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 REPLY BRIEF

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I. INTRODUCTION

Respondents' central argument relies upon the premise that this Court is prohibited from exercising its primary authority to interpret and enforce the civil liberties enshrined in the West Virginia Constitution. They contend that the Legislature ultimately retains the discretion to define the scope of protections afforded by Article III. On the contrary, this Court's recognition of a damages remedy for Article III, § 6 violations would be entirely consistent with its role as the guarantor of fundamental liberties against intrusion by the political branches of government. Pursuant to federal and State constitutional precedent, it is well-established that this Court may acknowledge a damages remedy to redress constitutional violations where injunctive or alternative remedies would offer no relief. Despite Respondents' characterization to the contrary, this Court has never stated that enabling legislation is necessary to vindicate victims in the context of constitutional deprivations.

Respondents implicitly assert that this Court should apply Article III, § 6 in a manner that fails to meet the level of protections guaranteed by the Fourth Amendment, disregards West Virginia's history of enhanced safeguards against search and seizure violations, and minimizes the independent significance of the West Virginia Constitution. Petitioner asks that this Court exercise its principal authority to enforce constitutional protections and confirm that Article III, § 6 is effective to independently provide complete relief to victims of search and seizure violations.

II. ARGUMENT

1. RESPONDENTS' POSITION THAT THE LEGISLATURE SHOULD DEFINE CONSTITUTIONAL PROTECTIONS VIOLATES THE SEPARATION OF POWERS DOCTRINE

Respondents contend that legislative authority is necessary for this Court to enforce rights and determine the boundaries of remedies provided by the West Virginia Constitution.

Respondents have supplied no judicial opinions to substantiate this proposition because none exist. This Court has never concluded that the judiciary's ability to enforce state constitutional rights and remedies is contingent upon the Legislature's statutory authorization.

In *Hutchison v. City of Huntington*, 198 W.Va. 139, 150, 479 S.E.2d 649, 660 (1996), this Court stated that "a private cause of action exists where state government, or its entities, cause injury to a citizen by denying due process." The *Hutchison* Court gave no indication that enabling legislation was a condition to the Court's recognizing a private right of action for constitutional violations. Rather, the Court's reasoning was consistent with the legal maxim that "where there is no remedy, there is no right." *See Marbury v. Madison*, 1 Cranch 137, 163, 5 U.S. 137, 163 (1803). To suggest that the West Virginia Constitution requires legislative acts to become operative "would make our constitutional guarantees…an empty illusion." *Hutchison*, 198 W.Va. at 150, 479 S.E.2d. at 660.

Petitioner finds it remarkable that Respondents would raise the Separation of Powers Doctrine in support of their position. Respondents ask that this Court both severely constrain the efficacy of our state's fundamental Bill of Rights and defer the judiciary's ultimate discretion over the protections afforded by the West Virginia Constitution to the Legislature. This scheme would categorically violate the Separation of Powers Doctrine. Although Respondents have provided a superficial summary of the Legislature's law-making role, they neglected to acknowledge that it is fundamentally the judicial branch's domain to interpret, enforce, and define the contours of protections afforded by the West Virginia Constitution.

This Court reiterated this longstanding principle recently in *State ex re. Workman v. Carmichael*, 241 W.Va. 105, 117, 819 S.E.2d 251, 263 (2018), providing that the judiciary is the "ultimate interpreter of the Constitution… Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law." *Id.* (citing

Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.E.2d 663 (1962)). As the preeminent interpreter of the West Virginia Constitution, this Court retains the primary authority "to define the safeguards against the abuse of power as provided in our Constitution." *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 120, 207 S.E.2d 431, 433 (1973). In *Brotherton*, this Court provided:

> [E]very officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the Executive or the Legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. *Id.* (emphasis added)

Respondents cite *State ex re. County Court of Marion County v. Demus*, 148 W.Va. 398, 135 S.E.2d 352 (1964) to suggest that the Legislature must determine the remedies available for constitutional violations.[1] In fact, the *Demus* Court emphasized the opposite principle, providing that "the most solemn duty [of] this Court is the determination of whether an act of the legislature is consistent with the provisions of the constitution of this state[.]" *Id.* at 401, 356. "There can be no doubt of the power of this Court to declare invalid an act of the legislature that it finds in plain contravention of a provision of the constitution of this state." *Id.* at 402, 356.

