IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ERIC ALLEN PATTON, Plaintiff, vs. JUSTIN JONES, in his capacity as Director Oklahoma Department of Corrections; MARTY SIRMONS, in his capacity as Warden, Oklahoma State Penitentiary; and UNKNOWN EXECUTIONERS, in their capacities as Employees and/or Agents of the Oklahoma Department of Corrections, Defendants.	)	**Case No. CIV-06-591-F**

MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendants Justin Jones and Marty Sirmons respectfully move the Court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted because Plaintiff has previously brought this same Eighth Amendment challenge to Oklahoma's lethal injection protocol before the Oklahoma Court of Criminal Appeal. The Court of Criminal Appeals denied Plaintiff's Eighth Amendment claims on the merits. Plaintiff's second attempt to argue the same claims is barred by the doctrines of issue preclusion, claim preclusion and laches.[1]

[1] Defendants respectfully reserve the right to assert a statute of limitations defense at the summary judgment stage. Based on the Court's rulings in *Anderson v. Jones*, No. CIV-05-825-F, it would appear that a statute of limitations defense in the context of these proceedings requires examination of factual issues that go beyond the pleadings.

BRIEF IN SUPPORT

INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff's First Amended Complaint seeks to enjoin Oklahoma's lethal injection protocol from being applied to Plaintiff on the grounds that the protocol, as it currently exists, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. (Doc. No. 4-1, Amend. Comp. ¶¶ 2, 76, 79.) Plaintiff also alleges that the procedures and protocols of the Oklahoma Department of Corrections are arbitrary and capricious in violation of the Fifth and Fourteenth Amendments. (*Id.* ¶¶ 2, 76.) Plaintiff named Justin Jones, the Director of the Oklahoma Department of Corrections, and Marty Sirmons, Warden of the Oklahoma State Penitentiary, as Defendants. While not specifically referencing *Ex parte Young*, Plaintiff relies on the "*Ex parte Young* fiction"[2] to seek equitable and injunctive relief against the State of Oklahoma.

On May 30, 2006, Plaintiff requested the Oklahoma Court of Criminal Appeals to stay his execution. Plaintiff "argue[d] that Oklahoma's lethal injection protocol violates the Eighth Amendment prohibition against cruel and unusual punishment." (Order, Ex. 1 at 2.) The Court of Criminal Appeals reached the merits of Plaintiff's Eighth Amendment challenge and denied the challenge. The Court "examined Oklahoma's lethal injection protocol as it exists today and found it did not constitute cruel and unusual punishment." (*Id.*)

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006). Plaintiff just finished litigating his Eighth Amendment claims in the Court of Criminal Appeals. He should not be permitted to

[2] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997).

litigate his claims anew in this Court. "The federal courts can and should protect States from dilatory or speculative suits . . . ." *Hill*, 126 U.S. at 2104 (emphasis added).

HISTORY OF LITIGATION BETWEEN THE PARTIES[3]

Plaintiff has pursued at least four avenues of relief in which he could have raised the challenges to Oklahoma's lethal injection protocol that he raises here. First, Plaintiff had a direct appeal of his criminal conviction and sentence. *Patton v. State*, 973 P.2d 270 (Okla. Crim. App. 1998), *cert. denied*, 528 U.S. 939 (1999). Second, Plaintiff sought collateral relief in an application for post-conviction relief. *Patton v. State*, 989 P.2d 983 (Okla. Crim. App. 1999). Third, Plaintiff pursued a *habeas corpus* action against the Warden of Oklahoma State Penitentiary. *Patton v. Mullin*, 425 F.3d 788 (10th Cir. 2005), *cert. denied*, *Patton v. Sirmons*, 126 S.Ct. 2327 (2006). In all of these proceedings Plaintiff could have, but chose not to, challenge the manner in which his lethal injection sentence would be carried out. Just recently, Plaintiff did raise such a challenge in the Oklahoma Court of Criminal Appeals.

