IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD DELANEY KYLES	)	
Plaintiff,	)	
	)	
v.	)	Appeal No. 08-40271
	)	District Ct. No. 03-CV-53
GERALD GARRETT, TROY FOX	)	
	)	
Defendants.	)	
	)	

Appeal from the United States District Court
for the Southern District of Texas

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CERTIFICATE OF INTEREST

_____The undersigned, counsel of record for Plaintiff, Jason R. Epstein, furnishes the following information in compliance with Circuit Rule 12(d).:

(1) The full name of every party or amicus the attorney represents in this matter: Richard Delaney Kyles

(2) If such amicus or party is a corporation: Not applicable. Party is an individual.

(3) The names of all law firms, partners or associates who have appeared for the party in the District Court or are expected to appear for the party in this Court:

District Court:	Appellate Court:
Southern District of Texas	Fifth Circuit
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Certified this 5th___ day of August, 2009

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TABLE OF CONTENTS

Page

Statement of Issues Presented for Review 1

Jurisdictional Statement 1

Statement of the Case 3

Statement of Facts 3

Summary of Argument 4

Argument 5

I *COLLATERAL ESTOPPEL* MAY NOT BE APPLIED AGAINST PLAINTIFF BECAUSE

1) DEFENDANT FAILED TO PLEAD THE DEFENSE *5*

2) *RES JUDICATA ESTOPS* DEFENDANT FROM ASSERTING IT 7

3) *LACHES* BARS ITS APPLICATION AGAINST PLAINTIFF. 8

II APPLICATION OF *COLLATERAL ESTOPPEL* PRINCIPLES RESULTS IN NOT APPLYING THE DOCTRINE AGAINST KYLES BECAUSE 9

1) THE FACTS, LAW AND PRINCIPLES ARE DIFFERENT IN THE SUITS AT

ISSUE 9

2) PLAINTIFF HAS NOT HAD AN OPPORTUNITY TO FULLY LITIGATE THE MATTER. 11

III THE CHANGE IN THE TEXAS PAROLE SCHEME HAS CREATED MORE THAN A SPECULATIVE, ATTENUATED RISK OF EFFECTING KYLES ACTUAL TERM OF CONFINEMENT AND THUS VIOLATES *EX POST FACTO*. 14

IV ADJUDICATING KYLES DECLARATORY §1983 ACTION WILL NOT IMPLY THAT THE UNDERLYING PAROLE STATUTE IS INVALID 16

V DEFENDANTS RULE 56 MOTION SHOULD BE STRICKEN . . . .

VI DEFENDANTS ARE NOT ENTITLED TO IMMUNITY WHERE THE ONLY CLAIM IS A PROSPECTIVE DECLARATORY ACTION. 20

Conclusion 20
Table of Contents to Appendix 17
Appendix A1-3

TABLE OF AUTHORITIES

Page(s)

42 U.S.C. 1983 . . . . *passim*

Ali v. Higgs, 892 F2d 438 (5th Cir. 1990) 7

Allen v. McCurry, 449 U.S. 90, 94 (1980) . . . . *passim*

Banc One Capital Partners v. Kneipper, 67 F.3d 1187, 1199 (5th Cir. 1995) 8

Bankr. L. et al., v. America's Favorite Chicken, et al. 47 F.3d 1415 (5th Cir. 1995) 9

Blonder Tongue v. University of Illinois Found., 402 U.S. 313 (1971) 6,11,13

Brister v. A.W.I., 946 F.2d 350, 354 (5th Cir. 1991). 9

Chrissy F. by Medley v. Miss. Dep't of Pub. Welfare, 925 F.2d 844, 849 (5th Cir.1991). 20

Clarke v. Stadler, 154 F.3d 186, 190-91 (5th Cir. 1998) . . . . *passim*

Cook v. Texas Dep't of Criminal Justice Trans.Dept., 37 F.3d 166, 168 (5th Cir.1994) 17

