IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22–ICA–163

Hank Heckman and Loren Garcia,
Plaintiffs below

Petitioners,

v.

Betsy Jividen, Jeff Sandy, and Patrick Morrisey, Defendants below

Respondents.

Appeal from an order of the Circuit Court of Kanawha County
(Case Nos. 21-C-903 and 21-C-904)

RESPONDENTS BETSY JIVIDEN AND JEFF SANDY'S BRIEF

William E. Murray
W. Va. State Bar I.D. 2693
Jaden P. Rhea
W. Va. State Bar I.D. 13454

Anspach Meeks Ellenberger LLP
500 Virginia Street, East, Suite 525
Charleston, West Virginia 25301
304–205–8063 – telephone
340–205–8062 – facsimile
wmurray@anspachlaw.com
Counsel for Respondents Betsy Jividen and Jeff Sandy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE CASE

I. Statement of Facts

Petitioners Hank Heckman and Loren Garcia ("Heckman," "Garcia," or collectively "Petitioners") filed this proposed class action alleging they were arrested and incarcerated following a policy change after both Petitioners had already been released from incarceration. Petitioners sought declaratory judgment and injunctive relief declaring West Virginia Code §15A–4–17(p) unconstitutional as well as monetary damages for their re–incarceration. Petitioners allege Betsey Jividen ("Jividen" or collectively "Respondents"), the previous Commissioner of the West Virginia Department of Corrections and Rehabilitation ("WVDCR"), and Jeff Sandy ("Sandy" or collectively "Respondents"), the Secretary of the West Virginia Department of Homeland Security, enforced the policy that led to their re–incarceration on behalf of the WVDCR and that Jividen issued warrants for the arrests of Petitioners as a result of this policy change.

Heckman was previously an inmate in the custody of the WVDCR. (App. 7.) In 2010, Heckman was indicted on sexual offenses and was sentenced to three years of supervised probation and ten years of extended supervised release under West Virginia Code § 62–12–26. (App 9.) Heckman violated his probation, was re-incarcerated, and then discharged the remainder of his sentence. (*Id.*) After his sentence was discharged, Heckman began his ten-year term of extended supervised release, but his supervised release was revoked and he was ordered to serve the remainder of his supervised release in prison. (*Id.*) In June of 2020, Heckman was released on parole. (*Id.*)

Garcia was previously an inmate in the custody of the WVDCR. (App. 7.) Garcia was indicted in 2013 on child abuse charges and was later sentenced to one to three years of incarceration and ten years of extended supervised release under West Virginia Code § 62–12–26.

(App. 9.) While on supervised release, she was indicted for and pled guilty to a first degree robbery charge and, as a result, her supervised release was revoked. (App. 10.) Further, in December of 2019, Garcia was released on parole. (*Id.*)

In August of 2020, Petitioners allege that Jividen placed the good time award program under review and, in October of 2020, that the WVDCR adopted a new policy which was later codified at West Virginia Code § 15A–4–17. (App. 11.) Petitioners allege that Sandy was involved in the enactment of the new policy directive. (*Id.*) This new policy directive revoked the good time eligibility for certain types of inmates who had their supervised release revoked, and it was implemented by the WVDCR in November of 2020. (*Id.*)

Further, in December of 2020, Petitioners allege that Jividen issued a series of warrants for "clerical error or mistake," which included warrants for both Heckman and Garcia. (*Id.*) In December of 2020, both Heckman and Garcia were arrested and returned to incarceration. (App. 12.) Garcia filed a habeas petition in the Supreme Court of Appeals of West Virginia, but the petition was later denied as moot after the WVDCR recalculated Garcia's time and reinstated her good time which allowed her to be released from incarceration in April of 2021. (App. 13, 15.)

Heckman filed a habeas petition in the Supreme Court of Appeals of West Virginia which was also denied as moot after he was released to parole in June of 2020 after the Supreme Court of Appeals entered its decision in *State ex rel. Phalen v. Roberts*, 245 W. Va. 311, 858 S.E.2d 936 (W. Va. 2021). (App. 17.) *Phalen* held that West Virginia Code § 15A–4–17(a) could not be applied to individuals like Petitioners who were incarcerated pursuant to West Virginia Code § 62–12–26 prior to April 30, 2021, the effective date of the statute, because it violated the constitutional prohibition against *ex post facto* laws. Syl. Pt. 8, *Phalen*, 858 S.E.2d 936. Petitioners filed this proposed civil class action seeking declaratory, injunctive, and monetary

relief since Petitioners re–incarceration was declared unconstitutional by the West Virginia Supreme Court in *Phalen*.