In *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1990 (1971), the Court examined the Separation of Powers doctrine in considering the propriety of acknowledging a damages remedy for search and seizure violations. In an opinion

[1] The *Demus* case involved the constitutionality of the then-recently enacted "Industrial Development Bond Act." It did not discuss the judiciary's authority to interpret the scope of protections afforded by a constitutional provision.

which has been frequently cited by state supreme courts considering the present question, Supreme Court Justice Harlan concurred in the U.S. Supreme Court's judgment in *Bivens,* explaining that it was uncontroversial that the Fourth Amendment directly entitled Bivens to a remedy for the government's search and seizure violation. Justice Harlan believed the pertinent issue to be whether the Constitution placed the ability to create an action for damages for constitutional violations exclusively in the hands of the Legislature. *Id.* at 398-400, 2006-08. He concluded that the judiciary's authority to protect constitutional rights and enforce appropriate remedies functions to "check" the political branches from unduly narrowing civil liberties, providing as follows:

> [It must] be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities[.]
>
> [T]he arguments for a more stringent test to govern the grant of damages in constitutional cases seem to be adequately answer by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment.
>
> *Id.* at 407, 2010 (emphasis added).

Justice Harlan noted that courts often authorize damages remedies without express legislative authorization where such relief was deemed "necessary to effectuate the congressional policy underpinning [the] statute[2]," reasoning:

> I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.
>
> *Id.* at 403, 2008.

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[2] Restatement (Second) of Torts § 874A ("[T]he court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation...accord to an injured member of the class a right of action[.]") (emphasis added).

Justice Harlan further emphasized that it would be "anomalous to conclude that the federal judiciary…is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Id.* (emphasis added).

The constitutional principles Justice Harlan described are consistent with Justice Cleckley's reasoning in *Hutchison*. Eschewing a damages remedy for violations of the West Virginia Constitution, due to the absence of legislative authorization, would "make our constitutional guarantees… an empty illusion." *Hutchison*, 198 W.Va. at 150, 479 S.E.2d. at 660.

2. THE ALTERNATIVE REMEDIES PROPOSED BY RESPONDENTS ARE INSUFFICIENT

Respondents contend that traditional common law torts are a sufficient alternative remedy to redress violations of Article III, § 6 of the West Virginia Constitution. As the *Bivens* Court correctly noted, common law causes of action intended to regulate relationships between private citizens are not adequate to redress the sort of damage caused by constitutional violations. In the latter context, a government agent, cloaked with the authority of the law, "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens*, 403 U.S. at 392, 91 S.Ct. at 2002. To this point, the *Bivens* Court provided an example of why traditional tort actions like trespass are poorly equipped to redress constitutional deprivations:

> A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United*

States v. Lee, 106 U.S. 196, 219, 1 S.Ct. 240, 259, 27 L.Ed. 171 (1882).

Id. at 394-95, 2003-04.

In the present matter, had Petitioner attempted to resist the claim of authority wielded by the police officer that bashed him with a shotgun butt, he would have faced far greater legal sanctions than had he resisted a battery committed by a private citizen. Moreover, the extent of the injuries suffered by Petitioner arose directly out of the officer's claim of authority. Petitioner was complying with the demands of the officer, bending at the waist to get on the ground, when the officer attacked him without provocation. (JA at 2-3). In so doing, Petitioner was placed in a decidedly unenviable position: resist and face severe criminal penalties -- or permit himself to be viciously bludgeoned in a manner that could have taken his life. Traditional common law torts are not adequately equipped to govern circumstances in which the authority of the state underlies every aspect of the relationship between tortfeasor and victim.[3] Because traditional tort actions are ill-fitted to redress the peculiar harm associated with constitutional violations, in this case the deadly exercise of force by government agents, they do not constitute sufficient alternatives.

