolved on the merits before Baze's execution can be allowed to proceed.

Admittedly, this Court initially believed that it did not have subject matter jurisdiction over this case and that the complaint did not state a claim upon which relief can be granted. But,

after Plaintiffs filed a brief on the issue at this Court's request, this Court apparently changed its mind, or, at least, recognized that whether jurisdiction exists and whether relief can be granted on the claim is not as clear cut as it originally seemed. To aid this Court in deciding this difficult issue, this Court asked Defendants to file a brief on the issue. That brief was filed only nine days ago. This serious question on the merits of whether this case can go forward needs to be decided before Baze's execution can take place.

Once this Court rules that it has jurisdiction and relief can be granted, this case will have to be decided on the merits. There is no doubt that Defendants are not in compliance with the Controlled Substances Act (FCSA) or the Food, Drug and Cosmetic Act (FDCA). The FDA has not approved Kentucky's lethal injection chemicals for use in lethal injections, and Defendants admit that neither a doctor nor other licensed medical practitioner is injecting or prescribing the lethal injection chemicals. Thus, they are not in compliance with the statute, making the only legal issue whether the federal statutes apply to a Department of Corrections carrying out an execution.

There is nothing within FCSA or FDCA exempting lethal injections from the statute. The statutes, however, list other situations and entities that are exempt. The failure to mention lethal injections when exempting other situations suggests that Congress did not intend to exempt individuals carrying out lethal injections. Further, if Congress thought otherwise, it had plenty of time to amend the statutes. In 1985, the Supreme Court of the United States decided *Heckler v. Chaney*, which involved whether the FDA could be compelled to enforce its regulations against individuals carrying out lethal injections.²⁶ This case surely put Congress on notice that the FCSA and/or FDCA could apply to lethal injections. Yet, no action has been

²⁶ 470 U.S. 821 (1985).

taken in the twenty-two years since then to exempt lethal injections from those statutes. This suggests that Congress intended these statutes to apply to lethal injections.

Further evidence that the FCSA and FDCA apply to lethal injections is found in the Utah Regulations. Utah has a Controlled Substances Act that parallels the federal statute. Utah also, by law, injects sodium thiopental, a controlled substance. Recognizing that this could pose problems with the Controlled Substances Act, Utah Regulation R156-37-301 was promulgated, authorizing the Utah Department of Corrections to obtain a license to obtain controlled substances “for the conduct of execution by the administration of lethal injection under its statutory authority and in accordance with its policies and procedures.”²⁷ This suggests that Utah has recognized that lethal injections are covered by the Controlled Substances Act unless a regulation or statute is passed expressly exempting it. Kentucky has not done so, and even if it had, that would only exempt Kentucky from state law not the federal statutes at issue here.

Utah law and Congress’ failure to expressly exempt lethal injections from the FCSA and FDCA establish that these statutes apply to lethal injections. Defendants have admitted that they are not in compliance with these statutes, and even without their admission, the facts are clear that they are not in compliance. Thus, there is a serious question at issue here of whether they must comply and whether an execution can go forward when it is clear that it will be carried out in violation of at least one federal statute. This serious issue, for which Plaintiffs are likely to prevail, must be resolved before Baze is executed.

²⁷ Exhibit 3 (Utah Controlled Substances Act Rules).

E. Baze has not unduly delayed in filing this action and any harm to Defendants is of their own doing.

Any inquiry into harm to a party by the timing of the filing of a suit or by enjoining an execution must be analyzed not just based on how many days the litigation was filed before the scheduled execution but also in light of the posture of the case when the litigation was filed. As an equitable remedy, it also must consider Defendants' culpability in creating a need for the preliminary injunction for Defendants should not be able to use self-inflicted harm to prevent a preliminary injunction. Here, the posture of the case when the litigation was filed and Defendants' culpable conduct prevent Defendants from arguing they will be harmed by the grant of a preliminary injunction.