On May 30, 2006, Plaintiff filed a pleading entitled "Objection to Setting of Execution Date" in the Court of Criminal Appeals. (Objection, Ex. 2.) The Court of Criminal Appeals construed this as a request for a stay of execution. (Order, Ex. 1.) Plaintiff's request was based on two grounds. First, Plaintiff sought a stay on the grounds that Oklahoma's lethal injection protocol constituted cruel and unusual punishment in violation of the Eighth Amendment. (Objection, Ex. 2 at 1.) Second Plaintiff urged a stay because the protocol was being challenged in this Court in *Anderson*

[3] The procedural history discussed in this section is all a matter of public record. Exhibits 1-3 have been certified by the Court of Criminal Appeals. The Court can take judicial notice of each of these pleadings because they are matters of public record. *See Tal v. Hogan*, __ F.3d __, 2006 WL 1775371, *14 n.24 (10th Cir. June 29, 2006). Defendants attachment of these exhibits does not require this Motion to Dismiss to be converted to a Motion for Summary Judgment. *Id.*

v. Jones, No. CIV-05-825-F (W.D. Okla.). (Objection, Ex. 2 at 13.) Plaintiff provided a detailed description of the protocol to the Court of Criminal Appeals. (Objection, Ex. 2 at 3-8) Plaintiff also provided detailed factual information supporting his contention that the protocol was cruel and unusual, including the affidavit of a purported expert witness opining on Oklahoma's protocol. (Objection Attach. A-H, Ex. 2.)

Plaintiff later filed a reply clarifying that his request for a stay was not based solely on his intention to file this lawsuit. Rather, he was making a direct Eighth Amendment challenge to the protocol in the Court of Criminal Appeals:

> Mr. Patton's filed civil rights action CIV-06-591-F is not the single basis provided to this Court as a reason not to set an execution date. The underlying Eighth Amendment violation of the Oklahoma Department of Corrections is the reason why this Court should delay setting an execution date.

(Reply, Ex. 3 at 2.) Elsewhere in his reply, Plaintiff stated "Mr. Patton is asking this Court to not set an execution which is in violation of the Eighth Amendment until the Department of Corrections amends its lethal injection protocol." (*Id.* at 4.) Plaintiff's final word on the matter was "Until the State of Oklahoma and the Department of Corrections can show this Court it will comply with the Eighth Amendment this Court should not set an execution date which it knows will violate the Constitutional guarantees against cruel and unusual punishment." (*Id.* at 6.)

The Court of Criminal Appeals construed Plaintiff's Objection as a request for stay of execution: "Order Denying Request for Stay of Execution and Setting Execution Date." (Order, Ex. 1.) The Court of Criminal Appeals acknowledged that Plaintiff "argue[d] that Oklahoma's lethal injection protocol violates the Eighth Amendment prohibition against cruel and unusual punishment." (Order, Ex. 1 at 2.) The Court of Criminal Appeals reached the merits of Plaintiff's Eighth Amendment challenge. Detailed findings of fact and conclusions of law regarding Plaintiff's

Eighth Amendment challenge were unnecessary because the Court had just ruled on this same issue in *Malicoat v. State*, 2006 OK CR 25, ___ P.3d ____, 2006 WL 1672937 (Ex. 4). In that opinion, the "Court examined Oklahoma's lethal injection protocol as it exists today and found it did not constitute cruel and unusual punishment." (Order, Ex. 1 at 2.) The Court of Criminal Appeals specifically reached the merits of *Malicoat's* Eighth Amendment challenge (Ex. 4 at 1) and, by incorporating the *Malicoat* decision, reached the merits of Plaintiff's Eighth Amendment challenge as well. Plaintiff's request for a stay was denied on the merits.

ARGUMENT

I. Plaintiff's entire lawsuit is barred by the doctrine of *res judicata*.

"The doctrine of *res judicata*, or claim preclusion, will prevent a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005).

> Res judicata is "central to the purpose for which civil courts have been established," namely "the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 . . . (1979). "[A] party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion." Geoffrey C. Hazard, *Res Nova in Res Judicata*, 44 S. Cal. L.Rev. 1036, 1043 (1971). This bar protects against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54 . . ..

Park Lake Resources Ltd. Liability v. U.S. Dept. Of Agr., 378 F.3d 1132, 1135 (10th Cir. 2004).

