IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0183

CODY RYAN FIELDS,

Plaintiff, Petitioner,

v.

ROSS H. MELLINGER, individually and in his capacity as a Deputy within the Jackson County Sheriff's Department, TONY BOGGS, individually and in his capacity as the Sheriff of Jackson County, West Virginia, and the JACKSON COUNTY COMMISION d/b/a the JACKSON COUNTY SHERIFF'S DEPARTMENT, a body politic,

Defendants, Respondents.

On Certified Question from the United States District Court for the Southern District Court of West Virginia

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PETITIONER'S APPEAL BRIEF

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I. QUESTION PRESENTED

On March 3, 2020, Judge Johnston of the United States District Court for the Southern District of West Virginia, Charleston Division, submitted the following Certified Question to this Court:

> Does West Virginia recognize a private right of action for monetary damages for violations of Article III, Section 6 of the West Virginia Constitution?

Petitioner, Cody Ryan Fields, respectfully requests this Honorable Court to answer the Certified Question in the affirmative.

II. STATEMENT OF THE CASE

On July 2, 2019, Plaintiff Cody Ryan Fields filed his Complaint in the United States District Court for the Southern District of West Virginia against Defendants Ross H. Mellinger, both individually and in his official capacity as a Jackson County Sheriff's Deputy; Tony Boggs both individually and in his official capacity as the Sheriff of Jackson County; and the Jackson County Commission d/b/a Jackson County Sheriff's Department. (JA at 1-10). Plaintiff alleges that on or about September 20, 2017, Defendant Mellinger, among others, were executing a search warrant at a residence located at 298 Maplewood Heights Rd. in Jackson County, West Virginia. (JA at 2).

At the time of the incident, Plaintiff alleges that he was standing in a detached garage adjacent to the residence with open bay doors and as Defendant Mellinger approached the garage, Plaintiff had his hands raised and was bending at the waist to get on the ground. (JA at 2-3). As Plaintiff was bending down, Defendant Mellinger allegedly struck Plaintiff in the face with the

butt end of a shotgun. (JA at 2). Plaintiff was charged with obstructing an officer and simple possession of a controlled substance. (JA at 3).

Plaintiff asserts that Defendant Mellinger as well as J.M. Comer and C.C. Metz submitted written reports to Defendant Boggs and Katie Franklin, Prosecuting Attorney, to mitigate the alleged excessive force utilized against him. (JA at 8). Plaintiff asserts that he made repeated attempts to have a suppression hearing on the underlying charges, however each time the state's witnesses were unavailable. (JA at 3-4). Accordingly, the charges were dismissed. (*Id.*). Plaintiff further asserts that the Jackson County Commission implemented customs, policies or official or unofficial acts which led to the injury claimed by Plaintiff and failed to provide reasonable means of supervision of Deputy Mellinger despite having knowledge of his propensity or pattern or practice of violence. (JA at 7).

Plaintiff's Complaint asserts claims against Deputy Mellinger for violation of Article III, Sections 6, 10, and 17 of the West Virginia Constitution; negligence; battery; excessive force pursuant to 42 U.S.C. § 1983; *Monell* and Supervisory Liability claims pursuant to 42 U.S.C. § 1983 against Sheriff Boggs and the Jackson County Commission "d/b/a" Jackson County Sheriff's Department; and unlawful conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985. (JA at 1-8).

In Defendants' Partial Motion to Dismiss filed August 16, 2019, Defendants moved the district court to dismiss certain claims set forth in Plaintiff's Complaint, including Plaintiff's claims for violation of Article III, Sections 6, 10, and 17. (JA at 12-14). After the parties submitted their corresponding briefs (JA at 16-46), the district court entered an order (JA at 48-52) requesting that this Court exercise its certification jurisdiction on the present question.

III. SUMMARY OF ARGUMENT

The question presented is whether West Virginia recognizes a private right of action for monetary damages for violations of Article III, § 6 of the West Virginia Constitution. Petitioner contends that the question is expressed more effectively as follows: whether the West Virginia Constitution is empowered to provide complete relief to individuals harmed by government agents, or whether West Virginia's fundamental declaration of rights relies on other sources to vindicate constitutional wrongs.

West Virginia was one of the first states in the nation to acknowledge a private right of action for violations of its constitution's due process guarantees. Syl. Pt. 2, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) (recognizing a private cause of action where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution). In *Hutchison*, this Court emphasized that "the only realistic avenue for vindication of statutory and **constitutional guarantees when public servants abuse their offices is an action for damages**." *Id.* at 158, 658 (emphasis added).

As the West Virginia Constitution is the "paramount law" of our state, the West Virginia Judiciary is empowered to enforce appropriate remedies whenever its tenets are violated. *State ex rel. Smith v. Gore*, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965). This Court has never determined that the West Virginia Legislature must provide statutory authorization in order for the courts to redress constitutional violations with a damages remedy.

The present issue has come to this Court's attention because the United States District Court for the Southern District of West Virginia has, on few occasions, misinterpreted this Court's decision in *Harrah v. Leverette,* 165 W.Va. 665, 271 S.E.2d 322 (1980), and concluded that an

independent statute is necessary to authorize money damages.for violations of the West Virginia Constitution. *See McMillion-Tolliver v. Kowalski*, No. 2:13-CV-29533, 2014 WL 1329790 at *2 (S.D. W. Va. 2014). In fact, *Harrah* contains no language restricting this Court's authority to afford damages relief to victims of constitutional violations. On the contrary, the *Harrah* court determined that victims of cruel and unusual punishment in violation of Article III, § 5 were, among other remedies, entitled to a "civil action in tort," which would commonly offer the recovery the damages. Syl Pts. 3 & 4, *Harrah*, 165 W.Va. at 666, 271 S.E.2d at 324.

