

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

**ELECTRONICALLY FILED**

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BRIAN KEITH MOORE,	)	
	)	
and	)	
	)	
JEFFREY LEONARD	)	
Plaintiffs	)	CIV. ACTION # 3:06-cv-22
	)	
v.	)	<b>CAPITAL CASE</b>
	)	
JOHN D. REES,	)	
Commissioner,	)	
Kentucky Department of Corrections,	)	
Frankfort, Kentucky	)	
	)	
THOMAS SIMPSON, Warden	)	
Kentucky State Penitentiary	)	
Eddyville Kentucky,	)	
	)	
SCOTT HAAS	)	
Medical Director for the	)	
Kentucky Department of Corrections	)	
	)	
ERNIE FLETCHER,	)	
Governor of the Commonwealth	)	
of Kentucky	)	
	)	
and,	)	
	)	
UNKNOWN EXECUTIONERS,	)	
	)	
Defendants.	)	

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**RALPH BAZE'S EMERGENCY MOTION TO INTERVENE  
AS PLAINTIFF-INTERVENOR**

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Under Fed. R. Civ. P. 24(b), Ralph Baze hereby moves this Court for leave to intervene as a plaintiff in this action. As the attached intervenor complaint establishes, Baze shares a common legal question with Brian Keith Moore and Jeffrey Leonard's complaint: whether the implementation of Kentucky's lethal injection procedure and chemicals will subject him to an unreasonable risk that he will suffer cruel and unusual punishment. Because this case is still in its early stages, allowing Baze to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties. In addition, neither the failure to exhaust administrative remedies nor res judicata prevents this Court from considering Baze's challenge to the chemicals and procedures used in Kentucky lethal injections. Thus, this Court should permit Baze to intervene in this action as it did with Leonard.

Because Baze will likely receive an execution date before Moore and Leonard, Baze requests expedited review of his motion to intervene.

The grounds for this Motion are set forth in the Memorandum below.

#### **MEMORANDUM IN SUPPORT**

Ralph Baze should be permitted to intervene in this action because he is asserting an identical claim to that raised by Moore and Leonard and is raising his claim in a timely fashion. Fed.R.Civ.P. 24(b), permits intervention upon a timely application that establishes that the intervening party's claim shares a question of law or fact with the original parties and intervening will not substantially impair the rights of the original parties to the pending action. Plaintiff Brian Keith Moore, a Kentucky death sentenced inmate, filed this action under 42 U.S.C. §1983 for violations and threatened violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth

Amendments to the United States Constitution. Four months later, this Court allowed Jeffrey Leonard to intervene. Baze is a true party in interest because he is similarly situated, asserts the same cause of action, and makes the same arguments as Plaintiffs Moore and Leonard, with the exception of compromised veins. *See* Intervenor Baze's Proposed Complaint (attached).

Specifically, Baze argues that the Commonwealth's current lethal injection procedures, including the chemicals Defendants plan to inject and the procedures for injecting the chemicals, are unconstitutional under both the Eighth and Fourteenth Amendments. Like Moore and Slaughter, he also challenges Defendants' lack of adequate life-preserving equipment and personnel if a stay of execution is granted after the first or second chemical is injected, as well as the constitutionality of electrocution. Because these are the same claims presented by Moore and Leonard, the commonality requirement is satisfied. This motion is also being made in a timely fashion and will not unduly delay or prejudice the adjudication of the rights of the other parties. Finally, neither exhaustion of administrative remedies nor *res judicata* poses an obstacle to this Court's authority to allow Baze to intervene.

**A. Baze satisfies the requirements for permissive intervention laid out in Fed. R. Civ. P. 24(a) (2).**

Rule 24 (b) of the Federal Rules of Civil Procedure allows a party to intervene if three requirements are satisfied: 1) the application to intervene is timely; 2) the applicant's claim or defense and the main action have a question of law or fact in common; and, 3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. For the reasons discussed below, each of these requirements is satisfied.

**1. Baze's application is timely.**

In determining whether Baze's motion to intervene is timely, this Court should consider the extent to which this case has progressed and how quickly after the action was initiated Baze moved to intervene. Moore filed this action approximately nine months ago. At the end of August, this Court allowed Leonard to intervene. No action has occurred in this case since then. Currently, this case remains in its infancy as the pro se clerk's office considers numerous discovery motions. Thus, the current status of this case will not be impacted by allowing Baze to intervene - - a request that he is making less than a week after the Kentucky Supreme Court decided his case, thereby removing any impediment to Baze joining this action. The expedience in which Baze has moved to intervene and the lack of progression of this case means that Baze's motion to intervene is timely.