Creel v. Keens, 928 F.2d 707 (5th Cir. 1991) 11, 12

Douthit v. W J Estelle, 540 F2d 800 (5th Cir. 1976) 11

Ex Parte Young 209 U.S. 123 (1908) 20

Ex parte Thomas 906 S.W.2d 22, 24 (Tex. Crim. App. 1995) 10

Ex parte Sadberry, 864 S.W.2d 541, 543 (Tex. Crim. App. 1993) 10

Fay v. Noia, 372 U.S. 391, 399, n. 5, 83 S.Ct. 822, 827, n. 5, 9 L.Ed.2d 837,24 09

FRCP8(c) 5,6

FRCP56 19

Home Depot v. Guste, 773 F.2d 616, 621 (5th Cir. 1985). 7,9

Kaspar Wire Works v. Leco Engineering,575 F.2d 530 (5th Cir. 1978) 17

Lesherv. G Lavrich, 784 F2d 193 (6th Cir. 1985) 9

Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991) 8

Orellana v. Kyle 65 F3d 29, (5th Cir. 1995) 11, 17, 18, 21

Preiser v. Rodriguez, 411 U.S., at 484, 93 S.Ct., at 1833 10

Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987) 17, 18

US v. Shanbaum, 10 F.3d 305, (5th Cir. 1994) 7

Wallace v. Quarterman, 516 F. 3d. 351, 356 (5th Cir. 2008) 14, 15, 19

Weaver v. Graham, 450 U.S. 24, 29-30, 101 S.Ct. 960, 964-65, 67 L.Ed.2d 17 (1981) 11

JURISDICTIONAL STATEMENT

Jurisdiction of the Court - 28 U.S.C. 1291. The matter was brought in the trial court pursuant to 42 U.S.C. §1983. This is an appeal from a final order of dismissal with prejudice entered by the United States District Court, Southern District of Texas on February 19, 2008. (Rec. 610). Plaintiff's Notice of Appeal was timely filed on March 11, 2008. (Rec. 620).

ISSUES PRESENTED FOR REVIEW

I

Whether appellees' *collateral estoppel* argument should be allowed to withstand the failure to plead, *res judicata* and laches.

II

Whether application of *collateral estoppel* principles bar plaintiffs claims where the facts, law and principles are different in the suits at issue and plaintiff has not had an opportunity to fully litigate the matter.

III

Whether plaintiff states an *ex post facto* violation.

IV

Whether adjudicating Plaintiff's declaratory §1983 action will imply that the underlying parole proceeding is invalid.

V

Whether defendants rule 56 motion should be stricken.

VI

Whether defendants are entitled to immunity where the only claim is a prospective declaratory action.

STATEMENT OF THE CASE

Plaintiff Richard Kyles seeks this Courts relief in barring the defendant from applying the new Texas parole scheme to his future parole proceedings. Applying the new scheme will make it more difficult for plaintiff to obtain parole.

STATEMENT OF FACTS

___In April 1976, plaintiff was convicted of capital murder and sentenced to life imprisonment. Rec. 571. At the time of his conviction, parole eligibility was governed by Article 42.12 of the Texas Code of Criminal Procedure, under which Parole Board members and Commissioners were allowed to act in panels of three persons; only two out of three votes of the panel were required for an inmate to be released to parole. *Id.* In April 2002 and February 2004, Plaintiff acquired two out of three votes to grant him parole. During his incarceration the Texas parole scheme changed to require 18 instead of 3 votes. Kyles sought an injunction prohibiting Defendant from applying section 508.046 of the Texas Government Code to future determinations of his eligibility for release on parole; and, to have the Court order Defendant to consider him under the version of former article 42.12 of the Texas Code of Criminal Procedure that was in effect at the time his offense was committed in future parole proceedings.

Case History Facts

Plaintiff, Richard Kyles, incarcerated in a Texas prison was denied parole in 2002 and 2004. While incarcerated Texas changed its method in evaluating parole. Plaintiff brought a declaratory action pursuant to §1983 to redress an *ex post facto* violation brought on by the change in the Texas Parole scheme. Rec. 11. On October 2004 the District court accepted the report and recommendation of the magistrate and dismissed his action *sua sponte* pursuant to §28 U.S.C. 1915 as failing to state a claim and as frivolous. Rec. 107. Plaintiff filed an appeal and this Court, on April 10th, 2007, remanded to address plaintiff's *ex post facto* claim. April 10th 2007. Rec. 151. The attorney general entered an appearance. The defendant filed a motion to dismiss the matter on June 5, 2007. Rec. 262. The motion to dismiss was denied and the district court dismissed the matter pursuant to motion for summary judgement on August 13th, 2007. Rec. 307.

