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CASE NO. 112741

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CLAYTON LOCKETT and CHARLES WARNER,

Plaintiffs/Appellants,

v.

EDWARD EVANS, in his Official Capacity as the Interim Director of THE OKLAHOMA DEPARTMENT OF CORRECTIONS and the OKLAHOMA DEPARTMENT OF CORRECTIONS,

Defendants/Appellees.

Appeal of District Court of Oklahoma County Case No. CV-14-440
The Honorable Patricia Parrish

DEFENDANTS/APPELLEES EDWARD EVANS AND THE OKLAHOMA DEPARTMENT OF CORRECTIONS' RESONSE TO APPELLANTS' APPLICATION FOR EMERGENCY STAY OF EXECUTION AND SUPPLEMENT TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

DEFENDANTS/APPELLEESS' RESPONSE TO APPELLANTS' APPLICATION FOR EMERGENCY STAY OF EXECUTION AND SUPPLEMENT TO EMERGENCY APPLICATION FOR STAY OF EXEUCTION 1

INTRODUCTION 1

ANATOMY OF THE LITIGATION 3

Plaintiffs' Claims 3

1. Constitutional Challenge to 22 O.S. 2011, § 1015(B) 4
2. Challenge to the Adoption of Execution Protocols Under the APA 4
3. Constitutional Challenge to 22 O.S. 2011, § 1014(A) 4

Criminal Sentences and Executions 4

DISCUSSION 5

PROPOSITION I:

THIS COURT SHOULD TRANSFER THIS MATTER TO THE OCCA 5

1. Plaintiffs' Claims are Inextricably Intertwined with Criminal Law 6
2. Title 22 O.S. 2011, § 1015(B) and the Execution Protocol are Predominantly Criminal Matters 8
3. The Nature of this Case Urges that this Court Transfer the Case to the OCCA 10

PROPOSITION II:

THIS COURT SHOULD DENY PLAINTIFFS' APPLICATION BECAUSE OF PLAINTIFFS' DEATH SENTENCES IS AN ESSENTIAL PART OF THE JUDGMENTS IN THEIR RESPECTIVE CRIMINAL CASES AND THE CARRYING OUT, OR STAYING, OF SUCH JUDGMENTS IS WITHIN THE EXCLUSIVE APPELLATE JURISDICTION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS 11

PROPOSITION III:

PLAINTIFFS' CLAIMS REGARDING THE DISTRICT COURT'S ORDER ARE IRRELEVANT TO THE ISSUES BEFORE THIS COURT 17

PROPOSITION IV:

PLAINTIFFS CANNOT MEET THE STANDARDS NECESSARY TO QUALIFY FOR A STAY OF EXECUTION 19

1. Plaintiffs cannot Establish a Likelihood of Success on the Merits 19

   a. Plaintiffs are not likely to succeed on their claims in this appeal 20

   b. Even if this Court considers Plaintiffs' claims concerning 22 O.S. 2011, § 1015(B), Plaintiffs still have no likelihood of success of the merits 23

2. Plaintiffs Fail to Establish an Irreparable Harm 26

3. The Potential Harm to Public Policy Weighs Heavily in Favor of Denying a Stay in this Matter 27

4. There are no Significant Public Policy Interests that Weigh in Favor of an Injunction in this Matter 28

CONCLUSION 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

CASES

Allen v. State,
2011 OK CR 31 ..... 9, 12

Baze v. Rees,
553 U.S. 35 (2008) 7, 21

Braun v. State,
1997 OK CR 26 25

Chavez v. Florida SP Warden,
742 F.3d 1267 (11th Cir. 2014) 21

Christopher v. Harbury,
536 U.S. 403 (2002) 25

Cooey v. Strickland,
589 F.3d 210 (6th Cir. 2009) 21

Delaware v. Deputy,
644 A.2d 411 (Del. Super. 1994) 22

Diaz v. Florida,
945 So.2d 1136 (Fla. 2006) 22

Dobbs v. Bd. of Cnty. Comm'rs of Okla. Cnty.,
1953 OK 159 20

Ex parte Granviel,
561 S.W.2d 503 (Tex. Cr. App. 1978) 22

Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.,
503 U.S. 653 (1992) 20, 27

Hill v. McDonough,
126 S.Ct6. 2096 (2004) 20, 29

Hobbs v. Jones,
412 SW 3d 844 (Ark. 2012) 22

House of Sight & Sound, Inc. v. Faulkner,
1995 OK CIV APP 112 19

In re Estate of Bell-Levine,
2012 OK 112 20

In re Lombardi,
741 F.3d 888 (8th Cir. 2014) 22, 25

In the Matter of M.B.
2006 OK 63 ..... 6, 12

Leftwich v. Court of Criminal Appeals,
2011 OK 80 12

Lewis v. Casey,
518 U.S. 343 (1996) 23, 24

Lockett v. State,
2002 OK CR 30, *cert. denied,* 538 U.S. 982 (direct appeal) 5

Lockett v. State,
No. PCD-2002-631, slip op. (Okl.Cr. 2002)(original post-conviction) 5

Lockett v. Trammell,
134 S.Ct. 924, 187 L.Ed.2d 799(2014) 5

Lockett v. Trammell,
711 F.3d 1218 (10th Cir. 2013)(federal habeas appeal) 5

Lockett v. Workman,
2011 WL 10843368 (W.D. Okla. 2011)(federal habeas) 5

Malicoat v. State,
2006 OK CR 25 ..... 9, 15, 16, 25

Matthews v. State,
No. PCD-2010-1193, slip op. (Okla. Cr. Jan. 7, 2011) 9, 15, 16

Maynard v. Layden,
1992 OK CR 31 ..... *passim*

Movants to Quash Multicounty Grand Jury Subpoena v. Dixon,
2008 OK 36 ..... 8, 9

Pavatt v. Jones,
627 F.3d 1336 (10th Cir. 2010) 21

RoDa Drilling Co. v. Siegal,
552 F.3d 1203 (10th Cir. 2009) 26

Rollins v. Thermodyne Indus., Inc.,
1996 OK 6 24

Sells v. Livingston,
2014 WL 1316339 25

Sepulvado v. Jindal,
729 F.3d 413 (5th Cir. 2013) .....

Smith v. State,
2013 OK CR 14 9

Starkey v. Okla. Dep't of Corrs.,
2013 OK 43 20

State ex rel., Henry v. Mahler,
1990 OK 3 ..... 8, 12

Thomas v. Hampton,
1978 OK 114 26

Thomas v. Henry,
2011 OK 53 20

Valdez v. State,
2002 OK CR 20 15

Warner v. State,
2006 OK CR 40, *cert. denied*, 550 U.S. 942 (direct appeal) 5
Warner v. State,
No. PCD-2003-897, slip. Op. (Okl. Cr. 2006)(original post-conviction) 5