Respondents also propose that a 42 U.S.C. § 1983 action is sufficient to redress State constitutional deprivations. State supreme courts have repeatedly rejected this proposition in the

[3] "A private citizen generally is obliged only to respect the privacy rights of others and, therefore, to refrain from engaging in assaultive conduct or from intruding, uninvited, into another's residence. A police officer's legal obligation, however, extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to *protect and defend* those rights. In order to discharge that considerable responsibility, he or she is vested with extraordinary authority. Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen's rights but affirmatively *violates* those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen." *Binette v. Sabo*, 244 Conn. 23, 43-44, 710 A.2d 688, 698 (1998) (emphasis added).

context of search and seizure provisions. First, a § 1983 action creates a damages remedy only for violations of federal rights against state officials in their individual capacity. It does not authorize a damages action against a state, a state agency, or state officials in their *official* capacity. *Zullo v. State*, 209 Vt. 298, 324, 205 A.3d 466, 485 (2019). Because state constitutional search and seizure protections are often broader than those afforded by the Fourth Amendment, courts have concluded that relying upon a § 1983 action would be inappropriate given its narrow remedial scope. *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 n. 18 (1998).

In *Widgeon v. Eastern Shore Hosp. Center*, 300 Md. 520, 479 A.2d 921 (1984), the Court emphasized the "well-settled rule...that where a particular set of facts gives rise to alternative causes of action, they may brought together in one declaration, and where several remedies are requested, an election is not required prior to final judgment." *Id.* at 535, 928. Given that § 1983 actions are subject to multiple defenses that may be inapplicable in the context of State constitutional violations, recognizing an Article III, § 6 damages action as an alternative theory would aid in vindicating liberty interests that are otherwise unprotected by § 1983 or state common law. *See id.*

3. THE RESTATEMENT (SECOND) OF TORTS § 874A SUPPORTS RECOGNITION OF AN ARTICLE III, § 6 DAMAGES REMEDY

The Restatement (Second) of Torts § 874A has been properly utilized to affirm the propriety of a damages remedy for search and seizure violations. *See Brown v. State of New York*, 89 N.Y. 172, 674 N.E.2d 1129 (1995); *Dorwart v. Caraway*, 31 Mont. 1, 58 P.3d 128 (2002); *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 (1998). Section 874A states that "when a legislative provision protects a class of persons by proscribing...conduct but does not provide a civil remedy for the violation," the court may "accord to an injured member of the class a right of action" if the remedy "is appropriate in furtherance of the purpose of the legislation." Notwithstanding

Respondents' objections, Comment A of Section 874A plainly states that the term "legislative provisions" includes "constitutional provisions."

Respondents contend that limiting claimants to injunctive or declaratory relief for Article III, Section 6 violations is sufficient because remedies arising from other sources are adequate most of the time. Notably, Respondents cite the six-factor analysis located in Comment H of Section 874A as supporting their position that constitutional tort claims are superfluous. Resp. Br. 13-14. However, Respondents neglected to emphasize that the first of these six factors in Comment H is "(1) the nature of the legislative provision." *Id.* The West Virginia Constitution is "the fundamental law by which all people of the state are governed [and is] the paramount law." *Smith ex rel. Smith v. Gore*, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965). Given that the purpose of our state's Bill of Rights is to act as the final stop against the deterioration of civil liberties, the "nature of the legislative provision" clearly weighs in favor of providing a complete remedy independent of other sources. *See Binette v. Sabo*, 244 Conn. 23, 34, 710 A.2d 688, 693 (1988) ("It would be incongruous to hold that our constitution is a drier source of private rights than the federal constitution or our own statutes.").