**2. Baze's claim and the main action have a question of law or fact in common.**

As this Court recognized in permitting Leonard to intervene, the commonality requirement for permissive intervention may be satisfied where the legal question involved is the same, notwithstanding factual differences between the parties. Like Leonard, Baze shares a common legal question with Moore's complaint: whether the implementation of Kentucky's lethal injection procedure will subject him to an unreasonable risk that he will suffer cruel and unusual punishment and whether Kentucky's life-saving equipment is sufficient to maintain life if a stay of execution is granted after the first or second lethal injection chemical is administered. Baze thus satisfies the commonality requirement for permissive intervention.

**3. Intervention by Baze will not unduly delay or prejudice the adjudication of the rights of the original parties.**

Allowing Baze to intervene will not “unduly delay or prejudice the adjudication of the rights of the original parties.”<sup>1</sup> This case remains in its early stages as this Court has yet to rule on numerous discovery motions. Admittedly, mandatory disclosures under Fed.R.Civ.P. 26, responses to request for production of documents, interrogatories, and admissions have been provided, but this should have no impact on this Court’s decision to allow Baze to intervene. Much of these initial discovery methods were undertaken prior to this Court’s ruling allowing Leonard to intervene, and Baze does not intend to file any additional discovery requests. Further, Baze will likely receive an execution date prior to Moore or Leonard. For these reasons, neither the current Plaintiffs nor the current Defendants will suffer any delay or prejudice from Baze intervening in this action. Rather, allowing Baze to intervene will further the interests of all parties and this Court by not forcing Baze to duplicate efforts by filing a separate lawsuit. Accordingly, the unduly delay and prejudice analysis for permissive intervention favors allowing Baze to intervene in this action.

**B. Administrative Remedies**

Baze has not exhausted his administrative remedies. However, this should not affect this Court’s decision on his intervention for three reasons. First, exhausting administrative remedies is not a requirement to intervene. As this Court ruled in the June 13, 2006 order in Moore’s case, there is nothing suggesting that the Prison Litigation Reform Act overrules the Federal Rules of Civil Procedure. Thus, since the Federal Rules of Civil Procedure do not mention exhaustion of administrative remedies in the context of

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<sup>1</sup> Fed. R. Civ. P. 24(b).

intervention, doing so is not a prerequisite to intervening in a lawsuit. Second, Baze is dealing with prospective injuries that cannot be remedied after they occur. Third, exhausting administrative remedies should be excused because there is no adequate corrective process for doing so. Both Moore and Leonard have filed a grievance with the prison. Their grievances were rejected as non-grievable because it involved a statute. Thus, there is no adequate process for grieving this claim through the inmate grievance system. If Baze filed a grievance, it would be treated in the same way. Thus, there is no relief that can be afforded through the administrative grievance process, and therefore there is no available administrative remedy to exhaust. Finally, this Court allowed Leonard to intervene before he exhausted administrative remedies. For these reasons, Baze should not be required to exhaust his administrative remedies in order to intervene in this action.

**C. Res judicata does not prevent this Court from exercising jurisdiction.**

By prohibiting Baze from deposing or otherwise questioning the execution team, the state courts deprived Baze the opportunity to discover information that was necessary to fully prepare and litigate the issues concerning the chemicals and procedures Defendants intend to use to carry out his execution. This prevents the application of res judicata in this case.

Res judicata does not apply where the losing party in the first decision did not have a full and fair opportunity to litigate the claim or issue.<sup>2</sup> This includes situations where a plaintiff was denied sufficient discovery, which has the effect of burdening the

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<sup>2</sup> *Allen v. McCurry*, 449 U.S. 90 (1980).

plaintiff's ability to prepare his or her case.<sup>3</sup> When "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," redetermination of issues is warranted.<sup>4</sup> Here, there are substantial reasons to doubt the quality, extensiveness, or fairness of the procedures used in the Kentucky state courts to adjudicate Baze's lethal injection claims.

The state courts prohibited Baze from deposing or otherwise examining the execution team members. As a result, at the state court hearing, both Baze and the court were required to rely on representations made by counsel for Defendants and other individuals who neither participate in carrying out the execution nor are physically present during crucial stages of the execution process. These representations included statements about the qualifications and experience of the execution team, what happened in past executions, and what will happen at future executions. The representations also include the responsibilities of individual members of the execution team. Four days ago, the Kentucky Supreme Court upheld the lower court's ruling. By doing so, the Kentucky Supreme Court made it clear that it was not going to require a full and fair opportunity to litigate the constitutionality of the chemicals and procedures Kentucky uses in lethal injections.

As recent lethal injection litigation in Missouri has proven, representations from attorneys and corrections personnel who are not on the execution team is no substitute for questioning the execution team members and can be the difference between prevailing and losing on a challenge to the chemicals and procedures used in lethal injections.

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<sup>3</sup> *West v. Ruff*, 961 F.2d 1064, 1066 (2d Cir. 1992) (citing the lack of sufficient discovery as one of the reasons why the plaintiff lacked a full and fair opportunity to litigate his claim in state court).