SUMMARY OF ARGUMENT

I

Defendant can not argue *collateral estoppel* against plaintiff as they failed to plead the defense, *Res judicata* bars its application as it could have been raised in a prior proceeding and the over twelve month delay renders application unjust pursuant to *laches*.

II

Plaintiff is not barred from asserting his claim assuming proper application of *collateral estoppel* as the facts, law and principles of the two competing suits are different and plaintiff has not had an opportunity to fully litigate the matter.

III

Plaintiff states a valid claim pursuant to *ex post facto* as the change in the Texas Parole scheme has created more than a "speculative, attenuated risk of effecting Kyles actual term of confinement.

IV

Adjudicating Plaintiff's declaratory §1983 action will not imply that the underlying parole proceeding is invalid but may have direct impact which is cognizable.

V

Defendants rule 56 motion should be stricken as it states no argument and fact as to summary judgement.

VI

Defendants are not entitled to immunity where the only claim is a prospective declaratory action.

ARGUMENT

I.

***Collateral Estoppel* may not be applied against Plaintiff because 1) Defendant failed to plead the defense 2) *Res Judicata estops* defendant from asserting it 3) *laches* bars its application against Plaintiff.**

OVERVIEW

Collateral Estoppel/ Issue Preclusion vs. Res Judicata / Claim Preclusion

The government has not stated which doctrine they wish to proceed on and in shotgun fashion names and argues both. As an overview a brief explanation of the principles of *res judicata* and *collateral estoppel* is set forth.

Res Judicata - Claim Preclusion

Res Judicata is the legal doctrine based in equity which states that if a claim or argument could have been made in a prior case, whether or not it was made, is forfeited in a later case between the same parties. The foundation of *Res Judicata* emanates from doctrines of forfeiture and seeks to utilize judicial resources efficiently.

Collateral Estoppel - Issue Preclusion

Collateral Estoppel is the equitable doctrine that a claim or argument which is actually and fully argued is *estopped* from being litigated again. It also has foundations emanating from principles of judicial economy.

The text of the government argument refers to the Habeas petition filed by Mr. Kyles. The government asserts that Kyles filed a prior claim and argued the exact issue in the Texas Court of Criminal appeals and the Court dismissed the matter. Resp. Brf. Sect. C. By this it appears that the government is asserting *Collateral Estoppel* against Mr. Kyles.

A. *Collateral Estoppel* was not plead and is therefore forfeited.[1]

Res judicata and *collateral estoppel* are affirmative defenses that must be plead. Fed.Rule Civ.Proc.8; *US v. Shanbaum*, 10 F.3d 305, (5th Cir. 1994); *Blonder Tongue v. University of Illinois Found.*, 402 U.S. 313 (1971). The purpose of pleading arguments need not be stated in length except in a case such as this. The defendant in this matter was not only *pro se* but is in prison. Notice of claims to an opposing party is the fundamental basis of our system of pleading rules. *Pro Se* defendants not afforded with proper notice by learned counsel and

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[1]Waiver is different from forfeiture. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *United States v. W Olano*, 507 US 725 (1993).

court should not be afforded lenient scrutiny. Because it was not plead the argument is forfeited.

Of course, Courts have leeway in allowing late pleadings and answers. Where it is not plead it must be raised at the earliest practicable time. *Home Depot v. Guste*, 773 F.2d 616, 621 (5th Cir. 1985).

The attorney general asserts that collateral estoppel runs from a decision made in a lower court and taking an appeal does not effect that assertion. Rec. 312. Thus, according to the argument of defendant, Kyles habeas dismissal of April 2006 is when the argument of collateral estoppel became ripe. From April 2006 on, the matter could have been utilized to assert *collateral estoppel*. The time to assert *collateral estoppel* begins to run when the prior case upon which the argument is based is discoverable. *Banc One Capital Partners v. Kneipper*, 67 F.3d 1187, 1199 (5th Cir. 1995). (Party failed to plead *Res Judicata* and this Court affirmed dismissal of the claim based on waiver where the precedent case was discoverable.) August 2007 is the first time *collateral estoppel* is raised. Rec. 307. April 2006 is the first point in which it could've been raised. See gov. brief. Rec. 312. A full sixteen months elapsed from the time which collateral estoppel became "ripe" until the time it was alleged.