Further, recognizing a damages remedy is consistent with West Virginia's tradition of rigorously protecting its citizens' liberty interests against unlawful search and seizure beyond the protections afforded by the Fourth Amendment of the U.S. Constitution. *See State v. Mullens*, 221 W.Va. 70, 89, 650 S.E.2d 169, 188 (2007) (holding that Article III, § 6 includes broader search and seizure protections than the Fourth Amendment). As the U.S. Supreme Court has determined that violations of the Fourth Amendment give rise to an action for damages, Respondents contend that this Court should apply Article III, § 6 in a manner that fails to meet the Fourth Amendment's "floor" of protections and is plainly incompatible with West Virginia's more stringent restrictions. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971) (holding that violations of the Fourth Amendment give rise to a damages remedy).

Finally, many state courts of highest jurisdiction have acknowledged that their respective constitutions are independently empowered to provide a damages remedy in the absence of enabling legislation, relating to violations of search and seizure provisions as well as other constitutional provisions where the victim's rights cannot otherwise be adequately vindicated. *See* Sec. 5 *infra*.

For the reasons set forth in this Brief, Petitioner contends that providing a damages remedy for Article III, § 6 violations is consistent with West Virginia common law, federal constitutional precedent, and the purposes underlying the West Virginia Constitution as a guarantor of its citizens' fundamental liberties.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the West Virginia Rules of Appellate Procedure, Petitioner requests that this Court select this case for Rule 20 argument. Petitioner states that oral argument would be beneficial in this case as the issue of whether the West Virginia Constitution affords complete remedial protections for violations of Article III, § 6 is of fundamental importance to the public in clarifying the extent to which citizens may vindicate their civil liberties to privacy and security. Moreover, the issue is proper for oral argument as it has been the subject of much disagreement among West Virginia's federal courts. Regarding R.A.P. 18(a), Petitioner asserts that this issue has never been authoritatively decided, and oral argument would significantly aid this Court's decisional process as the legal arguments herein presented reference a broad range of authorities from foreign jurisdictions. Petitioner further requests that this Court decide the case on the merits by issuing an opinion authored by one of the Justices rather than through a memorandum opinion.

V. ARGUMENT

1. PRELIMINARY STATEMENT

Petitioner, Cody Ryan Fields, submits his Petitioner's Brief with regard to the Certified Question submitted by the United States District Court of the Southern District of West Virginia.

> Does West Virginia recognize a private right of action for monetary damages for violations of Article III, Section 6 of the West Virginia Constitution?

Petitioner respectfully requests that this Honorable Court answer the question in the affirmative.

2. THIS COURT RECOGNIZED A PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF ARTICLE III, § 10 OF THE WEST VIRGINIA CONSTITUTION AND EXPRESSED THAT DAMAGES ARE A PROPER REMEDY.

As a threshold matter, recognition of a damages remedy in the present context would not constitute the first time that this Court acknowledged a private right of action arising directly under Article III of the West Virginia Constitution. This Court has long acknowledged a direct action for damages for violations of Article III, § 9, i.e., the clause prohibiting the State's taking of private property without just compensation. *See, e.g., Fox v. Baltimore & O.R. Co.*, 34 W.Va. 466, 12 S.E. 757 (1890). As Article III establishes a broad variety of civil liberties, damages are not appropriate as a remedial mechanism for each of its provisions. The nature of the acts protected within a constitutional provision informs what remedies are necessary to vindicate the victim of a constitutional deprivation. However, this Court has determined that a constitutional provision need not include language of "just compensation" or "damages" to infer a private right of action for monetary relief.

In a highly cited unanimous opinion by Justice Cleckley, this Court concluded that the West Virginia Constitution independently provides a cause of action for violations of its Due

Process Clause. In Syllabus Point 2 of *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), this Court established the following:

> Unless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution.

In *Hutchison*, a landowner claimed that the City of Huntington deprived him of his property interests in violation of Article 3, § 10. *Id.* at 147, 657. The landowner had incurred significant costs from the city's initial refusal to issue him a building permit. *Id.*

Justice Cleckley reasoned that direct constitutional claims were necessary to vindicate the rights of individuals harmed by government action, and "[t]o suggest otherwise, **would make our constitutional guarantees of due process and empty illusion**." *Id.* at 150, 660 (emphasis added). To prove a claim under Article 3, § 10, this Court established "[a]s under [42 U.S.C.] § 1983, the plaintiff must show (1) that there was a constitutional violation, and (2) that the claim is not barred by an applicable immunity." *Id.*

The *Hutchison* court further concluded that damages were an appropriate, if not the predominant, type of relief for remedying constitutional violations. "Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages." *Id.* at 158, 658. Moreover, having modeled the prima facie elements of a state constitutional claim after a 42 U.S.C. § 1983 action, the same policy interests that the Court emphasized under the federal claim should inform the relief available to state constitutional claims. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federal guaranteed rights and to provide relief to victims

if such deterrence fails... **the goals of § 1983 urge availability of damages**" *Id.* (citing *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S.Ct. 1827, 1830, 118 L.Ed.2d 504 (1992)) (emphasis added).