Warner v. Trammell,
134 S.Ct. 924, 187 L.Ed.2d 798 (2014) 5

Warner v. Trammell,
520 F.App'x 675 (10th Cir. 2013)(federal habeas appeal) 5

Warner v. Workman,
814 F.Supp.2d 1188 (W.D. Okla. 2011)(federal habeas) 5

Whitaker v. Livingston,
732 F.3d 465 (5th Cir. 2013) 25

Williams v. Hobbes,
658 F.3d 842 (8th Cir. 2011) 23, 24

STATUTES

12 O.S. 1991, § 1381, *et seq.* 13

12 O.S. 2011, § 66 19

22 O.S. 2011, § 1001.1(C) 14

22 O.S. 2011, § 1001.1(D) 14

22 O.S. 2011, § 1014(A) ..... *passim*

22 O.S. 2011, § 1015(B) ..... *passim*

22 O.S. 2011, § 1089(D)(8) 9, 15, 16

22 O.S. 2011, § 3001.1 15

75 O.S. Supp. 2013, § 250.2 22

75 O.S. Supp. 2013, § 250.4(10)(A) 23

75 O.S. Supp. 2013, § 250.6 22

75 O.S. Supp. 2013, § 250.7 22

75 O.S. Supp. 2013, § 250.9 – 308.2 22

75 O.S. Supp. 2013, § 303 22

42 U.S.C. § 1983 12

42 U.S.C. § 1986 12

RULES

Okla. Sup. Ct. R. 1.21(a) 19

OTHER

OKLA. CONST. art. II, § 6 24

OKLA. CONST. art. II, § 9 8

OKLA. CONST. art. VII, § 4 12

DEFENDANTS/APPELLEES EDWARD EVANS AND THE OKLAHOMA DEPARTMENT OF CORRECTIONS' RESPONSE TO PLAINTIFFS/APPELLANTS' APPLICATION FOR EMERGENCY STAY OF EXECUTION AND SUPPLEMENT TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

Defendants/Appellees Edward Evans and the Oklahoma Department of Corrections ("ODOC") submit their response to Plaintiffs/Appellants' (Plaintiffs) Emergency Application for Stay of Execution. ODOC requests that this Court deny Plaintiffs' application, and instead transfer the entire case to the Oklahoma Court of Criminal Appeals ("OCCA").

INTRODUCTION

This Court and the OCCA have long acknowledged that "the punishment, and the amount thereof, is an essential part of the judgment in a criminal case and...the carrying out, prohibiting, **or staying such a judgment is within the exclusive appellate jurisdiction of** the OCCA. *Maynard v. Layden*, 1992 OK CR 31, ¶ 3, 830 P.2d 581, 581 (emphasis added). Plaintiffs are asking for a stay from the wrong court. Plaintiffs Clayton Lockett and Charles Warner filed a civil declaratory judgment action in state district court, challenging the constitutionality of 22 O.S.2011, § 1015(B) and ODOC's adoption of execution protocols under the Administrative Procedures Act ("APA"). *Emergency Appl. for Stay of Execution* at 2 (herein after "*Emergency Appl.*"). Plaintiffs later raised a challenge to 22 O.S.2011, § 1014(A). The District Court dismissed Plaintiffs' APA claim and their challenge to 22 O.S.2011, § 1014(A). *Id.* at 3. The District Court also ruled that 22 O.S.2011, § 1015(B)'s confidentiality provision was unconstitutional. *Id.* Plaintiffs appealed the District Court's dismissal of their APA claims and their challenge to 22 O.S.2011, 1014(A). *Petition in Error*, Exhibit C. Plaintiffs now also request a stay of their executions pending the outcome of the appeal of their civil declaratory judgment action.

Plaintiffs have seemingly attempted to delay their executions through every procedure except for the method actually prescribed by statute. Plaintiffs have shunned the proper procedures, and have tried to convince the courts to assist them in this avoidance. Plaintiffs had an opportunity for a stay in federal court when ODOC removed the case, but Plaintiffs purged their complaint of federal claims in order to get their case back into the state district court. *Western District Order*, at 1-2 (attached as Exhibit 1). Once back in state district court, Plaintiffs requested a stay, but the district court correctly ruled that it had no jurisdiction to enter a stay. *Emergency Appl.* at 2. Plaintiffs then appealed, and this Court informed the Plaintiffs in no uncertain terms that the OCCA is the proper court in which to seek a stay of execution.[1] *March 13, 2013 Order*, (attached as Exhibit 2). This Court repeated that decision by denying rehearing. *Order Denying Rehearing* at 1 (attached as Exhibit 3). Plaintiffs then asked the OCCA for a stay, while deliberately not placing any action before them. *Emergency Appl.* at 5. Now, the Plaintiffs ask this Court *again* for a stay of their executions, in blatant disregard of well-established Oklahoma law and this Court's own order. *Id.* at 1.

Plaintiffs' repeated assertions that they are not challenging ODOC's protocol now ring hollow in the light of their most recent filing. Rather than claim that they lack information, Plaintiffs have now shifted to claiming that they do not approve of what they have been provided. *Id.* at 1, 4, 9-10. In fact, Plaintiffs even falsely stated to this Court that they received *no* information regarding the protocols and the drugs involved, which is a blatant misrepresentation. *Petition in Error*, Ex. B. Plaintiffs' latest application attacks the use of

[1] Plaintiffs claim that this Court did not rule that the OCCA had exclusive jurisdiction to decide the stay request. However, this claim ignores that when this Court transferred the stay issue to the OCCA, it cited *Maynard v. Layden*, 1992 OK CR 31, 830 P.2d 581, which states that the Oklahoma Supreme Court had noted that the carrying out, prohibiting, or staying an execution is "within the exclusive appellate jurisdiction of [the OCCA]." *Id.* 1992 OK CR 31, ¶ 3, 830 P.2d at 582.

midazolam, shifting from their earlier complaints about not knowing the drugs' source.[2] Plaintiffs' demands have clearly left the arena of civil claims, crossing over into the realm of a challenge to ODOC's methods imposing executions pursuant to a criminal conviction. Yet rather than seek that relief in the proper court, Plaintiffs have filed this appeal and are attempting to achieve a back-door stay.

Plaintiffs' claim of an emergency is belied by their continued insistence on avoiding the only court that has the power to issue a stay; and by their own dilatory filings. This court should not indulge Plaintiffs' gamesmanship, rather this Court should transfer the case to the OCCA, the only court which can grant the relief they seek. If this Court decides not to transfer the case, ODOC requests that this Court deny Plaintiffs' application.

ANATOMY OF THE LITIGATION

Due to the complex nature of this case, and the various claims that Plaintiffs have raised and continue to raise, ODOC presents the following description of the claims as they currently exist.

Plaintiffs' Claims

1. Constitutional Challenge to 22 O.S.2011, § 1015(B)

Plaintiffs challenged 22 O.S.2011, § 1015(B), which keeps confidential the identities of persons that participate in, administer, or provide materials for executions. *Emergency Appl.* at 2. Plaintiffs claimed that section 1015(B) violated their right of access to courts. *Id.* Plaintiffs

[2] A copy of ODOC's execution protocols dated March 24, 2014 is attached to Plaintiffs' Emergency Appeal as Exhibit 5. On April 10, Plaintiffs' other attorneys from the Federal Defenders Office raised a question regarding the concentration of the midazolam to be used. ODOC assured the federal defenders that it was looking into their question. ODOC has corrected the error in its protocol regarding concentration of midazolam in method "e" and disseminated the new protocol to all interested parties. *Execution Protocol* at 18 (attached as Exhibit 4); *April 14, 2014 Letter to Susanna Gattoni* at 1 (attached as Exhibit 5).

challenged this criminal procedure statute in a civil declaratory judgment proceeding. *Id.* The District Court agreed with the Plaintiffs, and struck down the confidentiality portion as unconstitutional. *Id.* at 3. ODOC intends to appeal that civil declaratory judgment, but has not done so as of this time. Plaintiffs have not appealed that decision (in their favor). Until ODOC files its appeal, any discussion of section 1015(B) is premature. Therefore, section 1015(B) is not at issue in this appeal.

2. Challenge to the Adoption of Execution Protocols Under the APA

Plaintiffs also challenged ODOC's adoption of execution protocols, alleging that ODOC violated the APA rulemaking requirements. *Id.* at 2. Plaintiffs challenged that adoption of protocols in a civil declaratory judgment proceeding. *Id.* The District Court dismissed Plaintiffs' APA claim. *Id.* at 3. Plaintiffs have appealed that ruling to this Court. *Petition in Error*, Exhibit C.