The attorney general received official notice in April of 2007. Prior to the

attorney generals duty to raise the defense it was incumbent upon the magistrate to raise it in their report and recommendations.[2] After April 2007 it was the duty of the attorney general to raise the issue.

The attorney general ignored this Courts order to answer the complaint and filed another motion to dismiss. Rec. 262 *Collateral estoppel* was not raised in this motion. Rec. 262. The attorney general responded to discovery- no mention of *collateral estoppel*. Rec. 551. Not until summary judgement was filed was *collateral estoppel* raised. One year and four months elapsed before the doctrine is asserted. The defense was raised in a dispositive motion against a *pro se* litigant instead of in the pleadings as required by FRCP 8(c). The doctrine of *collateral estoppel* has been forfeited as against Plaintiff Kyles.

B. Defendant is estopped from raising *collateral estoppel* pursuant to *res judicata*

The doctrine of *Res Judicata* applies in this matter against the government. Any claims that can be brought, but are not, are deemed forfeited in later

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[2]Fairness dictates that since burdens of equity apply against pro se litigants under 28 U.S.C. 1915 that equitable benefits also apply. *Res judicata* has been raised in §1915 reviews previously. *Ali v. Higgs*, 892 F2d 438 (5th Cir. 1990) Equitable principles apply against the litigant at this stage. We have a "firm waiver rule when a party fails to object to the findings and recommendations of the magistrate." *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991). It seems hardly equitable that the road does not flow both ways.

appropriate proceedings. *Allen v. McCurry* 449 U.S. 90, 94 (1980). In April 2006, Kyles §1983 matter was on appeal. Rec. 114. Kyles habeas petition was dismissed in April 2006. Any claim of *collateral estoppel* became ripe while the §1983 matter was on appeal.

Collateral estoppel can be raised in an appellate court, *Lesher v. G Lavrich*, 784 F2d 193 (6th Cir. 1985) and should be raised at the earliest practicable time. *Home Depot v. Guste*, 773 F.2d 616, 621 (5th Cir. 1985). Claim preclusion prevents collateral estoppel from being asserted against Kyles. The doctrine could have been raised in a prior proceeding, his appeal, and was not. The government is *estopped* from raising *collateral estoppel* against Kyles.

C. Laches bars the government from asserting *collateral estoppel*

Blacks law defines *laches* as an unreasonable delay in pursuing a right or claim in a way that prejudices the party of whom relief is sought. Blacks Law 7th ed.

The delay in this matter has been over sixteen months. In two separate proceedings the doctrine could have been raised. *Res judicata* dictates that any argument that could have been raised and is not is forfeited. Two procedural opportunities for the doctrine to have been alleged and it was not. It could have

been raised on his first appeal and it could have been raised in the pleadings on remand. It was not. As the great William Ewart Gladstone stated "Justice delayed is justice denied. "

II.

APPLICATION OF *COLLATERAL ESTOPPEL* PRINCIPLES RESULTS IN NOT APPLYING THE DOCTRINE AGAINST KYLES BECAUSE A) THE FACTS, LAW AND PRINCIPLES ARE DIFFERENT IN THE SUITS AT ISSUE B) PLAINTIFF HAS NOT HAD AN OPPORTUNITY TO FULLY LITIGATE THE MATTER C) AS AN ONGOING VIOLATION JUDICIAL ECONOMY RESULTS IN HEARING THE MATTER.

Collateral Estoppel is improper where the law and /or burden are different. Assuming *arguendo* that the court does not find that forfeiture, *laches* nor *res judicata* applies against the government in asserting *collateral estoppel* against Kyles, the principles of *collateral estoppel* dictate that Kyles is not barred from raising *ex post facto* in the §1983 action.