Since *Hutchison*, the question of whether the West Virginia Constitution affords private causes of action involving other Article III provisions has become an area of confusion. *See Spry v. West Virginia*, No. 2:16-CV-01785, 2017 WL 440733 at *9 (S.D. W. Va. 2017) (memorandum decision) ("The *Hutchison* court did not address whether its holding was limited to § 10 or, alternatively, applied to other rights enshrined in Article III.").

On several occasions, West Virginia's federal courts have interpreted *Hutchison* to recognize constitutional claims for violations of provisions other than Article III, § 10. *See Ray v. Cutlip*, No. 2:13-CV-75, 2014 WL 858736 at *3-4 (N.D. W. Va. 2014) (recognizing plaintiff's claims for violations of Article III, §§ 1, 5, 6, and 10 to the extent predicated upon allegations of excessive force); *Wood v. Harshbarger*, No. 3:13-21079, 2013 WL 5603243 at *6–8 (S.D. W. Va. 2013) (memorandum decision) (finding plaintiffs had alleged sufficient facts to state a constitutional claim under Article III, § 5); *Barcus v. Austin*, 2018 WL 4183213 at *5–6 (N.D. W. Va. 2018) (memorandum decision) (dismissing plaintiffs' claims under Article III, §§ 7, 10 and 11 for failing to plead sufficient facts but recognizing private causes of action for state constitutional violations pursuant to *Hutchison*).

On other occasions, the federal courts have concluded that claims for money damages are not available to remedy violations of Article III. *See Nutter v. Mellinger*, No. 2:19-CV-00787, 2020 WL 401790 at *6 (S.D. W. Va. 2020) (memorandum decision); *Smoot v. Green*, No. 2:13-10148, 2013 WL 5918753 at *4–5 (S.D. W. Va. 2013) (memorandum decision) (concluding that Article III violations do not give rise to claims for money damages) ; *McMillion-Tolliver v. Kowalski*, No. 2:13-cv-29533, 2014 WL 1329790 at *2 (S.D. W. Va. 2014) (memorandum decision) ("Without an independent statute authorizing money damages for violations of the West Virginia Constitution,

the plaintiff's claim must fail."). Notably, none of the courts that denied the availability of a damages remedy has referenced *Hutchison* in rendering these opinions. Rather, these decisions relied predominantly upon *Harrah v. Leverette*, 165 W.Va. 665, 271 S.E.2d 322 (1980).

A. This Court Has Not Determined that the Legislature Must Provide Statutory Authorization in order to Redress Constitutional Violations with a Damages Remedy.

In *Harrah*, this Court was asked to address what remedies would be available to inmates at the Huttonsville Correctional Center, who had been subjected to cruel and unusual punishment and various due process violations following a riot at the facility. *Id.* at 668, 325. In summing up the broad range of possible remedies available to these inmates, this Court held in Syllabus Point 4:

> A person brutalized by state agents while in jail or prison may be entitled to:
>
> (a) A reduction in the extent of his confinement or his time of confinement;
>
> (b) Injunctive relief, and subsequent enforcement by contempt proceedings, including but not limited to, prohibiting the use of physical force as punishment, requiring psychological testing of guards, and ordering guards discharged if at a hearing they are proved to have abused inmates;
>
> (c) A federal cause of action authorized by 42 U.S.C. § 1983; and
>
> **(d) A civil action in tort.** (Emphasis added).

Harrah affords an expansive list of remedies available to an inmate brutalized by correctional officers while in the custody of the State. *Id.* The *Harrah* opinion cited no specific statute providing the basis for any of the remedies recognized, and there is no discussion suggesting that a direct claim for damages under the state constitutional was unavailable because the legislature had never adopted a statute authorizing such a remedy. On the contrary, Syllabus Point 4 of *Harrah* provided that victims of Article III, § 5 violations are entitled to a "civil action in

tort," which commonly would mean the recovery of money damages.[1] *See* BLACK'S LAW DICTIONARY 1526 (8th ed. 2004) (A tort is defined as a "civil wrong, other than breach of contract, for which a remedy may be obtained, **usually in the form of damages**[.]") (emphasis added).

Despite the breadth of remedies articulated in *Harrah* and the specific inclusion of a civil action for tort arising from the violation of Article III, § 5, some federal courts have curiously interpreted *Harrah* as "not contemplat[ing] a damages award for Article III violations[.]" *Smoot v. Green*, 2013 WL 5918753 at *5. *Smoot* was the first West Virginia district court opinion to suggest that *Harrah* prohibited victims of unconstitutional misconduct from obtaining monetary relief in the absence of legislative authorization. Although the *Smoot* opinion failed to reference case law or any other supporting precedent for this conclusion, *Smoot* was cited repeatedly by subsequent district court opinions as authoritative, resulting in a string of poorly substantiated memorandum decisions involving *Harrah*'s implications. *See McMillion-Tolliver*, 2014 WL 1329790 at *2; *Spry,* 2017 WL 440733 at *9. It is not at all clear from reading *Harrah* where the idea developed that West Virginia law does not authorize a state constitutional tort action for money damages because West Virginia does not have a statute affording such relief.

Ultimately, the issue of whether the West Virginia Constitution presumptively provides a damages remedy for Article III violations has not been thoroughly developed in West Virginia case law. Accordingly, this Brief will examine the analytical methods and authorities utilized by the United States Supreme Court and other state supreme courts in recognizing a damages remedy for vindicating constitutional misconduct.