II. Procedural History

On October 8, 2021, Petitioners each filed their separate but identical Complaints in the Circuit Court of Kanawha County, West Virginia. (App. 6.) The cases were eventually consolidated. (App. 131.) In lieu of an answer, Respondents Jividen and Sandy filed their Motion to Dismiss and accompanying Memorandum in Support on November 5, 2021. (App. 85.) Petitioners filed their Response, (App. 105), and Respondents filed their Reply, (App. 123). On August 31, 2022, Respondents' Motion to Dismiss was heard for oral argument, and, on September 14, 2022, Judge Tera Salango entered an Order granting Respondents' Motion in its entirety and dismissed this case. (App. 184.) Petitioners have now filed this appeal.

SUMMARY OF ARGUMENT

The circuit court did not err in granting Respondents' Motion to Dismiss because Jividen and Sandy are entitled to qualified immunity and, in the alternative, statutory immunity pursuant to W. Va. Code § 15A-4-17(p). Petitioners have failed to identify any assignments of error which support reversal of the circuit court's order granting Respondents' Motion to Dismiss.

In this case, the WVDCR created a new internal policy directive that established that sexual offenders and child abuse and neglect offenders were not eligible for parole or good time for the period of incarceration imposed for the revocation of supervised release. In December of 2020, the WVDCR issued warrants for the arrest of Petitioners, who were both on parole at the time, because their release violated this new WVDCR policy. The West Virginia Supreme Court's opinion in *Phalen* addresses this exact issue, and it was entered on June 16, 2021. Further, Garcia was re–released on parole on April 13, 2021, prior to this decision, and Heckman was re–released

on parole on June 24, 2021, as a result of the *Phalen* decision. (App. 15–17.) Petitioners filed this proposed civil class action seeking declaratory, injunctive, and monetary relief since Petitioners re–incarceration was declared unconstitutional by the West Virginia Supreme Court in *Phalen*.

However, as the circuit court correctly held, the constitutional rights at issue were not clearly established for purposes of the qualified immunity analysis at the time of the alleged violations because the constitutional question was not beyond debate. In fact, the clearly confusing nature of this issue and the *Phalen* decision itself makes it obvious that this question was not beyond debate in December of 2020 when Petitioners were re–incarcerated. Further, Justices Armstead and Jenkins entered a Dissent in *Phalen* where they engaged in a lengthy analysis and argued that they believed Respondents actions were lawful and did not violate any constitutional principles. If the Justices of the West Virginia Supreme Court can disagree on the constitutionality of the exact question faced by this Court here, it is unfair to subject Respondents to money damages for picking the losing side in this controversy. Qualified immunity exists to shield state actors from liability for this very purpose.

Next, Respondents are also entitled to statutory immunity pursuant to W. Va. Code § 15A-4-17(p). However, this Court does not even need to consider the question of the constitutionality of this statute because the circuit court's order also found that Respondents were entitled to qualified immunity for all of Petitioners claims. As a result, even if this Court were to find that this statute is unconstitutional, the circuit court's order must still be upheld because dismissal of this action is supported by the finding of qualified immunity. The remaining assignments of error asserted by Petitioners here are red herrings which misinterpret the circuit court's conclusions of law and provide no legitimate basis for reversing the circuit court's order. Accordingly, the circuit court's order is supported by established precedent, and it correctly granted Respondents' Motion

to Dismiss and dismissed this action. Petitioners' appeal must be denied, and the circuit court's order must be upheld.

STATEMENTS REGARDING ORAL ARGUMENT AND DECISION

Respondents assert that oral argument is not necessary pursuant to the criteria of Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure because "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument."

STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (W. Va. 1995). Further, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (W. Va. 1995). Likewise, "[c]onstitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review." *Morris v. Crown Equip. Corp.*, 219 W. Va. 347, 633 S.E.2d 292, 297 (W. Va. 2006). Finally, the West Virginia Supreme Court of Appeals has held that

> in considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (W. Va. 1965); *see also* Syllabus Point 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (W. Va.

1967) ("When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.").