A. The law, facts and principle of the cases at issue are different.

Collateral estoppel does not preclude litigation of an in issue unless both the facts and the legal standard used to assess them are the same in both proceedings. *Bankr. L. et al., v. America's Favorite Chicken, et al.* 47 F.3d 1415 (5th Cir. 1995). Even where both suits arise out of the same factual basis collateral estoppel does

not apply unless the legal standards are the same. *Id*. citing *Brister v. A.W.I.*, 946 F.2d 350, 354 (5th Cir. 1991). Even if the issue is the same, (which it is not) if the policy behind the two claims is different *collateral estoppel* does not apply. *Id.*

The legal standard and policy for the two legal doctrines are vastly different. Habeas actions and § 1983 are the two matters which must be set apart in order for Kyles to prevail. Courts have specifically recognized the vast difference between the two statutes.

> "It is difficult to believe that the drafters of that Act [§1983] considered it be a substitute for a federal writ of habeas corpus, the purpose of which is not to redress civil injury, but to release the applicant from unlawful physical confinement, *Preiser v. Rodriguez*, 411 U.S., at 484, 93 S.Ct., at 1833; *Fay v. Noia*, 372 U.S. 391, 399, n. 5, 83 S.Ct. 822, 827, n. 5, 9 L.Ed.2d 837,24 particularly in light of the extremely narrow scope of federal habeas relief for state prisoners in 1871". *Allen v. McCurry* 449 U.S. 90 (1980).

Habeas Corpus

Habeas petitions are directed at releasing someone wrongfully held in confinement. To prevail on a writ of habeas corpus, the proponent must prove his allegations by a preponderance of the evidence. See *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995). Habeas corpus is applicable only to review jurisdictional defects or denials of fundamental or constitutional rights. *Ex parte*

Sadberry, 864 S.W.2d 541, 543 (Tex. Crim. App. 1993).

42 U.S.C. §1983

§1983 is directed at redressing Constitutional violations by state actors. Fundamental liberty interests are not required in *ex post facto* actions brought pursuant to §1983. This simple difference, the lack of a need of a fundamental liberty, calls to mind a vast array of fundamental right jurisprudence which is not at issue in §1983 actions. "A law need not impair a vested right to violate the *ex post facto* prohibition". *Orellana v. Kyle* 65 F3d 29, (5th Cir. 1995) referencing *Weaver v. Graham*, 450 U.S. 24, 29-30, 101 S.Ct. 960, 964-65, 67 L.Ed.2d 17 (1981).

> "The presence or absence of an affirmative, enforceable right is not relevant.... Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated." Id. at 30, 101 S.Ct. at 965.

The two legal doctrines contrasted above are vastly different and implicate further innumerable considerations. In one, state law must be considered and applied and in the other federal jurisprudence controls. For instance, it is stated by the district court in Kyles *habeas* case that there is no liberty interest in parole.

Rec. 408 citing *Creel v. Keens*, 928 F.2d 707 (5th Cir. 1991). This doctrine is not implicated in Kyles §1983 action. In one the goal is to be set free from a governmental entity and the other to show a deprivation at the hands of a state actor. Can the two cross? Yes. How they cross and the place they end are two different roads of analysis.

Their purposes are vastly different. In one the purpose is to free those wrongfully held against their will. In the other the purpose is to protect civil rights not adequately protected by the states. *Allan v. Mccurry*, 449 U.S. 90 (1980). *Habeas* actions are directed at government officials. §1983 is directed at state actors acting under color of law.

The factual underpinnings in Kyles *Habeas* matter and his §1983 actions are the same. Identical facts don't necessarily give rise to *collateral estoppel.* See *Douthit v. W J Estelle,* 540 F2d 800 (5th Cir. 1976). (defendant charged with rape twice over three counties). Moreover, the factual use in the matters are distinct. In one it will be presumably argued that he had enough votes to secure release. In the other that the past voting statistics give rise to a likelihood greater then speculation that Kyles will receive votes again..

B. Kyles has not had a full and fair opportunity to litigate his Ex Post

Facto claim.

A "full and fair opportunity" must be afforded to the litigant to bear out his claims.[3] *Blonder Tongue v. University of Illinois Found.*, 402 U.S. 313, 328 (1971). It is impossible to assert that Kyles had a full and fair opportunity to litigate the matter in the *Habeas* proceeding where the legal principles are so vastly different. Kyles claims seek different results, one prospective one retroactive, one for release and one for fair application of laws in the future with no guarantee of release.