[1] "Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS *2* (5th ed. 1984).

3. FEDERAL CONSTITUTIONAL PRECEDENT, ENGLISH COMMON LAW, AND THE RESTATEMENT (SECOND) OF TORTS SUPPORT RECOGNITION OF AN ACTION FOR DAMAGES FOR VIOLATIONS OF ARTICLE III, SECTION 6.

Article III, Section 6 of the West Virginia Constitution states as follows:

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

Being virtually identical to its federal counterpart, this Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment of the United States. *State v. Duvernoy*, 156 W.Va. 578, 582, 195 S.E.2d 631, 634 (1973). As will be discussed *infra*, the U.S. Supreme Court has interpreted the Fourth Amendment to afford victims a private right of action for damages. *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971). In recent decades, actions for damages arising directly under federal or state constitutions have been examined by legal scholars within the category of "constitutional torts." T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions against State Governments*, 50 VANDERBILT L. REV. 1525, 1534 (1997)

A constitutional tort is broadly defined as a cause of action which "seeks recovery of money damages for constitutional wrongs." *West Virginia Lottery v. A-1 Amusement, Inc.*, 240 W.Va. 89, 103, 807 S.E.2d 760, 774 (2017). In *Hutchison*, this Court was one of the first state supreme courts in the nation to recognize the availability of a constitutional tort for due process violations. Although the concept of a constitutional tort may appear to be a recent innovation, the practice of redressing constitutional violations with monetary damages is well-established historically. Gary

S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877 (2011).

It is a fundamental maxim in American jurisprudence that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 1 Cranch 137, 163, 5 U.S. 137, 163 (1803). In *Marbury*, U.S. Supreme Court Justice John Marshall stated that in order for our state constitutional guarantees of individual liberties to have any significance, our courts must provide a remedy when those liberties are violated. *Id.* ("The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). However, the precedent for remedying violations of individual rights that are enshrined in constitutions or fundamental documents dates back even further than *Marbury*. Pursuant to Chapter 2, Article 1 of the West Virginia Code, it is appropriate to look to the common law of England for persuasive authority on the typical remedies for constitutional violations.[2]

In English common law, a violation of individual rights afforded under the constitution by a government official was considered a trespass and actionable for damages, even in the absence of enabling legislation from Parliament. Specifically, damage suits were available for search and seizure violations of the Magna Carta. *See Wilkes v. Woods*, Lofft's 1, 98 Eng.Rep. 489 (1763) (holding that a government official's unlawful search of plaintiff's home violated constitutional principles and gave rise to damages); *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (1763)[3]

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[2] **"The Common law of England, so far as it is not repugnant to the principles of the Constitution of this state, shall continue in force within the same**, except in those respects wherein it was altered by the general assembly of Virginia before June 20, eighteen hundred and sixty-three, or shall be, altered by the Legislature of this state." W.Va. Code §2-1-1. (emphasis added).

[3] "I think [the jury] have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition [...] I thought that the 29th chapter of *Magna Carta* ... which is pointed against arbitrary was violated. **I cannot say what damages I should have given if I had been on the jury; but I directed and told them they were not bound to any certain damages** ...." *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (1763) (emphasis added).

(affirming exemplary damages remedy to plaintiff that was placed in custody based on an unlawful warrant).

In other words, constitutional rights were not merely principles around which the lawmaking body would craft effectuating legislation. Rather, the expression of the fundamental right gave rise to an appropriate remedy, and damages were deemed proper to deter unconstitutional conduct and to accentuate the community's condemnation of the wrong.

States like West Virginia, whose statutory codes incorporate accordant elements of English common law, have utilized these principles in adopting constitutional tort actions. *See Widgeon v. Eastern Shore Hosp. Center,* 300 Md. 520, 526, 479 A.2d 921, 924 (1984); *Dorwart v. Caraway,* 31 Mont. 1, 13-14, 58 P.3d 128, 135-136 (2002). However, the precedent for acknowledging such claims is similarly established in American tort law.

The Restatement (Second) of Torts indicates that judicial recognition of a damage remedy for state constitutional deprivations is proper, even in the absence of legislative implementation, so long as the remedy furthers the fundamental purpose of the constitutional provision. This common-law doctrine is expressed in Section 874A, which provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Section 874A, comment a, clarifies that the term "legislative provision" includes *constitutional* provisions.

Relying on this section, other state supreme courts have concluded that a damages remedy for search and seizure violations is "needed to assure the effectiveness of the provision" in

circumstances in which injunctive, administrative, or other relief does not meaningfully redress the victim's harm. *See Binette v. Sabo*, 244 Conn. 23, 34, 710 A.2d 688 693-694 (1998) ("If the legislature has not provided a remedy or if the remedy is not reasonably adequate ... a private cause of action is constitutionally available to right the wrong.") (citation omitted). Given the gruesome nature of Petitioner's injuries and the indefensible exercise of malicious force by law enforcement, the present case represents a compelling example of where a damages remedy is the only satisfactory means to vindicate Petitioner's civil rights.

4. THE PRINCIPLES AND POLICY INTERESTS ARTICULATED IN *BIVENS* ON THE REMEDIES AVAILABLE FOR FOURTH AMENDMENT VIOLATIONS SUPPORT RECOGNITION OF A DAMAGES REMEDY.