3. Constitutional Challenge to 22 O.S.2011, § 1014(A)

Plaintiffs raised a new claim in a reply brief, challenging the constitutionality of 22 O.S.2011, § 1014(A). *Emergency Appl.* at 2. Plaintiffs argued that section 1014(A) delegated unchecked authority to the ODOC Director in adopting execution protocols. *Id.* The District Court rejected this claim, and ruled that section 1014(A) was constitutional. *Id.* at 3. Plaintiffs have appealed that ruling to this Court. *Petition in Error*, Exhibit C.

Criminal Sentences and Executions

Plaintiffs' most recent filings in this Court and in the OCCA show that they are now challenging the method of their executions. *Emergency Appl.* at 4, 8-9. However, Plaintiffs have never before officially challenged the method or manner of their executions. They have only

challenged state statutes and an administrative rule in civil declaratory judgment actions. *Id.* at 2. There are no pending Eighth Amendment claims in this appeal, nor in the underlying case.

However, Plaintiffs have raised numerous Eighth Amendment issues in their present application, primarily their concerns with the specific drugs and dosages. *Emergency Appl.* at 3-5, 9-10. These claims have not been brought before any court, nor are they properly at issue in this appeal.

DISCUSSION

PROPOSITION I: THIS COURT SHOULD TRANSFER THIS MATTER TO THE OCCA.

These Plaintiffs are not strangers to the court system. Plaintiffs have already exhausted all of their regular appeals. On January 13, 2014, the United States Supreme Court denied Plaintiffs' final regular appeal: petitions for writ of certiorari challenging the U.S. Tenth Circuit Court of Appeals' denial of federal habeas relief. *Lockett v. Trammell*, 134 S.Ct. 924, 187 L.Ed.2d 799 (2014); *Warner v. Trammell*, 134 S.Ct. 924, 187 L.Ed.2d 798 (2014). These rulings capped years of appellate review by the OCCA and federal courts of Plaintiffs' murder convictions and death sentences. *See Lockett v. State*, 2002 OK CR 30, 53 P.3d 418, *cert. denied*, 538 U.S. 982, 123 S.Ct. 1794 (2003) (direct appeal); *Lockett v. State*, No. PCD-2002-631, slip op. (Okl.Cr. 2002) (unpublished)(original post-conviction); *Lockett v. Workman*, 2011 WL 10843368 (W.D. Okla. 2011) (unpublished)(federal habeas); *Lockett v. Trammell*, 711 F.3d 1218 (10th Cir. 2013) (federal habeas appeal); *Warner v. State*, 2006 OK CR 40, 144 P.3d 838, *cert. denied*, 550 U.S. 942, 127 S.Ct. 2266 (direct appeal); *Warner v. State*, No. PCD-2003-897, slip op. (Okl.Cr. 2006)(unpublished)(original post-conviction); *Warner v. Workman*, 814 F.Supp. 2d 1188 (W.D. Okla. 2011) (federal habeas); *Warner v. Trammell*, 520 F.App'x 675 (10th Cir. 2013)(unpublished)(federal habeas appeal).

The ultimate objective of Plaintiffs' foray into civil court in the present case appears to be to delay their executions. While Plaintiffs cloak their allegations in civil claims, the issue is, at its heart, an attempt to derail the enforcement of their lawfully imposed criminal sentences. In fact, Plaintiffs requested a stay of their executions in the District Court, twice in the OCCA, and twice in this Court. Plaintiffs have only gone to the OCCA once voluntarily, and did not actually file any underlying challenge, just a stand-alone request for a stay. Plaintiffs' assurances that their claims are purely civil are contradicted by the fact that they are using those civil claims to delay the executions in their criminal cases.

This Court previously held that the Oklahoma County District Court had jurisdiction over Plaintiffs' civil declaratory action. Ex. 2 at 2. Given the latest developments and Plaintiffs' recent filings, it now appears that Plaintiffs' claims fit squarely within the OCCA's jurisdiction. Therefore ODOC requests that this Court transfer the matter to the OCCA. *In the Matter of M.B.*, 2006 OK 63, ¶ 8, 145 P.3d 1040, 1044 (footnote omitted) ("The question of jurisdiction is primary and fundamental in every case and cannot be conferred by the consent of the parties, waived by the parties or overlooked by the Court."). As opposed to the speculation surrounding the issues of this case on Plaintiffs' first appeal, there are now substantive facts showing that the OCCA properly has jurisdiction over this action.

1. Plaintiffs' Claims are Inextricably Intertwined with Criminal Law.

Plaintiffs have intertwined their civil claims with criminal law and, more significantly, the execution of Plaintiffs' lawful sentences of death and their endless quest for a stay of execution.

When Plaintiffs recently requested a stay from the OCCA, they presented the OCCA with their concerns about *possible* Eighth Amendment violations related to ODOC's non-disclosure of

drug sources and new execution protocols. (*Emergency Appl. for Stay of Execution before the OCCA*, at 2-6, attached as Exhibit 6). Plaintiffs previously insisted that their claims only involve due process and right of access to courts, *Emergency Appl.* Ex. 5, at 41, 45, but it is clear now that their claims are inextricably intertwined with the Eighth Amendment arguments they raised before the OCCA. Plaintiffs explicitly stated in their application for a stay before the OCCA that they

> respectfully request this Court issue a stay of execution until such time as the Oklahoma Supreme Court has ruled upon the decision of the District Court, and if the District Court's decision is affirmed until such time as there has been time to evaluate any potential Eighth Amendment challenges to the execution protocol.

Ex. 6 at 6.

In their present application, Plaintiffs' primary concern is that ODOC will execute them with "a new and untested execution protocol...." *Emergency Appl.* at 1. Plaintiffs allege (albeit inaccurately) that it is unknown whether the drugs will render Plaintiffs insensate during their executions. *Id.* at 4. Plaintiffs also complain that no state has executed an inmate using the exact dosages used in ODOC's protocol. *Id.* These arguments are clearly challenges to ODOC's protocol under the Eighth Amendment. No amount of civil camouflage can conceal the nature of these claims. Plaintiffs are attempting to launch an Eighth Amendment challenge to the method of their executions.

Plaintiffs have woven together their state constitutional claims with Eighth Amendment claims. An analysis of Plaintiffs' claims *necessarily* requires analysis of the standard for Eighth Amendment challenges to lethal injection protocols set forth in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion) and the state and federal decisions applying *Baze*. The relevance of the Director's discretion, and the implementation of execution protocols, is dependent upon the underlying Eighth Amendment standard. Plaintiffs' reliance on state constitutional law to drive

their challenge to § 1014(A) requires this Court to compare OKLA. CONST. art. II, § 9's ban on "cruel or unusual punishments" with the Eighth Amendment standards discussed in *Baze*. These inquiries are based distinctly on criminal law.

Plaintiffs' constitutional claims naturally belong before the OCCA. Stripped of artifice, Plaintiffs' claims are predominantly about the Eighth Amendment and the constitutionality of their sentences. The OCCA is the forum which should hear the entire substance of their claims. Plaintiffs have disingenuously insisted that their case is strictly civil. However, Plaintiffs seek a stay of their criminal executions based on their "civil" claims. The claims they are appealing are merely the civil pegs upon which they have hung their criminal law claims. Therefore, this Court should transfer this entire case to the OCCA for final determination.

2. Title 22 O.S.2011, § 1014(A) and the Execution Protocols are Predominantly Criminal Matters

Title 22 deals with "Criminal Procedure." Section 1014(A) of Title 22 is a criminal statute, which deals with how criminal sentences are carried out. The execution protocols are purely criminal in nature, as they deal with the execution of criminal death sentences.