<sup>4</sup> *Montana v. United States*, 440 U.S. 147, 164 n. 11 (1979).

In *Taylor v. Crawford*,<sup>5</sup> after hearing testimony from Dr. Heath and Dr. Dershwitz (two experts that testified in the state court lethal injection litigation), a federal district court judge in Missouri upheld Missouri's lethal injection procedures and chemicals - - the same chemicals that are used in Kentucky.<sup>6</sup> On remand from the Eighth Circuit to conduct a more thorough hearing, a Missouri federal district court judge allowed interrogatories of members of the execution team and an anonymous deposition of one of the members of the execution team.<sup>7</sup> The information learned from the Missouri execution team proved that the previously made representations about what would happen during an execution are not what were actually occurring.

At least some members of the execution team had not seen a written execution protocol and were not fully aware of their responsibilities.<sup>8</sup> In addition, deviations from the protocol were occurring on a regular basis and members of the execution team were found to be not as qualified as the Missouri Department of Corrections had held them out to be.<sup>9</sup> Thus, it quickly became clear that what was believed to be occurring during an execution that was considered constitutional by a Missouri federal court judge was merely a theoretical plan that was not taking place - - a fact that only became known because the judge allowed discovery of the execution team. Relying on the information obtained from the execution team members, the federal judge in Missouri ruled that Missouri's lethal injection procedures create an unnecessary risk of pain and suffering in violation of the Eighth Amendment to the United States Constitution.<sup>10</sup> Thus, a

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<sup>5</sup> No. 2:05-cv-04173 (W.D. Mo., order dated, June 26, 2006) (attached).

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 8-10.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 13.



constitutional procedure became unconstitutional because of information that was obtained only by examining the execution team. The same thing could happen here if Baze is given the opportunity to examine the execution team members, which has also permitted in California, Louisiana, and Maryland.

In addition to not being able to examine the members of the execution team, recent information out of California and North Carolina showing that the testimony of Dr. Dershwitz - - the only expert that testified on behalf of Defendants in the state litigation - - was misleading, inaccurate, and possibly intentionally so casts substantial doubt on the reliability of Dr. Dershwitz's testimony,<sup>11</sup> the only medical testimony that contradicted the evidence Baze presented in state court. The recent developments which discredit Dr. Dershwitz' testimony and the state court's refusal to allow Baze to depose or otherwise examine the execution team members create "a reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation."<sup>12</sup> As a result, the state court's adjudication of Baze's claims was "inadequate for ascertainment of the truth," making it this Court's "duty to disregard the state findings and take evidence anew."<sup>13</sup>

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<sup>11</sup> As discussed in Bowling's intervenor complaint, toxicology analysis results from individual executed in North Carolina after the state court trial in Bowling's lethal injection case that were conducted to prove Dr. Dershwitz's conclusions have done the exact opposite by proving that the amount of sodium thiopental in the condemned inmates body was not enough to prevent the inmate from feeling pain. In addition, California execution logs prove that inmates do not cease breathing within a minute of the injection of sodium thiopental as Dr. Dershwitz alleges.

<sup>12</sup> *Montana v. United States*, 440 U.S. at 164 n.11.

<sup>13</sup> *Townsend v. Sain*, 372 U.S. 239, 316 (1963) (holding that where a hearing is "seriously inadequate for ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew").

### **Conclusion**

The three requirements for permissive intervention - - a timely request to intervene in a case where the intervenor's claim and the main action share a question of law or fact and intervention will not unduly delay or prejudice the rights of the parties - - are satisfied here. Baze's motion to intervene is being filed four days after the Kentucky Supreme Court affirmed the denial of his claim, thereby affirming the fact that he would not receive a full and fair opportunity to litigate his claims in state court. As this Court recognized in allowing Leonard to intervene, Baze's complaint shares a common legal action with Moore's complaint. And, because this case remains in its early stages with discovery issues not having been resolved and no action beyond discovery have taken place, none of the parties to the main action will be prejudiced by allowing Baze to intervene. Thus, the requirements for permissive intervention are satisfied. The failure to exhaust administrative remedies has no impact on this Court's authority to allow Baze to intervene. Because Baze was not allowed to depose or otherwise question the execution team members and new evidence casts doubt on the only medical testimony presented by Defendants in state court, res judicata also does not bar this Court from allowing Baze to intervene in this case. Thus, Baze requests that this Court grant his motion for permissive intervention under Fed.R.Civ.P. 24(b).

RESPECTFULLY SUBMITTED,

/s/ David M. Barron

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COUNSEL FOR RALPH BAZE

November 27, 2006.

**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 27<sup>th</sup> day of November 2006 and that a copy of the foregoing document was personally delivered to Marguerite Thomas at 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky, 40601 on the same day.

/s/ David M. Barron

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Counsel for Ralph Baze