While common law actions had long existed for illegal or unconstitutional searches and seizures in the United States, the concept of a direct constitutional claim for damages under the Fourth Amendment of the U.S. Constitution first appeared in the case of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971). In *Bivens*, the Supreme Court recognized a claim arising directly under the U.S. Constitution against federal agents in their individual capacities for violating the plaintiff's Fourth Amendment rights. *Id.* The complaint arose from the federal agents conducting a warrantless search and subsequent arrest of the petitioner on narcotics charges. *Id.* at 389, 2001. The respondents contended that the Fourth Amendment does not provide for a monetary damages remedy, and since the petitioner could obtain money damages for the invasion of his privacy rights in tort under state law, a direct constitutional claim was not necessary to vindicate his rights. *Id.* at 390-91, 2001-02.

The *Bivens* court first dispatched with the Respondents' contention that because the Petitioner had a state tort remedy available to him (i.e. common law trespass), there was no need for a cause of action to vindicate his constitutional rights. In an excerpt repeatedly cited by state

courts considering the same issues, the court emphasized that a constitutional violation is inherently more pernicious than a tort occurring between private citizens:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. **An agent acting albeit unconstitutionally in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.**
>
> Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And **"where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."**
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> *Id* at 391-92, 2002. (emphasis added) (citations omitted).

The court reasoned that limiting the redress of constitutional violations to common law remedies was "an unduly restrictive view of the Fourth Amendment" and inconsistent with the severity of misconduct by individuals cloaked with government power. *Id.* at 391, 2002.

The *Bivens* court then turned to the issue of whether damages could be awarded for Fourth Amendment violations, concluding that damages were appropriate, and countervailing considerations of "federal fiscal policy" were superseded by the liberty interests involved.

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, **damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty**. *See Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Swafford v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); *Wiley v. Sinkler*, 179

> U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900); J. Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT 28 et seq. (1966); N. Lasson, HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43 et seq. (1937); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U.Pa.L.Rev. 1, 8—33 (1968); cf. *West v. Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894); *Lammon v. Feusier*, 111 U.S. 17, 4 S.Ct. 286, 28 L.Ed. 337 (1884).
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> *Id.* at 395-396, 2004 (emphasis added).

Finally, the court acknowledged that the Fourth Amendment itself, without any enabling legislation, gives rise to a suitable remedy, and victims of constitutional violations need not "be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397, 2005. On the contrary, the court stated:

> The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is **entitled to redress his injury through a particular remedial mechanism normally available in the federal courts**. Cf. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964); *Jacobs v. United States*, 290 U.S. 13, 16, 54 S.Ct. 26, 27—28, 78 L.Ed. 142 (1933). 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).
>
> *Id.* (emphasis added).

The impact of the *Bivens* case is that the Fourth Amendment is a "self-executing" [4] constitutional provision, i.e., operative to protect rights and afford complete redress without the aid of legislation.[5] As the West Virginia Constitution's Article III, Section 6 is to be construed in

[4] "A constitutional provision may be said to be self-executing, if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced[.]" Thomas Cooley, Constitutional Limitations (5th ed. 1883).

[5] *See* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution,* 68 S. CAL. L. REV. 289, 292 (1995). (arguing that *Bivens* bolsters the principle that "[t]he Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals").

harmony with the Fourth Amendment, our search and seizure provision should be presumed to similarly offer a complete remedy independent of other sources. *See State v. Duvernoy*, 156 W.Va. at 582, 195 S.E.2d at 634.

Since the *Bivens* decision, state supreme courts have grappled with the recognition of constitutional torts in various contexts. Jefferson, *supra.*

5. MANY OTHER SUPREME STATE COURTS HAVE RECOGNIZED A DAMAGES REMEDY FOR CONSTITUTIONAL SEARCH AND SEIZURE VIOLATIONS.

Many supreme state courts have embraced the recognition of constitutional tort actions for damages. By 1996, when New York's highest court first acknowledged state constitutional tort claims, nineteen other states had recognized an implied cause of action for various state constitutional violations, not including the majority of states which had long recognized a right of action based upon their constitution's "government takings" clause.[6] Only seven states had specifically rejected state constitutional torts. Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 450 n. 2 (1998).

Although the supporting rationales vary among the state supreme courts that have acknowledged direct constitutional claims for damages, there are many common elements to be gleaned from their respective cases, involving a combination of the following:

[6] "Prior to the New York Court of Appeals' decision in *Brown*, 19 states and Puerto Rico recognized an implied cause of action for state constitutional violations prior to the *Brown* decision. The states in which such a cause of action has been recognized by the highest state court are California, Illinois, Louisiana, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Pennsylvania, Utah, Vermont and West Virginia. Four additional states: Arkansas, Maine, Massachusetts, and Nebraska, have enacted statutes providing private causes of action for violation of state constitutional rights under certain circumstances. Direct causes of action based on the Florida and Wisconsin Constitutions have also been recognized by certain lower courts of those states, but not by either state's highest court." Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 450 n. 2 (1998).

1. The state constitutional search and seizure provision is co-extensive with, or proscribes more misconduct than, the Fourth Amendment, which has been applied to extend a damages remedy[7];

   See Widgeon v. Eastern Shore Hosp. Center, 300 Md. 520, 532, 479 A.2d 921, 927 (1984); *Zullo v. State*, 209 Vt. 298, 325, 205 A.3d 466, 485 (2019).