Further, Respondents' objection to the creation of a "new breed of tort law for which there is no established body of precedent" is unfounded. Resp. Br. 13-14. Since the Fourth Amendment acts as the floor of protections from which Article III, Section 6 must equal or exceed, West Virginia courts would continue the tradition of relying upon the U.S. Supreme Court's Fourth Amendment decisions in determining the boundaries of State constitutional protections. *See, e.g., Ulmon v. Miller*, 227 W.Va. 1, 705 S.E.2d 111 (2010).

4. THE WEST VIRGINIA GOVERNMENTAL TORT CLAIMS ACT DOES NOT APPLY TO BAR CIVIL CLAIMS BASED UPON CONSTITUTIONAL VIOLATIONS

In their final argument, Respondents assert that the West Virginia Governmental Tort Claims and Insurance Reform Act (the "Tort Claims Act") immunizes the Jackson County Commission as a political subdivision. W.Va. Code § 29-12A-18 governs the applicability of the Tort Claims Act and states as follows:

> This article does not apply to, and shall not be construed to apply to, the following: [...]
>
> (e) civil claims based upon alleged violations of the constitution or statutes of the United States except that the provisions of section eleven of this article shall apply to such claims or related civil actions.
>
> *Id.* (emphasis added).

This provision specifically identifies what civil actions against political subdivisions are not subject to this Act. Thus, while the Legislature sought to provide broad liability protection to political subdivisions, it recognized that political subdivisions could not be insulated completely by this Act. Where a civil complaint against a political subdivision includes alleged violations of the United States Constitution, the intent of the Legislature to preclude application of this Act was abundantly clear.

In the present case, Petitioner relied upon the unambiguous language in W.Va. Code § 29-12A-18 in drafting his Complaint. In Paragraph 13 of his Complaint, Petitioner alleged that the "actions of Defendant violated the constitutional rights guaranteed to plaintiff under Article III, Section 6 10, and 17 of the West Virginia Constitution, which incorporates the constitutional rights guaranteed to plaintiff under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." (JA at 4). Therefore, Plaintiff has asserted a civil claim "based upon alleged violations of the constitution...of the United States." W.Va. Code § 29-12A-18(e).

Respondents contend that the Legislature "purposefully omitted" civil claims arising under the "West Virginia" Constitution from the list of the statute's exceptions – an interpretation which manifestly contradicts the purpose of the above provision. Resp. Br. 21. Any violation of the United States Constitution would also violate the West Virginia Constitution because the protections afforded by our state constitution must equal or exceed its federal counterpart. *See* 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.").

Given that any violation of the West Virginia Constitution necessarily violates the U.S. Constitution, it is nonsensical to conclude that the Legislature intended that government misconduct violative of our state's elevated constitutional protections would be immunized while conduct violative of the lesser federal constitutional protections would be excluded. At the time of the Tort Claims Act's enactment in 1986, this Court had not explicitly recognized direct civil claims based upon violations of the West Virginia Constitution. It was not until 1996 that the *Hutchison* Court first expressly recognized a private right of action arising directly from a state constitutional violation, Article III, Section 10. *Hutchison,* 198 W.Va. 139, 479 S.E.2d 649. Therefore, Respondents contend that the Legislature divined the advent of civil claims based upon State constitutional violations and purposefully sought to immunize such claims, even though W.Va. Code § 29-12A-18(e) plainly states the Act's inapplicability to violations of constitutional rights.

Respondents' interpretation of W.Va. Code § 29-12A-18(e) lacks logical and historical foundation. Because the Tort Claims Act does not apply to Petitioner's civil claim based upon

violations of the United States and West Virginia Constitution, Respondents' parsing intentional torts from claims sounding in negligence is immaterial. Resp. Br 21-22.

III. 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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CERTIFICATE OF SERVICE

I, Luca DiPiero, do hereby certify that a copy of the foregoing **PETITIONER'S REPLY BRIEF** was hand-delivered to counsel of record on the 16th day of September, 2020 to the following:

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