It is emphatically the province and duty of the OCCA to say what the law is in a criminal matter, particularly with respect to the execution of a sentence. As this Court recognized in a slightly different context (a post-conviction challenge to an earned credit statute), in a criminal case the "essential part of the judgment is the punishment and the amount thereof." *See State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 15, 786 P.2d 82, 85 (citation omitted) (emphasis added). Issues relating to sentences lie within the OCCA's exclusive appellate jurisdiction. *Id.*

The present case raises issues of criminal procedure uniquely within the OCCA's purview, further warranting deference to that court's jurisdiction. *Cf. Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶ 10, 184 P.3d 546, 549 (Supreme

Court has deferred to OCCA's "limited jurisdiction . . . when the determination of the extent of a multicounty grand jury's authority raised issues of criminal procedure uniquely within that Court's expertise."). The OCCA recently addressed a variety of Eighth Amendment challenges to Oklahoma's lethal injection protocol, including last-minute challenges made on the eve of execution.[3]

This Court, by contrast, rarely handles death penalty cases. This Court recently assumed original jurisdiction over, then reversed itself and transferred to the OCCA, a death row inmate's challenge to the absence of an appeal provision for adverse jury verdicts under Oklahoma's competency-to-be-executed statute. *See Allen v. State*, 2011 OK CR 31, ¶ 2, 265 P.3d at 755-56. The OCCA, by contrast, has broad power to construe filings made in connection with motions for stay of execution as second or successive post-conviction relief applications. In *Malicoat*, the OCCA reviewed a constitutional challenge to Oklahoma's lethal injection protocol as carried out by the Department of Corrections. *Id.*, 2006 OK CR 25, ¶¶ 4-11, 137 P.3d at 1235-39. This claim was asserted for the first time by the defendant in a written objection to the setting of an execution date. *Id.*, 2006 OK CR 25, ¶ 2, 137 P.3d at 1235. The OCCA treated Malicoat's claim as a second or subsequent state post-conviction relief application under 22 O.S. 2011, § 1089(D)(8) and reviewed the merits of his constitutional challenge. *Malicoat*, 2006 OK CR 25, ¶ 3, 137 P.3d at 1235 ("This Court has not yet had an opportunity to rule on this issue . . . 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.") (citation omitted).

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[3] *See, e.g.*, *Smith v. State*, 2013 OK CR 14, ¶ 71 & n.23, 306 P.3d 557, 579 & n.23; *Matthews v. State*, No. PCD-2010-1193, slip op. at 9-13 (Okl.Cr. Jan. 7, 2011) (unpublished) (Ex. 7); *Malicoat v. State*, 2006 OK CR 25, ¶¶ 3 & 7-11, 137 P.3d 1234, 237-39.

3. The Nature of this Case Urges that this Court Transfer the Case to the OCCA.

Plaintiffs will be executed on April 22 and 29, 2014, respectively. *Emergency Appl.* at 1. This Court previously held that the OCCA holds the exclusive authority to issue a stay. Ex. 2 at 2; *Maynard v. Layden*, 1992 OK CR. 31, 830 P.2d 581. The OCCA has denied Plaintiffs' most recent request for stays of their executions, because there is no action pending at the OCCA. *Emergency Appl.* Ex. 9, at 4-5. Plaintiffs urge this Court to interpret the OCCA's order as a disclaimer of jurisdiction. This is not the case. Instead, the OCCA was merely making the same point that ODOC has made from the beginning of this litigation: Plaintiffs must file their challenge in the OCCA, which would give that Court the ability to actually order a stay if it were merited. In fact, Judge Lumpkin noted in his dissent that Plaintiffs have chosen to file a civil suit instead of filing a "second application for post-conviction relief challenging their death sentences" in the OCCA, which Judge Lumpkin identified as the Plaintiffs' only option for receiving a stay. *Emergency Appl.* Ex. 2, dissent at 3-4. With no case before the OCCA, Plaintiffs have no state court avenue by which to receive a stay of their executions.

Plaintiffs have alleged in this Court, the OCCA, and to the public at large that ODOC's protocols are unconstitutional. However, Plaintiffs *still* have not filed an Eighth Amendment challenge, despite having all relevant information about the method of their executions. Yet here they still cite this alleged unconstitutionality as a basis for their requested stay. It is clear that Plaintiffs are wasting time, when they should be taking their claims to the OCCA, where they can request a stay if they file a challenge to ODOC's protocols.

By again seeking a stay in this Court, in spite of the guidance provided by this Court, the OCCA, and the plain language of the statutes and case law, Plaintiffs' efforts have been misdirected and confusing. There is no debate that the OCCA is the proper court for Plaintiffs'

present request, yet Plaintiffs refuse to take their claims to that court. Because of Plaintiffs' apparent unwillingness to present their claims to the *only* state court in which they have any opportunity to receive a stay, this Court should transfer this case to the OCCA. While Plaintiffs have not and cannot show any evidence entitling them to a stay of their executions, the OCCA would be the correct forum in which to analyze any such heretofore unknown evidence. If Plaintiffs are truly interested in a stay, then the OCCA is the proper forum for them at this juncture.

This case is inextricably intertwined with criminal law. It involves a challenge to a criminal statute, seeks stays of criminal sentences, and the pending executions can only be stayed by the OCCA if that Court has this case before it. Therefore, this Court should transfer the case to the OCCA for such determinations.

PROPOSITION II: THIS COURT SHOULD DENY PLAINTIFFS' APPLICATION BECAUSE EXECUTION OF PLAINTIFFS' DEATH SENTENCES IS AN ESSENTIAL PART OF THE JUDGMENTS IN THEIR RESPECTIVE CRIMINAL CASES AND THE CARRYING OUT, OR STAYING, OF SUCH JUDGMENTS IS WITHIN THE EXCLUSIVE APPELLATE JURISDICTION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS.

If this Court declines to transfer the case to the OCCA, ODOC requests that this Court reiterate its earlier ruling that this Court does not have jurisdiction to enter a stay of execution. Plaintiffs fail to cite a single Oklahoma decision wherein this Court has stayed an execution. In their application, Plaintiffs cite two cases, neither of which involved a stay of execution. *Emergency Appl.* at 7. Oklahoma authority expressly prohibits entry by this Court of a stay of execution for death row inmates. As shown below, the Oklahoma Legislature, the OCCA, and this Court have all recognized that special considerations and rules apply to death penalty cases. The jurisdiction and authority to enter Plaintiffs' requested stay of execution rests *solely* with the

OCCA as part of its exclusive appellate jurisdiction over criminal matters in this state. *See, e.g.*, OKLA. CONST. art. VII, § 4 ("the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases[.]"); *Allen v. State*, 2011 OK CR 31, ¶ 5, 265 P.3d 754, 756 ("The [Oklahoma] Supreme Court has recognized this Court's exclusive jurisdiction in criminal matters several times.") (citing *Leftwich v. Court of Criminal Appeals*, 2011 OK 80, ¶ 3, 262 P.3d 750, 750; *In the Matter of M.B.*, 2006 OK 63, ¶ 14, 145 P.3d 1040, 1047; *State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 19, 786 P.2d 82, 87).