2. The constitutional search and seizure provisions are self-executing;

   See Dorwart v. Caraway, 31 Mont. 1, 22, 58 P.3d 128, 141 (2002); *Zullo v. State,* 209 Vt. at 322, 205 A.3d at 483.

3. The constitutional principles and policy interests outlined in *Bivens* are consistent with the state's constitution;

   See Binette v. Sabo, 244 Conn. 23, 32, 710 A.2d 688, 693 (1998); *Strauss v. State*, 131 N.J. Super. 571, 575, 330 A.2d 646, 648 (1971); *Old Tuckaway Associates Ltd Partnership v. City of Greenfield,* 180 Wis.2d 254, 284 n. 4, 508 N.W. 323, 334 n.4 (1993).

4. A damages remedy furthers the fundamental purpose of the constitutional prohibitions against unlawful search and seizure;

   See Moresi v. State Through Dept. of Wildlife and Fisheries, 567 So.2d 1081, 1093 (La. 1990); *Brown v. State of New York*, 89 N.Y.2d 172, 189, 674 N.E.2d 1129, __ (1996).

5. The liberties protected under the state constitution can be enforced by the judiciary and need not rely on legislative action to afford relief;

   See Godfrey v. State, 898 N.W.2d 844, 848 (Iowa 2017); *Zullo v. State,* 209 Vt. at 322, 205 A.3d at 483.

6. The availability of other remedies is not determinative of whether the state constitutional provision should independently offer a complete remedy.

   See Dorwart v. Caraway, 31 Mont. at 14, 58 P.3d at 136; *Binette v. Sabo,* 244 Conn. at 44-45; 710 A.2d at 698-99; *Widgeon v. Eastern Shore*, 300 Md. at 535, 479 A.2d at 928.

7. Neither injunctive, administrative, or declaratory relief constitutes an adequate remedy in many instances of misconduct by government agents; and

   See Zullo v. State, 209 Vt. at 324-327, 205 A.3d at 485-487.

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[7] West Virginia's Article III, § 6, in many instances, offers stricter protection than its federal counterpart. *See State v. Mullens*, 221 W.Va. 70, 89, 650 S.E.2d 169, 188 (2007) (holding that Article III, Section 6 includes more rigorous search and seizure protections than the Fourth Amendment).

8. In states whose constitutions incorporate English common law, recognition of a damages remedy in this context is well-established in both English and American jurisprudence.

   See Dorwart v. Caraway, 31 Mont. at 22, 58 P.3d at 141; *Widgeon v. Eastern Shore*, 300 Md. at 525-526, 479 A.2d at 923-924.

Although the present issue has been scrutinized in lengthy detail by numerous courts and legal scholars, the propriety of recognizing a private action for damages for search and seizure violations is aptly illustrated in a few emblematic cases. One of these is *Brown v. State of New York*, 89 N.Y.2d 172, 674 N.E.2d 1129 (1996).

6. New York's Highest Court Concluded that its Constitutional Provision Was Self-Executing and that Search and Seizure Violations Should Give Rise to a Damages Remedy

In *Brown*, the New York Court of Appeals considered whether the State could be sued for damages based directly on the equal protection and search and seizure provisions of the New York Constitution. *Id.* The claim was brought by African-American males who were stopped and examined by police in Oneonta, New York based on a description by the victim of an attack that her assailant was a black male. *Id.* at 177, 674 N.E.2d at _. The New York State Police obtained a computer-generated list containing the names and addresses of every African-American male attending a university near where the attack occurred, and the police sought to interrogate each of those students. *Id.*

After determining that the New York Court of Claims had subject matter jurisdiction to decide constitutional tort claims, the court examined whether the constitutional provisions were "self-executing, that is, [taking] effect immediately, without the necessity for supplementary or enabling legislation." *Id.* at 18.

> Manifestly, article I, § 12 of the State Constitution and that part of section 11 relating to equal protection are self-executing. They define judicially enforceable rights and provide citizens with a basis for judicial relief against the State if those rights are violated.

> Actions of State or local officials which violate these constitutional guarantees are void.
>
> *Id.* (citations omitted).

Referencing the analysis in *Bivens*, the court held that the constitutional provisions were self-executing and turned to the issue of whether the violation of a self-executing constitutional provision supported a claim for damages. *Id.*

Relying on Section 874A of the Restatement (Second) of Torts, *Bivens*, and English and New York common law, the court determined that New York's constitutional guarantees are "worthy of protection on their own terms without being linked to some common-law or statutory tort," and provided:

> These sections establish a duty sufficient to support causes of action to secure the liberty interests guaranteed to individuals by the State Constitution independent of any common-law tort rule. [...] Manifestly, these sections were designed to prevent such abuses and protect those in claimants' position. **A damage remedy in favor of those harmed by police abuses is appropriate and in furtherance of the purpose underlying the section**.
>
> *Id.* at 187-92 (emphasis added).

The *Brown* majority then addressed the dissent's concerns about the "stigma of societal fault and the payment of unknown sums of public funds" associated with the recognition of constitutional torts, distinguishing the superior policy interests in vindicating constitutional rights over the considerations governing common law torts:

> Nor should claimants' right to recover damages be dependent upon the availability of a common-law tort cause of action. **Common-law tort rules are heavily influenced by overriding concerns of adjusting losses and allocating risks, matters that have little relevance when constitutional rights are at stake**. Moreover, the duties imposed upon government officers by these provisions address something far more serious than the private wrongs regulated by the common law.