ARGUMENT

Petitioners alleged the following fourteen causes of action against Respondents Jividen and Sandy in their Complaint: Count I for declaratory judgment; Count II for injunctive relief; Count III for civil RICO; Count IV for assault and battery; Count V for false imprisonment; Count VI for abuse of process; Count VII for malicious prosecution; Count VIII for violations of the Eighth Amendment of the United States Constitution; Count IX for violations of the Fourth Amendment of the United States Constitution against Jividen only; Count X for violations of the Fifth and Fourteenth Amendments to the United States Constitution against Jividen only and a second Count X for violations of the *ex post facto* clause against Jividen only; Count XI for violations of Article III, Section 9 of the West Virginia Constitution; Count XII for violations of West Virginia Code § 55–7–9 against Jividen only; and Count XIII for civil conspiracy. The circuit court properly dismissed the Complaint it in entirety and dismissed this action. (App. 184.) Further, Petitioners do not appeal the entirety of the circuit court's Order entered on September 13, 2022, and do not assert any assignments of error regarding the following conclusions of law: dismissal of their Count XI claim for violations of Article III, Section 9 of the West Virginia Constitution; the conclusion that the West Virginia Constitution does not create an independent cause of action for money damages; the conclusion that there is no *respondeat superior* liability pursuant to 42 U.S.C. § 1983; and the conclusion that Respondents' actions were discretionary for the purposes of qualified immunity. (App. 184–190.)

I. ASSIGNMENT OF ERROR I: The constitutional rights at issue were not clearly established for purposes of the qualified immunity analysis at the time of the alleged violations because the constitutional question was not beyond debate.

The circuit court correctly found that Respondents are entitled to qualified immunity from Petitioners' constitutional claims. (App. 189.) The circuit court's Order entered on September 13, 2022, held that Respondents did not violate a clearly established right when Petitioners were re–incarcerated in December of 2020 because the law was not clearly established until the West Virginia Supreme Court's decision in *Phalen* was entered. (App. 190.) This ruling was correct and follows established precedent.

The West Virginia Supreme Court of Appeals set forth the qualified immunity standard to be applied by a trial court in *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (W. Va. 2014). First, the Court must determine if the alleged conduct can be defined as a "discretionary act" on the part of the defendants.

> To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

Id. at Syl. Pt. 10.

Second, the Court must determine if Plaintiff has developed material evidence that the conduct of the Defendant violated a "clearly established law."

> To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or

> oppressive in accordance with *State v. Chase Securities, Inc.,* 188 W. Va. 356, 424 S.E.2d 591 (1992).

Id. at Syl. Pt. 11. *See also*, *Lavender v. W. Va. Reg'l Jail & Corr. Facility Auth*., 2008 U.S. Dist. LEXIS 8162 (S.D. W. Va. Feb. 4, 2008). "In other words, the State, its agencies, officials, and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they do not violate any known law or act with malice or bad faith." Syl. Pt. 8, *Parkulo v. W.Va. Bd. Of Probation*, 199 W. Va. 161, 483 S.E.2d 507 (W. Va. 1996). "In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability." Syl. Pt. 11, *A. B.,* 766 S.E.2d 751.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotations omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know. *District of Columbia v. Wesby*, 138 S. Ct. 589-590 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

"We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. In fact, qualified

immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Further, the United States Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Ashcroft*, 563 U.S. at 742. "The dispositive question is whether the violative nature of particular conduct is clearly established." *Mullenix*, 577 U.S. at 12. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201).

Here, this Court must determine whether it was beyond debate in December of 2020 that Respondents were violating the rights of Petitioners when Jividen issued a warrant for the arrest of both Petitioners after the WVDCR changed its good time eligibility policy. In this case, the WVDCR created a new internal policy directive that established that sexual offenders and child abuse and neglect offenders were not eligible for parole or good time for the period of incarceration imposed for the revocation of supervised release. In December of 2020, the WVDCR issued warrants for the arrest of Petitioners, who were both on parole at the time, because their release violated this new WVDCR policy. The West Virginia Supreme Court's opinion in *Phalen* addresses this exact issue, and it was entered on June 16, 2021. Further, Garcia was re–released on parole on April 13, 2021, prior to this decision, and Heckman was re–released on parole on June 24, 2021, as a result of the *Phalen* decision. (App. 15–17.)

Petitioners argue that the decision to re–incarcerate them under these circumstances violated clearly established law because every reasonable official would have known that Petitioners' re–incarceration was unlawful at the time it occurred. However, none of the cases relied on by Petitioners placed this "statutory or constitutional question beyond debate" prior to *Phalen*, and the question at issue in this case falls far short of that threshold. *Mullenix*, 577 U.S.

at 12. In fact, the clearly confusing nature of this issue and the *Phalen* decision itself makes it obvious that this question was not beyond debate before the West Virginia Supreme Court entered its decision in *Phalen.*

Phalen was not a unanimous decision, and Justice Armstead, joined by Justice Jenkins, entered a lengthy dissent where he argued the following:

> based upon my review of applicable law and the policies promulgated by the West Virginia Division of Corrections and Rehabilitation (DCR), I do not believe that inmates, such as Petitioner, who are incarcerated for violating the conditions of their extended supervised release, are eligible for parole nor are they entitled to receive commutation from their sentences for good time served.