Claim preclusion applies when the following three elements are met: "(1) both cases must involve the same parties or their privies, (2) the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first suit, and (3) the first suit must have resulted in a final judgment on the merits." *Century Indem. Co. v.*

Hanover Ins. Co., 417 F.3d 1156, 1158 (10th Cir. 2005). If these factors are present, the claim is precluded unless the party against whom the doctrine is invoked can establish that the previous adjudication did not provide a "full and fair opportunity" to litigate the claim. *MACTEC, Inc.*, 427 F.3d at 831, n.6. To the extent that this Court will look to Oklahoma law to determine the preclusive effect that Oklahoma law would assign to the Court of Criminal Appeal's Order, *Reed v. McKune*, 298 F.3d 946, 949 (10th Cir. 2002), Oklahoma applies these same elements to claim preclusion. *Feightner v. Bank of Okla., N.A.*, 65 P.3d 624, 629 (2003) ("Claim preclusion bars relitigation by parties or their privies of issues which either were or could have been litigated in a prior action which resulted in a prior judgment on the merits. In other words, where the two causes of action are the same the first judgment is a complete bar to the second action."); *State ex rel. Okla. Bar Ass'n v. Giger*, 93 P.3d 32, 38 (Okla. 2004) ("[C]laim preclusion . . . teaches that a final judgment on the merits of an action precludes the parties from re-litigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action."); *Veiser v. Armstrong*, 688 P.2d 796, 800, n. 9 (Okla. 1984) ("Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action").

All four of Plaintiff's opportunities to bring this challenge involved the same parties or their privies. Plaintiff's criminal appeal, post-conviction proceedings, and request for a stay of execution before the Oklahoma Court of Criminal Appeals involved Plaintiff and the State of Oklahoma. Plaintiff's *habeas corpus* action and the present action both involve Plaintiff and the State of Oklahoma as the real party in interest. Although Plaintiff's suit is technically brought against the Warden of Oklahoma State Penitentiary and the Director of the Oklahoma Department of Corrections, Plaintiff seeks only equitable relief. (Doc. No. 4-1, Amend. Compl. ¶ 2.) Plaintiff

employees the *Ex parte Young* fiction to side step the State's Eleventh Amendment immunity. Yet, in practical reality, Plaintiff is seeking equitable relief against the State.[4] *Cf. Brennan v. Stewart*, 834 F.2d 1248, 1252, n. 6 (5th Cir. 1988) "[A]lthough not usually conceptualized as *Ex parte Young* cases, most of the huge number of habeas claims in the federal courts under 28 U.S.C. § 2254 are effectively suits against the states. These suits pass muster under the Eleventh Amendment because the habeas theory of a civil suit against the bad jailer fits perfectly with the *Ex parte Young* fiction.").

Yet, even if this Court determined that, for purposes of *res judicata* analysis, the State of Oklahoma and Defendants in this lawsuit were not the same parties, Defendants are still in close privity with the State of Oklahoma and any injunction issued in this case would operate against the State. "The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right. Thus, privity depends mostly on the parties' relationship to the subject matter of the litigation." *Century Indem. Co. v. Hanover Ins. Co.*, 417 F.3d 1156, 1159 (10th Cir. 2005) (citations and quotations omitted). The interests of Defendants and the State of Oklahoma are the same. Plaintiff only named Defendants because he cannot name the State of Oklahoma as a Defendant. For *res judicata* purposes, the parties in this litigation and Plaintiff's prior litigation are the same.

The second element is also met. In discussing the meaning of "claim" for purposes of *res judicata*, Oklahoma looks to the case of *Retherford v. Halliburton Co.*, 572 P.2d 966 (Okla. 1977), to supply that definition. *See, e.g.*, *State ex rel. Okla. Bar Ass'n v. Giger*, 93 P.3d 32, 38 (Okla. 2004); *Miller v. Miller*, 956 P.2d 887, 897-98 (Okla. 1998). *Retherford* defined claim as

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[4] The State of Oklahoma in no way intends this argument to waive its Eleventh Amendment immunity. Defendants are merely pointing out that *Ex parte Young* is a legal fiction designed to side step the Eleventh Amendment and obtain equitable relief that would, in fact, bind the State even though the State is not an named party.