Id. at 191 (emphasis added).

The court also emphasized that its constitution was a source of positive law, not merely a set of limitations on government, stating:

> To confine claimants to tort causes of action would produce the paradox that individuals, guilty or innocent, wrongly arrested or detained may seek a monetary recovery because the complaint fits within the framework of a common-law tort, whereas these claimants, who suffered similar indignities, must go remediless because the duty violated was spelled out in the State Constitution.
>
> *Id.*

Finally, the court noted that "[d]amages are a necessary deterrent" to combat the misconduct of government officers. "The remedies now recognized, injunctive or declaratory relief, all fall short." *Id* at 192.

While the *Brown* decision is one of the most detailed and frequently cited opinions on the recognition of state constitutional torts, Maryland's highest court had reached the same conclusion twelve years prior in *Widgeon v. Eastern Shore Hosp. Center,* 300 Md. 520, 479 A.2d 921 (1984).

7. THE MARYLAND COURT OF APPEALS DETERMINED THAT ITS CONSTITUTION MUST OFFER COMPLETE REDRESS DESPITE THE AVAILABILITY OF 42 U.S.C. § 1983 AND OTHER REMEDIES FOR SEARCH AND SEIZURE VIOLATIONS.

In *Widgeon*, the Court of Appeals of Maryland dealt with this identical issue and held that Maryland "recognizes a common law action for damages for violations of the state constitutional rights" against unlawful search and seizure. *Id.* at 523, 922. Mr. Widgeon instituted, *inter alia*, a § 1983 action and alleged violations of Maryland's search and seizure constitutional provision against a hospital operated by the Maryland Department of Health and other individual state defendants. *Id.* at 524-25, 923.

The *Widgeon* court first determined that awarding damages for search and seizure violations was consistent with the fundamental purposes of the Fourth Amendment[8] as outlined in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). In *Boyd*, the U.S. Supreme Court cited with approval the judgment in the English case of *Entick v. Carrington*, 19 How.St. Tr 1029 (1765), where the plaintiff was awarded damages for the unlawful seizure of his effects by government agents, stating:

> The principles laid down in this opinion [*Entick v. Carrington*] affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. **It is not the breaking of his doors, and rummaging of drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense**,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment"
>
> *Widgeon*, 300 Md. at 528, 479 A.2d at 925 (citing *Boyd v. United States*, 116 U.S. at 630, 6 S.Ct. at 532).

Having determined that Maryland's constitutional principles weighed in favor of acknowledging a damages remedy, the court found persuasive the U.S. Supreme Court's history of recognizing direct damages actions for violations of the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution. *Id.* at 532, 928. The court also referenced courts in seven other states that had already acknowledged direct damage actions for constitutional deprivations in various contexts, not including the widely acknowledged "government takings" action. *Id.* at 534, 928.

[8] The *Widgeon* court emphasized that the search and seizure provision in Maryland's Declaration of Rights had been consistently held to be "equated with" the Fourth Amendment of the U.S. Constitution. *Widgeon*, 300 Md. at 532, 479 A.2d at 927.

The *Widgeon* respondents offered an argument that has since been recycled in many other state courts. They contended that because alternative remedies may be available to the victim of a search and seizure violation, i.e. state tort law and 42 U.S.C. § 1983, the courts should not recognize a damages action for violation of state constitutional rights. *Id.*

In response, the *Widgeon* court emphasized the "well-settled rule" that "where a particular set of facts give rise to alternative causes of action, they may be brought in one declaration, and where several remedies are requested, an election is not required prior to final judgment." *Id.* at 535, 928 (citations omitted). Moreover, a state constitutional provision may preserve an interest that is wholly unprotected under the state common law and statutes. Therefore, the existence of alternative remedies was "not a persuasive basis for resolution of the issue." *Id.*

As in *Widgeon*, some state supreme courts have considered whether the existence of alternative remedies for victims of unconstitutional searches and seizures should weigh against recognition of a damages remedy. Recently, the Supreme Court of Vermont provided a comprehensive analysis on this sub-issue in *Zullo v. State*, 209 Vt. 298, 205 A.3d 466 (2019).

A. Damages Are the Only Meaningful Relief In Many Instances of Article III, Section 6 Violations.

In *Zullo*, the Supreme Court of Vermont acknowledged a private right of action for violations of its search and seizure constitutional provision. The plaintiff alleged that a state trooper had violated his constitutional rights by unlawfully stopping, searching, and seizing his vehicle and person without probable cause. *Id.* at 305, 472.

The *Zullo* court determined that a plaintiff seeking damages against the State for violations of Article 11, Vermont's constitutional search and seizure provision, must show that:

a. the officer violated Article 11;

b. there is no meaningful alternative remedy in the context of that particular case; and

c. the officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith.

Id. at 333, 491.

The court reached its conclusion based on several of the common elements described in Sec. IV (5) of this Brief. However, the opinion is noteworthy for its discussion of the insufficiency of alternative remedies for individuals like Petitioner.

The State of Vermont contended that each of the following remedies was a sufficient alternative to suing the State for damages:

1. an action against the state trooper pursuant to 42 U.S.C. § 1983;

2. injunctive relief prohibiting the State from conducting unlawful stops in similar scenarios;

3. administrative relief by way of statutes providing procedure for reclaiming seized or forfeited property;

4. an administrative complaint against the individual officer accused of improper conduct; and

5. the assertion of rights in a criminal proceeding, including filing a motion to suppress, had plaintiff been criminally charged as a result of the incident.