This Court cited *Maynard v. Layden* in its March 26, 2014 order transferring the stay application to the OCCA. Ex. 2 at 2. In *Maynard v. Layden*, the OCCA granted a writ of prohibition vacating a Temporary Injunction entered by the Pittsburg County District Court in a state civil action filed by Benjamin Brewer, an Oklahoma death row inmate. 1992 OK CR 31, ¶ 2, 830 P.2d at 582. Brewer's civil complaint was filed under authority of 42 U.S.C. §§ 1983, 1986 and various provisions of the United States and Oklahoma Constitutions. *Id.*, 1992 OK CR 31, ¶ 2, 830 P.2d at 582. The Temporary Injunction enjoined the Director of ODOC, the Warden of the Oklahoma State Penitentiary, and other ODOC employees from carrying out Brewer's execution by lethal injection on the date previously set in Brewer's criminal case, which originated in Tulsa County District Court. *Id.* In its application for writ of prohibition, ODOC challenged the Pittsburg County District Court's "jurisdiction and authority to enter said Temporary Injunction." *Id.*

Notably, the OCCA's assumption of original jurisdiction and grant of the writ of prohibition occurred only after the respondent judge and Brewer, the real party in interest, filed with the Oklahoma Supreme Court an extraordinary writ challenging the OCCA's assumption of

jurisdiction over the case. *Id.*, 1992 OK CR 31, ¶ 3, 830 P.2d at 582. In this regard, the OCCA wrote:

> The Oklahoma Supreme Court has entered an order noting in part that the punishment, and the amount thereof, is an essential part of the judgment in a criminal case and that the carrying out, prohibiting, or staying such judgment is within the exclusive appellate jurisdiction of [the OCCA]. The Oklahoma Supreme Court therefore declined to assume jurisdiction of the Appellate Indigent Defender's challenge to this Court's assumption, in this proceeding, of specified jurisdiction over the Pittsburg County action.

Id.

The issue before the OCCA was "whether the District Court of Pittsburg County, in determining the merits of Brewer's claims in the civil rights action, has the jurisdiction and authority to impact the order to carry out the death sentence entered in a criminal case . . . ." *Id.*, 1992 OK CR 31, ¶ 4, 830 P.2d at 582. In finding that the Pittsburg County District Court did not have such jurisdiction or authority, the OCCA held that the state court having jurisdiction and authority over Brewer's criminal case "has jurisdiction and authority over Brewer's conviction and must determine issues relating to the execution of the judgment of death." *Id.*, 1992 OK CR 31, ¶ 5, 830 P.2d at 582.

The OCCA specifically rejected Brewer's argument that he could not be precluded in his civil lawsuit from obtaining an injunction under 12 O.S.1991, § 1381, *et seq.*, to prohibit any proven violations of his civil rights. *Maynard*, 1992 OK CR 31, ¶ 6, 830 P.2d at 582-83. While recognizing that Brewer "has the right to file a civil rights action and, if his complaints are valid, to obtain an injunction in such an action . . . the breadth of such an action, including the remedies available thereunder, is not unlimited and, as a general rule, cannot affect or apply to criminal actions, including the imposition of criminal punishment." *Id.*, 1992 OK CR 31, ¶ 7, 830 P.2d at

583. That is especially true, the OCCA reasoned, "where the criminal law provides a statutory remedy to prohibit the wrong or injury for which redress is sought by injunction." *Id.*

The OCCA found that Brewer had the opportunity under state statute to show in the court setting his execution date whether any legal reason exists against such execution. *Id.*, 1992 OK CR 31, ¶ 8, 830 P.2d at 583. In *Maynard*, the Tulsa County District Judge who presided over Brewer's murder trial set the execution date. *Id.* The OCCA held that "such a statutory forum is appropriate and sufficient to raise all possible claims against the imposition of a judgment of death" and "[t]herefore, an injunction emanating from an alternative forum is not necessary to effectuate such relief and is an improper intrusion upon criminal proceedings." *Id.*

Today, unlike in *Maynard*, Oklahoma law mandates that the OCCA has the sole jurisdiction and authority to set execution dates for death row inmates upon exhaustion of their regular state and federal appeals. *See* 22 O.S.2011, § 1001.1(D).[4] Plaintiffs nonetheless are authorized by statute to present to the OCCA any and all legal challenges to the setting of an execution date. Title 22, O.S.2011, § 1001.1(C) provides that the OCCA may enter a stay of execution, or an order which effectively stays an execution, "[w]hen an action challenging the conviction or sentence of death is pending before it[.]" The OCCA may enter a stay of execution "only upon a showing by the defendant that there exists a significant possibility of reversal of the

[4] Plaintiffs cite language found in several sub-parts of § 1001.1, which refer to the setting of an execution date by OCCA "should a stay of execution be issued by any state or federal court[,]" to support their theory of jurisdiction before this Court. *Emergency Appl.* at 7. Nothing in this statute, however, supports the notion that the Oklahoma Legislature intended to confer jurisdiction on Oklahoma civil courts to grant a stay of execution in death penalty cases. Rather, this broad statutory language allows OCCA to re-set an execution date, even in cases where a stay of execution is erroneously entered that, for whatever reason, prevents an execution date from being carried out. That would include, of course, entry of a stay of execution by a state district judge in a civil case who, as discussed in this brief, does not have jurisdiction to enter a stay. Thus, the language of § 1001.1 does not aid Plaintiffs' argument.

defendant's conviction, or vacation of the defendant's sentence, and that irreparable harm will result if no stay is issued." *Id.*

Here, Plaintiffs made no objections to the setting of their execution dates back in January of 2014. The OCCA continues to review objections to the setting of an execution date filed by death row inmates. In *Malicoat v. State*, 2006 OK CR 25, 137 P.3d 1234, the OCCA reviewed a constitutional challenge to Oklahoma's lethal injection protocol as carried out by ODOC. *Id.*, 2006 OK CR 25, ¶¶ 4-11, 137 P.3d at 1235-39. This claim was asserted for the first time by that defendant in a written objection to the setting of an execution date. The OCCA treated Malicoat's claim as a second or subsequent state post-conviction relief application under 22 O.S.2011, § 1089(D)(8) and reviewed the merits of his constitutional claim because (1) the OCCA had not had the opportunity to review the merits of this particular issue; and (2) "[i]f 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." *Malicoat*, 2006 OK CR 25, ¶ 3, 137 P.3d at 1235. The Court concluded that it "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." *Id.* & n.7 (citing 20 O.S.2011, § 3001.1; *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 710-11). The OCCA denied the lethal injection claim on the merits and set Malicoat's execution date.

Even after the setting of an execution date, the OCCA has broad authority to consider issues raised in connection with a second or successive state post-conviction relief application. In *Matthews v. State*, No. PCD-2010-1193, slip op. (Okl.Cr. Jan. 7, 2011) (unpublished), attached as Exhibit 7), the OCCA reviewed a death row inmate's claim, raised in a third application for state post-conviction relief, that ODOC's administration of Oklahoma's lethal

injection protocol violated 22 O.S.2011, § 1014(A) because the first drug in the execution process–pentobarbital–was not an "ultrashort-acting" barbiturate as required by the plain language of the statute. *Matthews*, No. PCD-2010-1193, slip op. at 9-13. This was a last-minute claim, raised on the eve of execution, well after the setting of an execution date. *See id.* at 1-2. The OCCA rejected the State's procedural bar argument based on the timing of the claim:

> This Court has not yet had the opportunity to rule on this issue. If Matthews' claim is correct, then his legal sentence will be carried out in an illegal manner. Given the nature of this claim, we address it on the merits. *See Malicoat v. State*, 2006 OK CR 25, ¶ 3, 137 P.3d 1234, 1235.

Id. at 10-11 n.10. The OCCA denied the claim on the merits and denied Matthews's request for stay of execution.

"[Plaintiffs'] foray into the District Court of [Oklahoma] County [was] simply a shopping excursion to find a sympathetic forum that will disagree with the [OCCA's] findings and conclusions" that execution of Plaintiffs is appropriate at this time. *Maynard*, 1992 OK CR 31, ¶ 9, 830 P.2d at 583. "Such excursions are not authorized and must be thwarted." *Id.* In light of *Malicoat* and *Matthews*, Plaintiffs may obtain a judicial stay of their respective executions from an Oklahoma court *only* if they can convince the OCCA that a stay is appropriate as part of its exclusive appellate jurisdiction.