This action was dismissed in January 2007 for failure to exhaust administrative remedies. It would have been refiled shortly thereafter if not for Defendants taking approximately three months to deny the prison grievance and the appeals of it (an amount of time that violates Defendants' internal policies and procedures). It was refiled on May 22, 2007, without any impending execution date or indication that one would be set in the near future. Twenty days expired without an answer or responsive pleading. Only after this Court ordered Defendants to respond that an answer was filed, Defendants' reply was filed - - substantially later than originally ordered by this Court. That being because counsel for Defendants claimed their caseload was so high that it could not respond any earlier. Yet, just before a reply was filed by Defendants, an execution warrant on Baze was requested. That warrant was signed two days ago. This establishes that any delay in deciding this case was caused by Defendants and that an execution date has been set in an attempt to circumvent this Court's jurisdiction.

As Governor Fletcher stated in expressing his intent to sign a death warrant, the Governor was fully aware of this litigation and viewed it as “extraneous.”²⁸ And today, the Governor’s general counsel stated that it was appropriate to sign the death warrant because “no court has prohibited us from proceeding.”²⁹ In essence, this means that Defendants and the Governor do not care about pending litigation; instead, they focus solely on whether there is a court order prohibiting the issuance of an execution warrant. This affirmative action of setting an execution date despite this case and then flaunting this Court by saying it could do so because the court has not prohibited it from doing so proves that Defendants have “unclean hands” and prevents them from saying they will be harmed by the issuance of a preliminary injunction barring Baze’s execution on September 25, 2007. It will also only preserve the status quo that existed when this action was filed three months ago - - no execution dates pending. Thus, Baze did not unduly delay in the filing of this action, and any harm to Defendants from an injunction is self-inflicted harm from which it cannot benefit. Thus, this Court should rule that the unduly delay prong and Defendants’ culpable conduct favor granting a preliminary injunction.

F. Conclusion

Each of the traditional factors for granting a preliminary injunction favors Baze. Should this Court think otherwise, a preliminary injunction is not prohibited. It is not a matter of counting the factors to see which way they fall, but instead is a balancing test. Balancing these factors, particularly in light of Defendants’ actions delaying this case, in setting an execution date to moot out the litigation with respect to Baze, and in flaunting the court by saying it has not prohibited it from setting an execution date so they have done so, lead to one conclusion - - the equities are in Baze’s favor. Thus, if this Court does not issue an injunction under the All Writs

²⁸ Exhibit 1.

²⁹ Exhibit 2.

Act, it should issue a preliminary injunction barring Baze's execution based on the traditional test for determining whether to grant a preliminary injunction.

III. The denial of a preliminary injunction will violate Baze's First Amendment and due process right of access to the courts.

If this Court does not grant Baze a temporary injunction, he will be denied his First Amendment and due process right of access to the courts. Baze filed this suit approximately three months ago without an execution date only to be sandbagged by the scheduling of his execution shortly before this Court could resolve the case on the merits. At the time of filing and up until today, no impediments existed to the speedy resolution of the merits of Baze's claim. Unless this Court grants a preliminary injunction, Baze's execution date could bar his due process and First Amendment rights of access to the courts in this case.

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.³⁰

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.³¹ That access to the courts cannot be accomplished when this Court has one month to give careful scrutiny to Baze's claim. By scheduling Baze's execution despite full knowledge of the procedural posture of this suit, Defendants are attempting to truncate and negate these proceedings. Not granting a preliminary

³⁰ *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

³¹ *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

injunction will deny Baze his First Amendment and due process right of access to the courts. To preserve a death row inmates' right of access to the courts in general, and Baze's right of access to the courts in this particular case, this Court must grant a preliminary injunction that will remain in effect until it can reach the merits of Baze's claim.

REQUEST FOR RELIEF

Ralph Baze respectfully requests that this Court preserve its jurisdiction over this case that has been pending for three months without an execution date by granting a preliminary injunction under the All Writs Act enjoining Defendants from executing Baze on September 25, 2007.

In the alternative, Baze requests that this Court grant a preliminary injunction under the traditional factors for determining to grant a preliminary injunction.

As a further alternative, Baze requests that this Court grant a preliminary injunction to protect his First Amendment and due process rights of access to the courts.

RESPECTFULLY SUBMITTED,

/s/ David M. Barron

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August 24, 2007.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Court by using the CM/ECF system, on this 24th day of August, 2007.

/s/ David M. Barron

COUNSEL FOR Ralph Baze