Phalen, 858 S.E.2d at 947. The dissent undertook a lengthy legislative history analysis and concluded that "I do not think the question of *ex post* facto application is as clear-cut as the majority has determined." *Id.* at 951. Finally, the dissent concluded as follows:

> As stated above, I believe a person incarcerated for violating conditions of his or her supervised release is no longer serving the original sentence but is instead being sanctioned for failing to comply with the court-ordered conditions of supervised release. Therefore, neither the parole statute, nor the good time statute as it existed prior to 2021, permit Petitioner to receive good time served or to be eligible for parole during his period of incarceration for violating his supervised release or extended supervised release. Following the passage of S.B. 713, it is clear that good time reductions are inapplicable to Petitioner because his extended supervised release was imposed pursuant to W. Va. Code § 62-12-26, and the version of W. Va. Code § 15A-4-17 adopted during the 2021 Legislative Session expressly prohibits such application. The Constitutional protections against *ex post facto* application is not implicated where, under a proper reading of both the pre-2021 good time served statute and the revised version, Petitioner was not eligible to avail himself of the parole or good time provisions in our law. Indeed, far from violating Petitioner's rights, the Legislature acted with compassion when it allowed Petitioner to benefit from DCR's mistaken allocation of good time as of October 21, 2020. W. Va. Code § 15A-4-17(a).

Id. at 952. Obviously, this issue was not clearly established prior to *Phalen* because the dissenting Justices, who were faced with this exact issue, disagreed with the majority's rulings and supported Respondents' actions and argued that they were lawful. Further, Respondent Patrick Morrisey and

the West Virginia Attorney General's Office also believed Respondents' actions were lawful and their arguments in *Phalen* support this position. Justice Armstead, Justice Jenkins, Respondent Morrisey and the attorneys at the West Virginia Attorney General's Office, and Respondents Jividen and Sandy clearly believed that Respondents' action were lawful in December of 2020 which shows that the rule was not one that "every reasonable official" would know. *Wesby*, 138 S. Ct. at 590. Qualified immunity exists for the very purpose of protecting Respondents' decision–making in circumstances just like this.

Further, Petitioners' arguments here only support the circuit court's conclusion that this was not a clearly established law in December of 2020 because their entire argument is based and modeled on the decision in *Phalen*. Petitioners copy the West Virginia Supreme Court's analysis in that case exactly and then argue that the holding in *Phalen* was so clear prior to that decision that every reasonable official would have interpreted the law to forbid the re–incarceration of Petitioners under these circumstances. This is inherently contradictory. It is obviously easy to read the decision in *Phalen* now with the benefit of hindsight, follow its analysis, and then argue that it should have been apparent well before that these principles of law are clear. This argument ignores the dissenting Justices opinion, and the significance of their arguments, and similarly ignores the fact that *Phalen* created a brand new syllabus point which articulated the principle of law Petitioners now argue was so clear prior to the decision. *See* Syl. Pt. 8, *Phalen*, 858 S.E.2d 936.

Moreover, this is exactly the type of argument that is forbidden when determining if a law is "clearly established." As the United States Supreme Court has held in *Ashcroft v. al-Kidd*, a court cannot determine that a law is clearly established through a few opinions that may suggest the conduct is unlawful. "[A]bsent controlling authority," there must be "a robust 'consensus of

cases of persuasive authority." *Ashcroft,* 563 U.S. at 742 (quoting *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999)). The Supreme Court in *Ashcroft* also disregarded the exact type of broad historical and purpose based arguments that Petitioners attempt to make here. *Id.* Petitioners argue here there are decades of precedent relating to *ex post facto* laws and alterations to parole eligibility to good time award calculations. Petitioners even attempt to argue that the issue here was clearly established in 1798 when the United States Supreme Court first discussed the issue of *ex post facto* laws. However, the United States Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality" which is exactly what Petitioners do here. *Id.*

While the *ex post facto* principles of the United States and West Virginia Constitutions have undoubtedly been established for a long time, this fact alone does not make a law "clearly established." This is the exact type of "high level of generality" that the United States Supreme Court cautioned about in *Ashcroft*. *Id.* at 742. Further, the Supreme Court "do[es] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 741. The Petitioners here do exactly what the lower courts were criticized for in *Ashcroft*, they "cherry-picked the aspects of [the decision in *Phalen*] that gave colorable support to the proposition that the unconstitutionality of the action here was clearly established." *Id.* at 743. This type of argument has already been forbidden by *Ashcroft*.