Plaintiffs may present their constitutional claims for review to the OCCA as part of a request to stay their respective executions. Plaintiffs' only current option for a judicial stay of execution from an Oklahoma state court is to file a second or successive post-conviction relief application with the OCCA pursuant to 22 O.S.2011, § 1089(D)(8). While the OCCA is the natural forum for Plaintiffs' constitutional claims, for some reason Plaintiffs refuse to present their claims in that forum. This Court should either therefore deny the motion for stay of

execution for lack of jurisdiction to review orders by the OCCA in undisputed criminal matters over which that court has exclusive jurisdiction, or transfer this case to the OCCA.

PROPOSITION III: PLAINTIFFS' CLAIMS REGARDING THE DISTRICT COURT'S ORDER ARE IRRELEVANT TO THE ISSUES BEFORE THIS COURT.

Plaintiffs cite ODOC's plans to proceed with the executions as a reason that this Court should grant a stay. *Emergency Appl.* at 6-7, 10. Understandably, with few to no options left, Plaintiffs are grasping at straws to find a way to stop or delay their executions. Plaintiffs are attempting to raise frenzied concerns of painful and unconstitutional executions based on a single sentence from 22 O.S.2011, § 1015(B). The law states:

> The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.

Id.

This law governs discovery in criminal and civil proceedings. Nothing about this law, or its purported unconstitutionality has any bearing on whether Plaintiffs will die as scheduled on April 22 and 29, 2014. Nothing about this law bars these Plaintiffs' right to access courts. This law simply prohibits the disclosure of the identities of the persons necessarily involved in the State's execution process; a practice the State employed long before this statute was enacted.

The reasons behind the practice and the law are perfectly legitimate and have been recognized by virtually every state in the United States that has a death penalty. The purpose of this practice is to protect those individuals who are willing to assist in this solemn act on behalf of the greater community as a whole. As will be more fully outlined in ODOC's appeal of the District Court's erroneous ruling, the State has a legitimate purpose for enacting this statute.

This is not to say the ODOC refuses to provide relevant information, even to condemned killers. ODOC continues to remain in contact with Plaintiffs' counsel regarding the protocol to be used in their executions. At this point in time, Plaintiffs' counsel know the specific protocol to be used, the fact that all drugs to be used in the executions are manufactured (as opposed to compounded), that the drugs were obtained from a licensed pharmacy and are intended for human use, and the expirations dates of the drugs.

Plaintiffs now complain of ODOC's changing protocols and drugs, although the changes were made in response to *Plaintiffs' concerns*. Due to the disputes regarding compounded drugs, ODOC continued to inquire about and search for manufactured drugs. It is specifically in response to Plaintiffs' concerns that ODOC worked to acquire manufactured drugs. Now, Plaintiffs complain that ODOC is changing the drugs used for the executions, despite the fact that it was *Plaintiffs' concerns* that spurred the change in the first place. Additionally, Plaintiffs' counsel at the Federal Defenders Office raised concerns regarding the dosages in the protocol. ODOC reviewed the concern, identified an error in the protocols, and corrected the relevant portion. Ex. 4 at 18. But rather than accepting the correction with satisfaction, Plaintiffs actually complain that ODOC has changed its protocol, even though the protocol was changed to address *Plaintiffs' concerns*. *Supplement to Emergency Application for Stay*, at 2. It is clear that Plaintiffs are not interested in a constitutional execution, but rather they seek to avoid their executions indefinitely.

In short, the ODOC is communicating to Plaintiffs all relevant information regarding their executions. If Plaintiffs are inclined to actually raise an Eighth Amendment/cruel and unusual punishment challenge to ODOC's protocol, they should proceed. The outcome of this

case will not change the information they receive (or need) to launch any such attack. At this point is it clear, Plaintiffs seek delays in the hope of justifying further delays.

In addition, Plaintiffs' insinuations that ODOC is somehow ignoring the District Court's order or acting improperly by proceeding with the executions are baseless. ODOC has thirty (30) days in which to file an appeal of the District Court's order. Okla. Sup. Ct. R. 1.21(a). ODOC is entitled to an automatic stay of the District Court's order under 12 O.S.2011, § 66. As Plaintiffs have frequently insisted, the District Court ruled against 22 O.S.2011, § 1015(B) in a *civil* proceeding. Therefore, Plaintiffs' executions are a separate matter from the District Court's ruling. However, Plaintiffs have muddled their civil and criminal claims, and now imply that ODOC is somehow acting capriciously or lawlessly by following the correct procedures within the given time limits. Plaintiffs' concerns regarding 22 O.S.2011, § 1015(B) are irrelevant to this appeal, and therefore this Court should ignore Plaintiffs' raising of the issue.

PROPOSITION IV: PLAINTIFFS CANNOT MEET THE STANDARDS NECESSARY TO QUALIFY FOR A STAY OF EXECUTION.

Even if this Court were to consider the request for a stay, this Court must deny that request because Plaintiffs have not set forward the necessary elements for a stay of execution.

1. Plaintiffs cannot Establish a Likelihood of Success on the Merits.

In order to receive temporary injunctive relief, a plaintiff must show (1) a substantial likelihood of success on the merits, (2) irreparable harm to the plaintiff if the injunction is not granted, (3) that the balance of the harms to parties weighs in favor of the injunction, and (4) any public policy interests that weigh in favor of an injunction. *House of Sight & Sound, Inc. v. Faulkner*, 1995 OK CIV APP 112, ¶ 5, 912 P.2d 357, 360. In addition, the U.S. Supreme Court has held that a stay of execution is an equitable remedy, and there is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as

to allow consideration of the merits without requiring entry of a stay." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). The Supreme Court has also stated that the "last-minute nature of an application" or an "applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay. *Gomez v. United States Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992).

As an initial matter, Plaintiffs have engaged in dilatory conduct, and have deliberately attempted to manipulate the judicial system, as revealed above in the procedural history of this case, and in their continued avoidance of the OCCA.

a. Plaintiffs are not likely to succeed on their claims in this appeal.

In addressing the constitutionality of 22 O.S.2011, § 1014(A), this Court must indulge *every* presumption that favors a statute's constitutionality. *Thomas v. Henry*, 2011 OK 53, ¶ 8, 260 P.3d 1251, 1254. Plaintiffs bear a heavy burden to show that a statute is "clearly inconsistent" with the Oklahoma Constitution. *Id.*; *Starkey v. Okla. Dep't of Corrs.*, 2013 OK 43, ¶ 44, 305 P.3d 1004, 1021. Plaintiffs must contend with the fact that courts construe statutes in a manner that upholds their constitutionality whenever feasible. *In re Estate of Bell-Levine*, 2012 OK 112, ¶ 9, 293 P.3d 964, 967. In instances where there is doubt, or if constitutionality is a close question, that "doubt must be resolved in favor of the constitutionality of the act of the Legislature." *Dobbs v. Bd. of Cnty. Comm'rs of Okla. Cnty.*, 1953 OK 159, ¶ 16, 257 P.2d 802, 806.

Plaintiffs try to draw this Court's attention away from the actual appeal at hand. Plaintiffs claim that they are likely to succeed on the merits of their challenge to 22 O.S.2011, § 1015(B). *Emergency Appl.* at 8. However, that statute is not at issue in this appeal. ODOC intends to appeal that ruling later in a separate proceeding, but has not filed such appeal as of this

time. Instead, the issues in this appeal are whether 22 O.S.2011, § 1014(A) is unconstitutional and if ODOC's execution protocols violated the Administrative Procedures Act (APA). *Petition in Error*, Exhibit C. On these issues, Plaintiffs have not shown any likelihood of success on the merits, nor have they even argued such likelihoods exist, aside from one sentence in their application. *Emergency Appl.* at 8. This Court must only consider Plaintiffs' likelihood of success on their claims under the APA and 22 O.S.2011, § 1014(A).