> "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issued decided by the first court.". *Allen* at 101.

The purpose of §1983 is to allow litigants a full and fair hearing in matters where state courts fail to do so. *Allen v. McCurry* 449 U.S. 90, 100-101 (1980). The Texas Courts do not recognize a constitutional interest in parole. The matter will never be addressed if left solely to Texas jurisprudence. Where state procedural law is inadequate in theory or practice or where litigants are not afforded opportunity to litigate their claim fully and fairly §1983 is the appropriate

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[3] The magistrate asserts that *collateral estoppel* applies even if the plaintiff had no opportunity to litigate the claim in a *federal* forum. Rec. 576. Emphasis added. This presumes an opportunity to litigate the matter at all.

remedy. *Allen v. McCurry* 449 U.S. 90, 100-101 (1980).

The Texas court reviewed Mr. Kyles *habeas* petition pursuant to the then standing parole statute. The court did not discuss Mr. Kyles *ex post facto* argument regarding whether application of the previous statute would have the effect of increasing his incarceration. Mr. Kyles then filed his federal habeas petition wherein it was dismissed as without merit pursuant to the Texas law that there is no liberty interest recognized in parole. *Creel v. Keens*, 928 F.2d 707 (5th Cir. 1991) Rec. 408.

The *habeas* matter was appealed and this Court affirmed the dismissal in the district court. No. 06-20495. It was denied based on the *habeas* requirement that the claim must show that the parole procedure was either contrary to, or an unreasonable application of, clearly established federal law. *Id.* citing *Wallace v. Quarterman*, 516 F. 3d. 351, 356 (5th Cir. 2008) . This legal standard is vastly different then §1983 requirement of showing deprivation of rights by one acting under color of law. The *exact* reason §1983 was enacted by elected officials was to address situations where state law does not adequately address federal concerns.[4] *Allen v. McCurry*, 449 US 90, 94 (1980).

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[4] "In reviewing the legislative history of § 1983 in *Monroe v. Pape*, supra, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow

The government does no analysis of the factual presentations done by Kyles in the Texas *Habeas* proceeding to support that he had a full and fair hearing. The government states the law but does no application to those facts. Rec. 310-312 The court can rule against the government on this basis alone.

Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard. *Blonder Tongue v. University of Illinois Found.*, 402 U.S. 313 (1971).

III

THE CHANGE IN THE TEXAS PAROLE SCHEME HAS CREATED MORE THAN A "SPECULATIVE, ATTENUATED RISK OF EFFECTING KYLES ACTUAL TERM OF CONFINEMENT AND THUS VIOLATES *EX POST FACTO*.

Wallace v. Quarterman, 516 F. 3d. 351, 356 (5th Cir. 2008) forecloses any debate on this issue.

> "Increasing the number of board members who must vote on parole may create more then a speculative, attenuate risk of affecting a prisoner's actual term of

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full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S., at 173-174, 81 S.Ct., at 476-477". *Allen v. McCurry*, 449 US 90, 94 (1980).

confinement..." *Wallace v. Quarterman*, 516 F. 3d. 351, 356 (5th Cir. 2008).

Wallace is on all fours except that in *Wallace* the underlying claim was not one of §1983 but was *habeas corpus.* A prison litigants claim challenging the restructuring of the Texas Parole statute at issue *sub judice* was dismissed. The *Wallace* court, this Court, directs the district court to look to the specific facts of the case to determine whether the new law produces a sufficient risk of increased confinement. This factual inquiry, in the matter has never been made by any fact finder.

Twice plaintiff received not one but two votes for release via parole. *Passim* These are the very type of facts which this Court referenced in *Wallace.* Other facts may be the length of time the prisoner has been incarcerated, whether his education is complete, whether he has a locus of support when he is released, 3whether he has been in trouble while incarcerated. These facts are the type of facts the court presumably had in mind.

For instance, if the prisoner had been incarcerated a short time, had a 100 year sentence, had made no effort at furthering his education, had been in fights, was in a gang, had no locus of support upon his release and had received zero votes on a single parole hearing his §1983 suit alleging the change in the parole

structure would be frivolous and speculative at best.