Id. at 323-34, 485.

The *Zullo* court concluded that none of the proffered alternative remedies would provide meaningful redress for the constitutional transgression alleged, reasoning:

> A § 1983 action for monetary damages cannot be maintained against a state, a state agency, or state officials sued in their official capacity. *Howlett v. Rose*, 496 U.S. 356, 358, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990)
>
> One may obtain injunctive relief against state officials in their official capacity under § 1983, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), but monetary damages are available against state officials only in their

> individual capacity, *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).
>
> *Id.* at 324, 485.

Further, the court determined that injunctive relief would be clearly deficient as the plaintiff would derive no meaningful benefit from an order enjoining future misconduct. *Id.* at 326, 486. In the same vein, an administrative complaint "would offer no remedy to individuals deprived of their constitutional rights, other than the knowledge that the offending officer may or may not have been disciplined, which may or may not result in others being spared a similar deprivation of their rights." *Id.* at 327, 487.

The court also emphasized that because the plaintiff "was not – and apparently could not have successfully been – charged with a crime," the exclusion of evidence via a motion to suppress would also offer the plaintiff no meaningful remedy. "[C]riminal process remedies are only effective when the government chooses to invoke its criminal powers against an individual." *Id* (citations omitted).

Finally, the court concluded that a potential common law tort action against the offending officer would be insufficient to redress the constitutional transgression. Referencing *Bivens*, the court illustrated that common law causes of action are designed to regulate relationships between private individuals – not between citizens and government agents, providing:

> The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. *Bivens*, 403 U.S. at 394, 91 S.Ct. 1999; *see Binette*, 710 A.2d at 699 (noting "important distinction between the tortious misconduct of one private citizen toward another, on the one hand, and the violation of a citizen's constitutional rights by a police officer, on the other"); *Dorwart*, 2002 MT 240, ¶ 46, 312 Mont. 1, 58 P.3d 128 ("Common law causes of action intended to regulate relationships among and between individuals are not

> adequate to redress the type of damage caused by the invasion of constitutional rights.").
>
> *Id.* at 327-28, 487.

In the present matter, the insufficiency of alternative remedies is magnified by the nature of Petitioner's injuries. Petitioner suffered an unprovoked and life-threatening attack on his person – a vicious shotgun bash to Petitioner's face which knocked out several of his teeth (JA at 10). The physical and psychological trauma resulting from the assault cannot be satisfactorily remedied by enjoining future conduct, administrative relief, or by gaining advantage in any related criminal proceedings. Article III, § 6 must be empowered to afford complete relief to individuals like Petitioner in circumstances of flagrant law enforcement misconduct.

8. RECOGNITION OF A DAMAGES REMEDY FOR VIOLATIONS OF ARTICLE III, SECTION 6 IS CONSISTENT WITH WEST VIRGINIA'S RIGOROUS CONSTITUTIONAL PROTECTIONS.

As in *Hutchison*, the question at issue involves whether Article III genuinely provides the protections it asserts or if the protections outlined in West Virginia's Bill of Rights are merely "an empty illusion." *Hutchison*, 198 W.Va. at 150, 479 S.E.2d at 660. This Court has asserted that the former is true, stating:

> [The West Virginia] Constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, **a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law.**
>
> *State ex rel. Smith v. Gore*, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965) (emphasis added).

Certainly not every Article III provision should be afforded the presumption of a damages remedy. However, when the constitutional violation involves the application of grievous or deadly force on a citizen by government agents, the constitution must provide an independent and adequate remedy to vindicate the victim's rights. Fortunately, in this instance, the constitutional

violation did not result in the deprivation of Petitioner's Article 3, § 10 right to life, which only then, under the Respondent's argument, would properly give rise to a damages action (JA at 28).

This Court has "determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart." *State v. Mullens*, 221 W.Va. 70, 89, 650 S.E.2d 169, 188 (2007) (holding that Article III, Section 6 includes more rigorous search and seizure protections than the Fourth Amendment); Syl Pt. 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."); *Women's Health Center v. Panepinto*, 191 W.Va. 436, 442, 446 S.E.2d 658, 664 (1993) (holding that West Virginia's "due process clause is more protective of individual rights than its federal counterpart").

In *Bivens*, the U.S. Supreme Court determined that the Fourth Amendment's search and seizure protections afford a damage remedy for the violation of citizens' security interests. This Court has provided that "a state may not interpret its constitutional guarantee which is identical to a federal constitutional guarantee below the federal level," *Adkins v. Leverette*, 161 W.Va. 14, 19, 239 S.E.2d 496, 499 (1977). Respondents contend that this Court should apply Article III, Section 6 in a manner that fails to meet the "floor" of protections guaranteed by the Fourth Amendment; disregards our state constitution's broader enforcement of civil liberties; and minimizes the independent significance of the West Virginia Constitution. This cannot be so.

Petitioner asks this Court to acknowledge the independent authority of the West Virginia Constitution to provide complete relief to victims of unlawful searches and seizures by recognizing a private right of action for damages under Article III, § 6.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court answer the Certified Question from the United States District Court for the Southern District of West Virginia in the affirmative.

RESPECTFULLY SUBMITTED,

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