In addition, to the extent Petitioners attempt to argue that West Virginia State agencies or Jividen or Sandy should have been subjectively aware of the unconstitutionality of their alleged actions, this argument also fails. "To be clearly established, the right violated must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Dean v. McKinney*, 976 F.3d 407, 417 (4th Cir. 2020) (quoting *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004)). "This determination is an objective one, dependent not on the subjective

beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances." *Id.* (internal quotations omitted). Thus, the actual knowledge of either Respondent is irrelevant to this analysis because this determination is based on an objective, not subjective, standard.

Further, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Id.* Respondents deserve qualified immunity despite the fact that their actions were ultimately determine in *Phalen* to violate the *ex post facto* clause. Further, Justices Armstead and Jenkins entered a Dissent in *Phalen* where they engaged in a lengthy analysis and argued that they believed that Respondents actions were lawful and did not violate any constitutional principles. If the Justices of the West Virginia Supreme Court can disagree on the constitutionality of the exact question faced by this Court here, it is unfair to subject Respondents to money damages for picking the losing side in this controversy. *See Wilson*, 526 U.S. at 618. Qualified immunity exists to shield state actors from liability for this very purpose. Accordingly, the circuit court did not err when it found that the law was not clearly established in December of 2020 when Petitioners were re–incarcerated, and Respondents are entitled to qualified immunity for the entirety of Petitioners' claims.

II. ASSIGNMENT OF ERROR II: The circuit court did not grant Respondents statutory immunity from Petitioners' federal causes of action under W. Va. Code § 15A–4–17(p) and instead granted Respondents qualified immunity.

Next, Petitioners argue that the circuit court erred because it granted Respondents absolute immunity under W. Va. Code § 15A–4–17(p) on the following federal causes of action alleged by Petitioner: Count VIII for violations of the Eighth Amendment of the United States Constitution; Count IX for violations of the Fourth Amendment of the United States Constitution against Jividen

only; and Count X for violations of the Fifth and Fourteenth Amendments to the United States Constitution against Jividen only and a second Count X for violations of the ex post facto clause against Jividen only. However, this is a clear misinterpretation of Respondents' arguments and the circuit court's ruling. The circuit court did not grant Respondents immunity under this statute and instead granted them qualified immunity on these claims because the conduct challenged here clearly stems from administrative policy–making. In fact, as Petitioners state in their brief, counsel for these Respondents agreed with counsel for Petitioner and stated at oral argument that W. Va. Code § 15A–4–17(p) cannot be used to eliminate the federal causes of action. (App. 220.)

In its Order entered on September 13, 2022, the circuit court held the following:

> 39. Defendants are entitled to qualified immunity from Plaintiffs' constitutional claims.
>
> . . .
>
> 47. Plaintiffs' Complaint alleges Jividen and Sandy were the decision makers behind the West Virginia Department of Corrections' policy directive which make persons who had their supervised release revoked ineligible for both parole and good time and that Jividen ordered Plaintiffs' re-incarceration after this policy was implemented.
>
> 48. This conduct clearly stems from administrative policy-making, and these Defendants are absolutely immune. *See Parkulo v. W. Va. Bd. of Prob. & Parole*, 483 S.E.2d 507, 510 (W. Va. 1996).
>
> 49. Plaintiffs have failed to show that these Defendants engaged in any conduct beyond administrative policy-making which would subject them to liability.

(App. 189–191.) These rulings clearly show that Respondents were granted qualified immunity on Petitioners' United States Constitutional claims. Further, counsel for Respondents clearly acknowledged at oral argument that they were not seeking immunity under W. Va. Code § 15A–4–17(p) on Petitioners' United States Constitutional claims. Accordingly, the circuit court did not

err on this ground because it never made this finding, and this argument is a clear misinterpretation of its ruling.

III. ASSIGNMENT OF ERROR III: West Virginia Code Section 15A-4-17(p) does not violate the principles of Article III, Section 17 of the West Virginia Constitution because it eliminates or curtails a clear social and/or economic problem.

Next, Petitioners argue that W. Va. Code § 15A-4-17(p) violates the right of access to the courts as guaranteed by Article III, Section 17 of the West Virginia Constitution, and that this statute is unconstitutional. However, even if this statute violates Article III, Section 17, which it does not, the circuit court also found that Respondents were entitled to qualified immunity for all of Petitioners claims. As a result, even if this Court were to find that this statute is unconstitutional, the circuit court's order must still be upheld because dismissal of this action is supported by the finding of qualified immunity and this assignment of error is moot.