> a legal concept which has no separate existence in the natural order of things. It is what the makers of legal policy, the Legislature and the courts, say it is. It exists to satisfy the needs of plaintiffs for a means of redress, of defendants for a conceptual context within which to defend an accusation, and of the courts for a framework within which to administer justice.

Retherford, 572 P.2d at 968. The *Retherford* opinion provides a greater explanation of what is meant by this definition. According to the Oklahoma Supreme Court, "cause of action" refers to "the transaction, occurrence or wrongful act from which the litigation arises." *Id*. Oklahoma "is committed to the wrongful act or transactional definition of a 'cause of action.'" *Id.* at 969.

Plaintiff's constitutional challenge to the protocol was presented to the Oklahoma Court of Criminal Appeals. While Plaintiff did not specifically raise his claims that the procedures and protocols of the Oklahoma Department of Corrections are arbitrary and capricious in violation of the Fifth and Fourteenth Amendments, those claims arise out of the same "transaction, occurrence or wrongful act." Those claims are part of the same cause of action as his Eighth Amendment claim for purposes of Oklahoma's *res judiciata* analysis. However, even if they were not, the fact remains that all of Plaintiff's claims could have and should have been raised in his request to stay execution before the Court of Criminal Appeals. Plaintiff also could and should have raised his claims in the context of his criminal appeal, post-conviction proceedings, and *habeas* lawsuit.

Finally, each of Plaintiff's four prior adjudications reached a judgment on the merits. Plaintiff's criminal appeal was finalized in Oklahoma's Court of Criminal Appeals and the Supreme Court denied certiorari. *Patton v. State*, 973 P.2d 270 (Okla. Crim. App. 1999), *cert. denied*, 528 U.S. 939 (1999). Plaintiff's post-conviction application was finalized by the Court of Criminal Appeals. *Patton v. State*, 989 P.2d 983 (Okla. Crim. App. 1999). Plaintiff's *habeas* lawsuit was finalized in the Tenth Circuit and the Supreme Court denied certiorari. *Patton v. Mullin*, 425 F.3d

788 (10th Cir. 2005), *cert. denied*, *Patton v. Sirmons*, 126 S.Ct. 2327 (2006). The merits of Plaintiff's Eighth Amendment claim were decided by the Court of Criminal Appeals' final ruling on Plaintiff's request for a stay of execution. The Court of Criminal Appeals Order was somewhat short, but the Court specifically incorporated its published opinion in *Malicoat v. State*, 2006 OK CR 25, ___ P.3d ____, 2006 WL 1672937 (Ex. 4). (Order, Ex. 1 at 2 ("[P]ursuant to this Court's fining in *Malicoat*, we deny Appellant's objection to the setting of an execution date and request for a stay of execution.") By incorporating the *Malicoat* opinion, the Court made several things very clear. First, the Court determined that it had jurisdiction to consider the Eighth Amendment challenge to the protocol and a request for stay of execution was an appropriate procedure to raise the challenge. *Malicoat v. State*, 2006 OK CR 25 ¶ 3[5]. Second, the Court made a detailed factual review of the protocol and considered the affidavit of *Malicoat's* expert witness opining on Oklahoma's protocol. *Id.* ¶¶ 4-5. Third, the Court concluded on the merits that "Oklahoma's execution protocol is not cruel and unusual." *Id.* ¶ 11. By incorporating *Malicoat* into Plaintiff's Order, the Court of Criminal Appeals adopted all of these points and the rest of *Malicoat*. Because Plaintiff received a final judgment in the Court of Criminal Appeals on the merits of his challenge to the protocol, this lawsuit is barred by the doctrine of *res judicata.*

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[5] We treat *Malicoat's* substantive claim, that to set an execution date would subject him to cruel and unusual punishment, as a subsequently filed application for capital post-conviction review. If *Malicoat's* claim is correct, then his legal sentence will be carried out in an illegal manner, substantially violating both the United States and Oklahoma constitutions. This Court has the authority to consider the merits of an issue which may so gravely offend a defendant's constitutional rights and constitute a miscarriage of justice. In the interests of justice, and considering the importance of the principle of finality of sentences, we reach the merits of *Malicoat's* claim and deny his request to stay his execution date.