Contrast these facts with the Plaintiffs. He has received two votes of a potentially three member panel on two occasions. This alone is sufficient to take the matter out of the “speculative” claim range. Plaintiff does not have to prove beyond a reasonable doubt nor by clear and convincing evidence that his claim will be successful. He has to show it is not speculative. Two reasonable persons reviewed Mr. Kyles history and voted that he be released.

It is a specious argument to allege that the same two people may not be on his parole board again. Rec. 316. Assume for the sake of argument that they will not be. This effects the parolees position in the least. Two reasonable persons reviewed it and said yes to his release. The board members presumed to be of the reasonable person variety. Thus, another reasonable person is likely to vote the same way. Even if it cant be proven that they *will* vote the same way the probability exists that they will given the past two. Kyles must show sufficient risk of increased incarceration and not sufficient certitude. The governments argument fails.

Arguments that his prior 100 were ‘no’ is also specious. Rec. 316. Time passing increases the parolees argument as to - someone will vote yes. As stated above, the parolee who on a 100 year sentence alleges an affect on his

incarceration after his first parole review would be speculative. Why? As time goes by the parole board members view the parolee as having served his time, paid his debt to society. These facts are facts for the fact finder. Mr. Kyles is not required by the law or equity to prove he that he WILL be released he only need show that application of the current statute creates a sufficient risk of increased confinement. On that note *Heck* is addressed.

IV

ADJUDICATING KYLES DECLARATORY §1983 ACTION WILL NOT IMPLY THAT THE UNDERLYING PAROLE STATUTE IS INVALID.

A claim[5] that has an indirect impact on whether a claimant eventually receives parole is cognizable under§ 1983. *Orellana v. Kyle* 65 F3d 29, (5th Cir. 1995) citing *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir.1987). The District Court cites *Clarke v. Stadler,* 154 F.3d 186, 190-91 (5th Cir. 1998*)* for the proposition that a ruling on the §1983 claim would necessarily imply the invalidity of the underlying conviction. Rec. 611. In *Clarke*, the litigant sought restoral of good time credits which goes directly, not

[5]The prospective relief sought by Kyles is different from any claim presented to this court previously in such matters. In this matter Kyles does not assert a claim but a an anticipatory defense to a potential claim. Thus is the nature of the declaratory action. *Kaspar Wire Works v. Leco Engineering* 575 F.2d 530 (5th Cir. 1978)

implicitly, but directly to the time the litigant had to do in prison. The *Clarke* court stated that the injunctive claim and the underlying conviction were so intertwined that the one could not be decided without calling into question the other. *Id.*

In making this determination as to when and how a claim is intertwined with the underlying conviction, the *Clarke* court stated that the court must consider the distinction between claims which *enhance eligibility for earlier release* and those that create entitlement to release. *Clarke* citing *Serio v. Members of Louisana State Board of Pardons,* 821 F.2d 1112, 1119 (5th Cir. 1987). Emphasis added. Clearly the court found the facts before it as falling under the latter theory of "one in which an entitlement to release" is implicated. The court specifically recognizes that actions will exist where the claim "enhances eligibility for earlier release". *Id.*

The *Clarke* Court specifically distinguished it from cases where it is possible, where the §1983 claim and any conviction is not so intertwined, as to afford relief for the claimant. *Clarke* cites ." *Orellana v. Kyle* 65 F3d 29, (5th Cir. 1995) for this proposition.

> "Section 1983 is an appropriate legal vehicle to attack unconstitutional parole procedures or conditions of confinement." *Orellana v. Kyle* 65 F3d 29, (5th Cir. 1995) citing *Cook v. Texas Dep't of Criminal Justice Transitional Planning Department*, 37 F.3d 166, 168 (5th Cir.1994).

The question becomes one of whether or not the Constitutional claim raised pursuant to §1983 and the underlying conviction are so intertwined that a ruling in favor of the plaintiff would imply the invalidity of said conviction. An indirect impact is acceptable. See *Clarke.* So the thermometer is established - a claim cannot "imply the invalidity of the conviction [parole hearing]" *Heck,* but it can have an indirect impact on said conviction/parole hearing. *Clarke.* The District Court did not give any factual analysis as to why Kyles §1983 claim is intertwined with any underlying conviction or parole proceedings.