W. Va. Code § 15A-4-17(p) states:

> (p) The Division of Corrections and Rehabilitation, its commissioner, employees, agents, and assigns, shall be granted absolute immunity from liability from any claims or actions of any person serving, or who has served, a term of incarceration pursuant to §62-12-26 of this code, for any matter or claim arising out of good time calculations or awards which may or may not have been awarded, given, removed, or taken which caused a person to be reincarcerated or to increase the expected term of his or her incarceration, which calculation, award, removal, taking, or reincarceration occurred prior to the effective date of the amendments to this section enacted during the regular session of the Legislature, 2021.

As the West Virginia Supreme Court of Appeals has stated, "where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied . . . ." *Div. of Justice & Cmty. Servs. v. Fairmont State Univ.*, 242 W. Va. 489, 836 S.E.2d 456, 463 (W. Va. 2019) (quoting Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (W. Va. 1970)).

In addition, Article III, Section 17 of the West Virginia Constitution contains a "certain remedy" provision and states as follows: "The courts of this State shall be open, and every person,

for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." In Syllabus Point 6 of *Gibson v. West Virginia Department of Highways*, the West Virginia Supreme Court of Appeals recognized the circumstances in which this right is implicated and held that "[t]here is a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated." 185 W. Va. 214, 406 S.E.2d 440 (W. Va. 1991), overruled on other grounds by *Neal v. Marion*, 222 W. Va. 420, 664 S.E.2d 771 (W. Va. 2008).

Further,

> [w]hen legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the *Constitution of West Virginia*, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

Syl. Pt. 5, *Lewis v. Canaan Valley Resorts*, 185 W. Va. 684, 408 S.E.2d 634, 637 (W. Va. 1991). The West Virginia Supreme Court has specifically held that the court has "accorded substantial latitude to legislative enactments" and the court must "consider the total impact of the legislation" under the "certain remedy" analysis. *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551, 561 (W. Va. 1992). "Where its impact is limited rather than absolute, there is less interference with the 'certain remedy' principle, and the legislation will be upheld." *Id.*

In the present case, West Virginia Code § 15A-4-17(p) grants Respondents absolute immunity from liability for any claims brought by persons like Petitioners who served a term of

incarceration pursuant to West Virginia Code § 62–12–26 and seek to bring claims arising out of good time calculations or awards. West Virginia Code § 15A-4-17(p) was effective on April 30, 2021, which was after Petitioners were re–incarcerated. As a result, this statute deprives Petitioners of a cause of action that was vested at the time the statute was enacted. This statute also does not provide an alternative remedy, but it must still be upheld because the "purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose." *Lewis*, at Syl. Pt. 5.

The legislature did not specifically provide a purpose for this statute, but it was likely enacted to prevent frivolous lawsuits filed by persons who have been incarcerated pursuant to West Virginia Code § 62-12-26, which relates to the supervision of certain sex offenders. West Virginia Code § 15A-4-17(p) is not absolute and applies only to a narrowed class of persons, like Petitioners, who were incarcerated under a very specific statute and seek to sue for a very specific purpose. Further, this statue serves the clear economic problem of reducing the money the State of West Virginia must expend to defend lawsuits brought by a narrow class of incarcerated persons.

The ability of the State of West Virginia to limit its liability has been upheld as a legitimate purpose in a similar challenge brought in *O'Dell*, 425 S.E.2d 551. In *O'Dell*, the Court found the Government Tort Claims and Insurance Reform Act, which grants immunity from tort liability to political subdivisions of the State of West Virginia, to be constitutional under Article III, Section 17 because it applied to a narrowed class of individuals and made liability insurance more affordable by reducing the amount of tort cases filed against the State. "The stated purposes of the Tort Claims Act are 'to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to

political subdivisions for such liability.'" *Id.* at 555 (quoting W. Va. Code § 29-12A-1). The purpose of West Virginia Code § 15A-4-17(p) should likewise be upheld because there is no inherent right to sue the State of West Virginia, and the ability to sue the state has always been limited. Accordingly, West Virginia Code Section 15A-4-17(p) does not violate the principles of Article III, Section 17 of the West Virginia Constitution and is constitutional.

IV. ASSIGNMENT OF ERROR IV: The circuit court did not err in granting Respondents immunity under W. Va. Code Section 15A-4-17(p) and in dismissing Petitioners claim for declaratory judgment because this statute is constitutional.