Plaintiffs raised their challenge to 22 O.S.2011, § 1014(A) in a reply brief. *Reply in Supp. of Pls.' Mot. for Summ. J.*, at 7-9 (attached as Exhibit 8). It was an issue that was not previously pled. *Id.* at 7. Plaintiffs argued below that 22 O.S.2011, 1014(A) gives the Director of ODOC unfettered discretion to execute inmates with whatever drugs the Director chooses. *Id.* at 8. These are baseless allegations. First, all five methods set forth in the new protocol have been vetted and approved by federal courts in various jurisdictions. *Baze*, 553 U.S. at 45 (three-drug protocol using sodium thiopental is valid); *Chavez v. Florida SP Warden*, 742 F.3d 1267, 1269, 1272 (11th Cir. 2014) (three-drug protocol using midazolam and a blocking agent is valid); *Sepulvado v. Jindal*, 729 F.3d 413, 416-17 (5th Cir. 2013) (one drug protocol with pentobarbital valid under *Baze*); *Pavatt v. Jones*, 627 F.3d 1336, 1337-40 (10th Cir. 2010) (three-drug protocol using pentobarbital is valid); *Cooey v. Strickland*, 589 F.3d 210, 230 (6th Cir. 2009) (protocol using midazolam and hydromorphone is valid). While dosages may vary in these protocols, this variance does not constitute an inappropriate unfettered discretion. Second, the Director cannot simply use "whatever drug he chooses" but is instead limited to one of the drugs or combination of drugs outlined in the protocol in place at the time of the execution.

Further, the Director's discretion to choose between valid execution methods is constitutional. While there is no Oklahoma authority directly on point, similar statutes have been

upheld in other states. *See Diaz v. Florida*, 945 So.2d 1136, 1143 (Fla. 2006); *Idaho v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Cr. App. 1978); *Delaware v. Deputy* 644 A.2d 411, 420-21 (Del. Super. 1994); *see also Hobbes v. Jones*, 412 S.W.3d 844, 861 (Ark. 2012) (dissent). Challenges to discretion were also heard and rejected in *In re Lombardi*, 741 F.3d 888, 897 (8th Cir. 2014). The cases cited by Plaintiffs below involved situations wherein the agencies were functioning as law makers without standards. Ex. 8 at 8. Here, the Director is given limited discretion in carrying out the law, and can only do so in accordance with constitutionally valid execution methods. Therefore, Plaintiffs cannot show a substantial likelihood of success on the merits on their challenge to 22 O.S.2011, § 1014(A).

Plaintiffs also do not show a likelihood of success on the merits of their APA claim. The Administrative Procedures Act, ("APA"), and specifically 75 O.S.Supp.2013, § 303 does not apply to the ODOC in the present situation. Plaintiffs' invocation of that rule is misplaced and only serves to highlight the latitude of responsibility necessarily conferred upon the Department and its administration. The APA consists of two (2) Articles: "Article I relating to agency filing and publication requirements for rules shall consist of Sections 250.2, 250.6, 250.7 and *250.9 through 308.2* of this title . . ." (75 O.S.2011, § 250.1)(A)) (emphasis added), and Article II which relates to agency notice and hearing requirements in individual proceedings. Section 303 cited by Plaintiffs is contained within Article I. However, contrary to Plaintiffs' allegations, the ODOC is not subject to Article I in this situation. In pertinent part, the APA states:

> *The Department of Corrections*, State Board of Corrections, county sheriffs and managers of jails *shall be exempt from Article I* of the Administrative Procedures Act with respect to: (a) prescribing internal management procedures for the management of the state prisons, county jails and city jails and for the management, supervision and control of **all incarcerated prisoners** . . . .

75 O.S. § 250.4(10)(A) (Emphasis added). ODOC is clearly exempt from the requirements of the APA. Plaintiffs' APA claim was rejected by the District Court, a decision that was consistent with authority from other states.

Plaintiffs attempt to gloss over the flaws in their arguments by complaining about the recent changes to the protocol, claiming that such changes make them even more unsure about the details of the executions. *Supplement to Emergency Appl. for Stay of Execution*, at 2. However, Plaintiffs are complaining about the very factors that ensure that the protocols can be changed to address issues. Plaintiffs raised concerns regarding the dosages. *Id.* ODOC has reviewed the concerns, and has revised the protocol to correct the dosages to ensure that Plaintiffs receive the appropriate amounts of drugs. Ex. 4 at 18. If ODOC did not have the flexibility granted under 22 O.S.2011, § 1014(A) and under the exemption from the APA, Plaintiffs' concerns could not be addressed, and thereby risking last-minute problems. Plaintiffs are seeking to undermine the very safeguards that they enjoy. Plaintiffs cannot show a substantial likelihood on the merits, and therefore this Court should deny their request.

b. Even if this Court considers Plaintiffs' claims concerning 22 O.S.2011, § 1015(B), Plaintiffs still have no likelihood of success of the merits.

Plaintiffs have only appealed the District Court's ruling on 22 O.S.2011, § 1014(A) and Plaintiffs' APA claims. However, even if this Court does decide to consider Plaintiffs' challenge to section 1015(B), Plaintiffs still have not shown a likelihood of success on the merits.

The U.S. Supreme Court has definitively stated that the right of access to courts does not give individuals a right to "*discover* grievances." *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (emphasis in original). There is no authority in Oklahoma indicating that preventing disclosure of information denies a party's access to courts. However, the Eighth Circuit has held that preventing disclosure does *not* deny access to courts. In *Williams v. Hobbes*, death row inmates

challenged an Arkansas statute that exempted certain parts of Arkansas' death penalty protocol from the state Freedom of Information Act. 658 F.3d 842, 846 (8th Cir. 2011). The inmates claimed that the secrecy around the protocols denied them an "opportunity to litigate," and therefore violated their right of access to courts. *Id.* at 851-52. The Eighth Circuit rejected this claim, stating that courts have held that an "inability to *discover* potential claims" is *not* a due process violation. *Id.* at 852 (emphasis in original).

State district courts in Georgia and Texas have ruled that those states' confidentiality laws bar access to courts. However, those rulings are unsupported by any controlling authority, and are therefore unpersuasive on this issue. Also, every time this situation has arisen in any form before the U.S. Circuit Courts or Supreme Court, those Courts have denied stays and rejected the challenges related to confidentiality statutes.

Here, the District Court ruled that 22 O.S.2011, § 1015(B) violated OKLA. CONST. art. II, § 6, opining that even though the Plaintiffs could file a case, it would do them "absolutely no good" because they could not discover the source of the drugs. [ROAC, Doc. 18, pp. 68-69]. However, as this Court has held, art. II, § 6 does not exist to guarantee a set of events, or to ensure that Plaintiffs succeed on their claims. *Rollins v. Thermodyne Indus., Inc.*, 1996 OK 6, ¶ 9, 910 P.2d 1030, 1032. Instead, art. II, § 6 ensures that the judiciary is open and available for Plaintiffs to bring their claims. Whether they have the ability to succeed on that claim is outside of the scope of art. II, § 6.

Also, the U.S. Supreme Court has held that a plaintiff must show actual injury in order to succeed on an access to courts claim. *Lewis v. Casey*, 518 U.S. 343, 351-52 (1996). This requirement stems from standing doctrine, which restricts courts to providing relief only to those "who have suffered, or will imminently suffer, actual harm...." *Id.* at 349. The OCCA has noted

that *Lewis* limits access to court claims due to the requirement of actual injury. *Braun v. State*, 1997 OK CR 26, ¶ 13 n.6, 937 P.2d 505, 509 n.6. The U.S. Supreme Court has also recognized that however "unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002).