Mr. Kyles has shown, via prior votes for release, that his eligibility for release is enhanced given the application of the appropriate law to his parole hearing. This enhanced showing is necessary pursuant to *Clarke* and *Serio* cited above. Mr. Kyles is well aware that his success in this claim does not guarantee nor make any entitlement to his release. *An* indirect impact on his parole hearing is cognizable. *Clarke* at 32. It would be near impossible to have no impact. The showing of prior votes does not mean his prior parole hearing was invalid as it was conducted.

Kyles success on his claim merely directs which law to apply. It does not dictate a result. Once it is established that he has a chance of future votes then that inquiry is at an end and the next begins. The next inquiry being whether or not

the Texas procedure in place violates the doctrine of *Ex post facto*. *Wallace* states unequivocally that the change from 18 to 3 may have an effect the time a prisoner is incarcerated and thus implicates *Ex Post Facto*.

Mr. Kyles is not asserting that someone voted for his release and therefore his prior parole hearing was invalid and he should be released immediately. His factual assertion of prior votes ONLY goes to the probability of his release for future application of the appropriate law. It goes ONLY to show that his claim is not speculative. The point of raising his prior votes is only as evidence and not for legal effect.

By the foregoing analysis the Supreme Court and the Fifth Circuit have recognized and specifically stated that §1983 is an appropriate vehicle to challenge ones parole proceeding. If this Court finds in this matter that it also violates the doctrine of *Heck* then this Court is basically overturning *Clarke* and abrogating 42 U.S.C. 1983 in *ex post facto* cases involving parole. *Clarke* specifically foresees that a §1983 action could be brought to address parole proceedings and *ex post facto* arguments. However, this matter, in how it is fashioned, as a declaratory action, seeking prospective relief, using the facts of parole hearings only as evidence of probability, is the last stop on the edge of the cliff. Outside of this legal position there is no other less intrusive manner in which

this issue can be addressed.

V

DEFENDANTS RULE 56 MOTION SHOULD BE STRICKEN

This factual dispute has not been had nor been addressed which renders the catalyst underpinning this dismissal, the granting of summary judgement, an abuse of discretion. The movant bears the burden of showing that there is no evidence in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Plaintiff argued *ad nauseum* regarding his suitability which is a relevant factor in determining whether or not a change in the law will effect the length of time he is actually incarcerated and more importantly *to what degree* the change in law "enhances eligibility for earlier release". See *Clarke v. Stadler,* 154 F.3d 186, 190-91 (5th Cir. 1998)

Defendant does not address summary judgement in their summary judgement motion. Rec. 307. In fact the motion is in reality a second motion to dismiss which this Court should strike as procedurally improper and abusive especially in light of the status of the plaintiff[6]. The law of summary judgement is

[6] *Pro se* claims for relief are held to less stringent standards. *Murrell v. Bennett*, 615 f.2d 306, 310 (5th Cir. 1980). The opposite is true and that is opposing counsel can not be allowed to take advantage of the litigants shortcomings as a 'lawyer'.

stated and then three other unrelated legal doctrines with no factual analysis and no application of summary judgement jurisprudence. Rec. 307-317.

VI

DEFENDANTS ARE NOT ENTITLED TO IMMUNITY WHERE THE ONLY CLAIM IS A PROSPECTIVE DECLARATORY ACTION

The issue of immunity is not complex nor highly germane to this appeal. Kyles §1983 complaint is for declaratory relief only. The law is settled in this arena.

> "Neither absolute nor qualified immunity extends to suits for injunctive or declaratory relief under Sec. 1983."*Orellana v. Kyle* 65 F3d 29, (5th Cir. 1995) citing *Chrissy F. by Medley v. Miss. Dep't of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir.1991). State officials may be sued for prospective relief as an exception to the 11th Amendment. *Ex Parte Young* 209 U.S. 123 (1908).

CONCLUSION

WHEREFORE, defendant moves this Court to remand this matter for trial.

Respectfully Submitted,

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