Next, Petitioners argue that the circuit court erred in dismissing their Count I claim for declaratory judgment regarding the constitutionality of West Virginia Code Section 15A-4-17(p) because it did not enter any ruling regarding this question. This argument is a red herring and appears to be a critique of the exact language used in the circuit court's order and not a challenge to its conclusions of law. While the circuit court's order did not specifically declare this statute constitutional, it clearly granted Respondents immunity under West Virginia Code Section 15A-4-17(p). Clearly, the court found it to be constitutional because it ruled as follows:

> 21. West Virginia Code § 15A–4–17(p) states:
> The Division of Corrections and Rehabilitation, its commissioner, employees, agents, and assigns, shall be granted absolute immunity from liability from any claims or actions of any person serving, or who has served, a term of incarceration pursuant to §62-12-26 of this code, for any matter or claim arising out of good time calculations or awards which may or may not have been awarded, given, removed, or taken which caused a person to be reincarcerated or to increase the expected term of his or her incarceration, which calculation, award, removal, taking, or reincarceration occurred prior to the effective date of the amendments to this section enacted during the regular session of the Legislature, 2021.
>
> 22. The West Virginia Supreme Court of Appeals has stated, "where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied . . . ." *Div. of Justice & Cmty. Servs. v. Fairmont State Univ.*, 836 S.E.2d 456, 463 (W. Va. 2019) (quoting Syl. Pt. 2, *Crockett v. Andrews*, 172 S.E.2d 384 (W. Va. 1970)).

> 23. Thus, Defendants have been "granted absolute immunity" from this action because it is a "matter or claim arising out of good time calculations or awards."

(App. 187.) The fact that the circuit court did not use the word "declare" or specifically state that this statute was constitutional is irrelevant here because it clearly found the statute constitutional since Respondents were granted immunity. The fact that the circuit court's order did not use certain language is not a sufficient basis to reverse that order and its conclusions of law. Thus, the circuit court did not err in dismissing Petitioners' Count I claim for declaratory judgment because its dismissal is supported by the clear language of the order which granted Respondents absolute immunity.

V. ASSIGNMENT OF ERROR VI: The circuit court did not err when it found that Respondents were entitled to qualified immunity based on administrative policy-making, but even if this was error, Petitioners concede that Respondents' actions were discretionary.

Next, Petitioners argue that the circuit court erred when it held that Respondents were entitled to qualified immunity on the basis of administrative policy–making. Again, this assignment of error is a red herring because the circuit court found that Respondents were engaged in administrative policy–making as well as discretionary duties. As is well established, either of these findings will support qualified immunity under the first part of that test.

As stated in Section I above, the West Virginia Supreme Court of Appeals in *A. B.*, 766 S.E.2d at 756 set forth the qualified immunity standard to be applied by a court. First, the Court must determine if the alleged conduct can be defined as a "discretionary act" on the part of the defendants.

> To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial,

> legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

Id. at Syl. Pt. 10.

Second, the Court must determine if Plaintiff has developed material evidence that the conduct of the Defendant violated a "clearly established law."

> To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.,* 188 W. Va. 356, 424 S.E.2d 591 (1992).

Id. at Syl. Pt. 11.

Petitioners here challenge the circuit court's finding under part one of this test. Part one of this test is met if Respondents actions were "administrative policy-making acts or involve otherwise discretionary governmental functions." *Id.* at Syl. Pt. 10. However, even if it were error to find that Respondents were engaged in administrative policy–making decisions, which it is not, this alleged error would not disturb the findings of the circuit court because it also held that Respondents actions were discretionary which is sufficient to support the finding of qualified immunity. The circuit court's order clearly ruled the following:

> 42. Where, as here, the Defendants acts were discretionary, it can only be stripped of qualified immunity if "[the plaintiff has] demonstrated that a clearly established statutory or constitutional law [has] been violated." *Crouch* v. *Gillispie,* No. 17-0025 (W.Va. 2018).

(App. 190.) Further, Petitioners concede that the actions of Respondents were discretionary and specifically state that

> the acts complained of are within the scope of "discretionary acts" as set forth in Syllabus Point 10 of *W. V.a Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va.

> 492 (W. Va. 2014), and thus the true question in this case revolves around whether the conduct of arresting and incarcerating the Petitioners violated clearly established law, as discussed *supra* in the first argument section."

(Pet'rs' Br. at 32.) Accordingly, even if Respondents' actions were not administrative policy-making decisions and this finding was error, the circuit court's order cannot be overturned on this basis because it also found that the actions were discretionary, which adequately supports the finding of qualified immunity. Petitioners also clearly concede that Respondents' actions were discretionary. Accordingly, Respondents are entitled to qualified immunity, and the circuit court's order was not in error.

VI. ASSIGNMENT OF ERROR VII: The circuit court did not err when it dismissed Petitioners' Count VIII, IX, and X claims against these Respondents in their official capacities.