II. Plaintiff is collaterally estopped from relitigating his Eighth Amendment challenge to Oklahoma's lethal injection protocol.

The doctrine of collateral estoppel or issue preclusion is similar to the doctrine of claim preclusion but presents a separate basis for dismissal.

> Issue preclusion requires, at a minimum, that the party against whom it is being asserted was either a party to or a privy of a party to the prior action and that the issue subject to preclusion have actually been adjudicated in the prior case in which said issue was necessary or essential to its outcome, but the doctrine does not require the successive causes of action to be the same.

Feightner v. Bank of Okla., N.A., 65 P.3d 624, 629 (2003). "[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979).

Issue preclusion differs somewhat from claim preclusion in that issue preclusion requires that the issue has been decided; whereas claim preclusion applies even if the claim was not raised in the prior litigation as long as it could have been. *See B-S Steel Of Kan., Inc. v. Texas Industries, Inc.*, 439 F.3d 653, 661-62 (10th Cir. 2006) ("In contrast to *res judicata*, the doctrine of collateral estoppel, also known as issue preclusion, attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.") (citations, quotations and alterations omitted). Claim preclusion requires identical parties (or their privies) whereas, issue preclusion can be invoked by one not party to the initial adjudication as long as the party against whom issue preclusion is invoked was a party to the initial adjudication.

Both doctrines apply here. For the reasons discussed above, the elements of collateral estoppel are also satisfied; therefore, Plaintiff is collaterally estopped from relitigating his Eighth Amendment challenge.

III. Plaintiff's lawsuit should be dismissed pursuant to the doctrine of *laches*.

"[E]quity aids the vigilant and not those who slumber on their rights." *Blacks Law Dictionary* 875 (6th ed. 1990). "'In order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by that delay.'" *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 949 (10th Cir. 2002) (quoting *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997)). The period of relevance in determining delay is "the period from when the plaintiff knew (or should have known) of the allegedly infringing conduct" until the lawsuit was filed. *Id*. "As with other equitable defenses, the existence of laches is a question primarily addressed to the discretion of the trial court." *Mile High Indus. v. Cohen*, 222 F.3d 845, 857 (10th Cir. 2000) (citations and quotations omitted).

As described above, Plaintiff has had many, many opportunities to assert the claims he raises now. *See Patton v. State*, 973 P.2d 270 (Okla. Crim. App. 1998), *cert. denied*, 528 U.S. 939 (1999); *Patton v. State*, 989 P.2d 983 (Okla. Crim. App. 1999); *Patton v. Mullin*, 425 F.3d 788 (10th Cir. 2005), *cert. denied*, *Patton v. Sirmons*, 126 S.Ct. 2327 (2006); Order, Ex. 1. This lawsuit amounts to an eleventh hour effort to forestall Plaintiff's execution. In *Hill v. McDonough,* 126 S.Ct. 2096 (2006), the United States Supreme Court recognized the potential for Section 1983 to be used as a dilatory tactic in death penalty cases. The Court pointed out that a number of federal courts had already taken action to prevent such abuses: "After *Nelson* a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day." *Hill*, 126

S.Ct. at 2104. The Court counseled that "[t]he federal courts can and should protect States from dilatory or speculative suits . . . ." *Hill*, 126 S.Ct. at 2104 (emphasis added).

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 126 S.Ct. at 2104. Elsewhere the Supreme Court has stated, "[A] State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004). If Plaintiff were permitted to use this lawsuit to stall his August 29th execution after just litigating the same claims and issues in state court and after having numerous other opportunities to present the same claims and issues in other litigation between the same parties, the State and the victims of Plaintiff's crime would be materially prejudiced. This Court should invoke its equitable powers to dismiss this lawsuit.

CONCLUSION

For the foregoing reasons, Plaintiff's lawsuit should be dismissed because all of the issues raised here have or should have been raised in Plaintiff's request to stay his execution that was recently litigated before the Oklahoma Court of Criminal Appeals and or Plaintiff's other numerous legal challenges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2006, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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