Plaintiffs have not and cannot show actual injury stemming from the non-disclosure of the information they seek. The existing authority shows that Plaintiffs' potential Eighth Amendment claims have no likelihood of success, despite their allegations regarding compounding, possible contamination, and botched executions. *Whitaker v. Livingston*, 732 F.3d 465, 468-69 (5th Cir. 2013) (speculation about drug contamination does not warrant stay); *In re Lombardi*, 741 F.3d 888, 889-96 (8th Cir. 2014) (denying discovery of drug sources to death row inmates); *Sells v. Livingston*, No. 14-70014, 2014 WL 1316339 at *2, 5 (possibility of improper compounding did not satisfy inmate's burden); *Malicoat v. State*, 2006 OK CR 25, ¶ 7, 137 P.3d 1234, 1237-38 (OCCA declined to speculate about potential problems). Even if Plaintiffs received the information they seek, and even if the specific participants and companies were identified, Plaintiffs would have no viable Eighth Amendment claim. Plaintiffs could only allege the *possibility* of contamination, which is clearly insufficient to support an Eighth Amendment challenge. Therefore, Plaintiffs have no actual injury supporting their access to courts claims.

The District Court's ruling was a dramatic departure from case law in Oklahoma and nationwide on this issue. ODOC has found no similar authority other than district court rulings from other states that support Plaintiffs' position. These district court rulings are not supported by any authority, but instead represent an extreme leap in access to courts jurisprudence.

Therefore, Plaintiffs are unlikely to be successful on the merits of their challenge to section 1015(B).

2. Plaintiffs Fail to Establish an Irreparable Harm.

Plaintiffs' burden is to establish harm by the "clearest proof," and show at least a reasonable probability that the harm will occur. *Thomas v. Hampton*, 1978 OK 114, 583 P.2d 506, 507-508. The Tenth Circuit has held that "[p]urely speculative harm will not suffice," unless a plaintiff shows a *significant risk* of harm. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). In the present case, however, Plaintiffs cannot meet this high burden. Plaintiffs will be executed, even if they receive all their requested relief. A stay would simply delay their executions, based upon the assertion of a purely speculative harm in the method of their execution. As previously discussed, Plaintiffs are far beyond the point of challenging their sentences or convictions and, at this point, the question is not whether they will be executed, but when and by what method. Therefore, the only harm this Court should evaluate is the one actually being challenged and asserted by Plaintiffs, applying the standard of clearest proof.

Plaintiffs' allegations have become more speculative each time ODOC has provided information about Plaintiffs' executions. For instance, Plaintiffs refer to the dangers of compounded execution drugs. *Emergency Appl.* at 10. However, this issue is completely irrelevant to Plaintiffs' executions, as ODOC has affirmatively disclosed that the drugs used will be manufactured, not compounded. *Supplement to Emergency Appl.* Ex. 3 at 1. Plaintiffs try to show danger through the alleged "untested" method of execution. *Emergency Appl.* at 1, 9-10. However, the constitutionality of ODOC's protocol has not been officially challenged in this case. In fact, Plaintiffs have repeatedly insisted that they are not challenging the protocol. *Id.* Ex. 5 at 41-42. If Plaintiffs are truly concerned with the method of their executions, they should

challenge those methods in the OCCA, which is the proper forum for such a challenge. Plaintiffs have not shown a risk of irreparable harm, and therefore this Court should deny their request.

3. The Potential Harm to Public Policy Weighs Heavily in Favor of Denying a Stay in this Matter.

The United States Supreme Court has recognized that a state has a "*strong* interest in proceeding with its judgment...." *Gomez v. U.S. Dist. Ct. for N. Dist. Of Cal.*, 503 U.S. 653, 654 (1992). Plaintiffs' purely speculative harm is outweighed by the very real harm to the State if the execution is stayed. In order to conduct an execution, the State of Oklahoma must begin preparations far enough in advance to ensure all the legal and procedural requirements are fulfilled. ODOC has already begun many of those preparations, including the isolation process and movement of personnel. A sudden reversal would require several alterations in ODOC procedure resulting in an interruption of the normal processes and preparations. A stay would also require the OCCA to set new dates for executions, which it has already appropriately set and a stay would cause congestion in the scheduling of other executions which could become ripe during that time. In addition, the families and friends of the victims have patiently waited for over a decade for the State to carry out Plaintiffs' sentences, and a delay in execution would also delay their much-needed closure. Finally, the harm to the finality of the criminal process of the State of Oklahoma cannot be understated. The citizens of the State of Oklahoma have found the Plaintiffs guilty and sentenced them to death utilizing a criminal process which has been reviewed and upheld as constitutionally sound. Plaintiffs have also had full benefit of every automatic and permissive appeal required by law, as well as the clemency process and numerous legal junctures such as an opposition to the State's request to the OCCA to set an Execution Date.

At the end of that lengthy and deliberate process, however, the authorities properly vested with jurisdiction to determine the constitutionality of those matters have ordered the death sentences to proceed. The citizens of the State of Oklahoma, therefore, have an interest in knowing that the criminal justice system within their State will not be thwarted from applying the punishment they have authorized and selected for Plaintiffs, absent proof of the highest order that it is necessary and proper to do so. The citizens should not see their criminal justice system derailed and subverted by criminal defendants who have completely exhausted the entire range of appeals and processes required by the U.S. and Oklahoma Constitutions due to baseless speculation of theoretical harms raised in improper venues. The citizens of the State of Oklahoma should not see their criminal justice system tripped and stymied by Plaintiffs who have been under death sentences for more than a decade, who are well past the point of clemency, and whose only remaining harm is purely speculative. Therefore, the balancing of the harms to Plaintiffs and public policy weigh in favor of denying Plaintiffs' request as well.

4. There are no Significant Public Policy Interests that Weigh in Favor of an Injunction in this Matter.

Plaintiffs claim that the public interest would be harmed by "denying the public full awareness of the means by which the State executes its own citizens, and by permitting the State to carry out executions in violation of the Constitution and laws of this State." *Emergency Appl.* at 9. Again, 22 O.S.2011, § 1015(B) is not at issue in this appeal. Additionally, ODOC has fully and adequately produced relevant information concerning the drugs used for Plaintiffs' executions. *Id.* Exs. 7, 8; *Supplement to Emergency Appl.* Ex. 3. Plaintiffs know the drugs which will be used, they know that those drugs are manufactured, and all other information about the drugs except for the identity of the supplier, manufacturer, distributor, and participants. *Emergency Appl.* Exs. 7, 8; *Supplement to Emergency Appl.* Ex. 3. In addition, ODOC will

continually re-evaluate any concerns and provide reliable and accurate information to address those concerns, while still protecting the legitimate governmental interests in protecting the identities of the participants. Finally, the method of execution has been implemented in other states, therefore Plaintiffs' conclusory statement that ODOC will execute Plaintiffs in violation of the Constitution is baseless.

In contrast with Plaintiffs' speculative claims, there is strong and clear public policy that the people of the State of Oklahoma have a vested interest in ensuring timely enforcement of their laws. This policy is far stronger than any purported public policy Plaintiffs' claim. Both the State and the victims of crime (in this case the family of Plaintiffs' murder victims) have an important interest in the timely enforcement of a sentence. *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2004).

CONCLUSION

The proper forum for the entirety of Plaintiffs' true claims is the OCCA. Therefore, ODOC requests that this Court decline jurisdiction and transfer the case to the OCCA.

In the alternative, ODOC would request that this Court acknowledge its earlier decision, and decline jurisdiction on whether or not stays of Plaintiffs execution dates are warranted or appropriate.

If, however, this Court reverses itself and determines that it should exercise jurisdiction over either the stay or the entire matter, ODOC would request that this Court deny Plaintiffs' stay because they have not and cannot meet the minimum standards necessary for injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2014, a true and correct copy of the attached document was sent via U.S. mail, postage prepaid to:

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