Finally, Petitioners argue that the circuit court erred when it dismissed the claims against Respondents in their individual capacities by ruling that these claims cannot be brought under 42 U.S.C. § 1983. Again, this assignment of error is a red herring and it completely misinterprets the circuit court's order, Respondents' Motion to Dismiss, and Respondents' statements at oral argument. The circuit court clearly did not dismiss the claims against Respondents in their individual capacities on this basis and instead granted them qualified immunity.

In this case, Petitioners' Complaint alleges the following claims against Respondents under 42 U.S.C. § 1983: Count VIII for violations of the Eighth Amendment of the United States Constitution; Count IX for violations of the Fourth Amendment of the United States Constitution against Jividen only; and Count X for violations of the Fifth and Fourteenth Amendments to the United States Constitution against Jividen only and a second Count X for violations of the ex post facto clause against Jividen only. (App. 30–34.) Further, these Respondents are being sued in both their individual and official capacities. (App. 7.) In its Order entered on September 13, 2022, the circuit court held the following:

> 50. In order to state a claim for relief under 42 U.S.C. § 1983, an aggrieved party must sufficiently allege that he or she was injured by "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a "person" acting "under color of state law." *See* 42 U.S.C. § 1983; *see Monell v. Dept. of Social Servs*., 436 U.S. 658, 691 (1978).
>
> 51. Claims under 42 U.S.C. § 1983 are specifically directed at "persons." *Will v. Mich. Dept. of State Police,* 491 U.S. 58, 60 (1989).
>
> 52. The Supreme Court of the United States has found that "neither a State nor its officials acting in their official capacities are 'persons' under §1983." *Id.* at 71.
>
> 53. As the Defendants are agents of the State of West Virginia while acting as employees of the WVDCR and Secretary of the West Virginia Department of Homeland Security, they are not a "person" under 42 U.S.C. § 1983, and are not subject to suit under that statute. *See Will v. Mich. Dept. of State Police,* 491 U.S. 58, 71 (1989).

(App. 187.) These rulings were not in error and are in accordance with established precedent. Petitioners even acknowledge that § 1983 claims cannot be brought against Respondents in their official capacities.

However, Petitioners appear to argue that the circuit court's order was in error because Respondents are not immune to liability in their individual capacities. These arguments by Petitioners are irrelevant here because the circuit court's order clearly dismissed these claims against Respondents in their official capacities only. The lower court's order clearly dismissed Plaintiffs' claims against these Respondents in their official capacities only in accordance with established precedent and then proceeded to dismiss the individual capacity claims under qualified immunity. Accordingly, the circuit court did not err on this basis.

CONCLUSION

Respondent respectfully moves this Honorable Court to uphold the Circuit Court's Order granting Respondents' Motion to Dismiss and grant such other relief the Court deems just and proper.

Respectfully submitted,

/s/ William E. Murray
Counsel for Respondents Betsy Jividen and Jeff Sandy

William E. Murray
W. Va. State Bar I.D. 2693
Jaden P. Rhea
W. Va. State Bar I.D. 13454

Anspach Meeks Ellenberger LLP
500 Virginia Street, East, Suite 525
Charleston, West Virginia 25301
304–205–8063 – telephone
340–205–8062 – facsimile
wmurray@anspachlaw.com
Counsel for Petitioner West Virginia
Division of Corrections and Rehabilitation

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22–ICA–163

Hank Heckman and Loren Garcia,
Plaintiffs below

Petitioners,

v.

Betsy Jividen, Jeff Sandy, and Patrick Morrisey, Defendants below

Respondents.

Appeal from an order of the Circuit Court of Kanawha County
(Case Nos. 21-C-903 and 21-C-904)

CERTIFICATE OF SERVICE

I, the undersigned, counsel for Respondents Betsy Jividen and Jeff Sandy, do hereby certify that on the 6th day of March 2023, I electronically filed the foregoing ***"Respondents Betsy Jividen and Jeff Sandy's Brief"*** with the Clerk of the Court using the electronic filing system which will send notification of such filing to the following participants:

Jeremy B. Cooper
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Counsel for Plaintiff

Johnnie E. Brown, Esq.
James A Muldoon, Esq.
Pullin Fowler, Flanagan, Brown & Poe, PLLC
James Mark Building
901 Quarrier Street
Charleston, WV 25301
Counsel for Defendant Patrick Morrisey

/s/ William E. Murray
William E. Murray, Esq. (WVSB #2693)
Jaden P. Rhea, Esq. (WVSB #13454)

ANSPACH MEEKS ELLENBERGER LLP
500 Virginia Street, East, Suite 525
Charleston, West Virginia 25301
304-205-8063 - telephone
304-205-8062 – facsimile
wmurray@anspachlaw.com
jrhea@anspachlaw.com