IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-163

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HANK HECKMAN and LOREN GARCIA,
Petitioners,

v.

JEFF SANDY, BETSY JIVIDEN, and PATRICK MORRISEY,
Respondents.

(An appeal of the final orders of Kanawha County Circuit Court, Case Nos. 21-C-903 and 904)

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

The Circuit Court erred by granting the respective motions to dismiss of Respondent Morrisey, and Respondents Jividen and Sandy on the following grounds:

1. The constitutional rights that the Respondents were alleged to have violated in the Complaint were clearly established at the time of the violations, and it was error to find the Respondents to be entitled to qualified immunity based on a finding that said legal principles were not clearly established.
2. It was error to determine that the Respondents were entitled to statutory absolute immunity from the Petitioners' federal causes of action pursuant to W. Va. Code § 15A-4-17(p), based upon the Supremacy Clause of the United States Constitution.
3. It was error to determine that the Respondents were entitled to statutory absolute immunity on all causes of action pursuant to W. Va. Code § 15A-4-17(p), based upon the statute's violation of the principles of Article III, Section 17 of the West Virginia Constitution.
4. It was error to withhold relief on the Petitioners' declaratory judgment claim concerning the constitutionality of W. Va. Code § 15A-4-17(p), which is not subject to the same immunity challenges as claims for monetary damages, and the dismissal of which was not justified on any other basis in the orders on appeal.
5. It was error to determine that Respondent Morrisey was entitled to absolute prosecutorial immunity from the allegations in the Complaint, to the extent that the allegations in the Complaint concerned Respondent Morrisey's role in

crafting and executing the policies in question, rather than to his role as an advocate of the policies in a judicial proceeding.

6. It was error to determine that Respondents Jividen and Sandy were entitled to absolute immunity on the basis of administrative policy-making.
7. It was error to determine that the Respondents were not amenable to claims under 42 U.S.C. § 1983 on the theory that the Respondents are not "persons" under that statute.
8. It was error to determine that Respondent Morrisey was immune from suit based upon a theory of sovereign immunity.

STATEMENT OF THE CASE

The circumstances underlying this case have previously been presented to the Supreme Court of Appeals of West Virginia, in the context of an original jurisdiction habeas matter that resulted in a signed opinion granting the writ in *State ex rel. Phalen v. Roberts*, 858 S.E.2d 936 (W. Va. 2021). The petitioner in that case was Scott Phalen, who was a person similarly-situated to the two Petitioners in this case and plaintiffs below, Hank Heckman and Loren Garcia. As discussed in the Complaint (A.R., at 5-37) that initiated the proceedings now on appeal, Mr. Phalen, Petitioner Heckman, Petitioner Garcia, and a class of other unknown individuals were all re-arrested after having been paroled off of periods of incarceration judicially imposed following the revocation of their supervised release under W. Va. Code § 62-12-26. These arrests stemmed not from any allegations of wrongdoing, nor from any court action, but instead from an apparent decision within the Division of Corrections and Rehabilitation to retroactively modify eligibility for parole and good time for persons who had been revoked from supervised release.

Justice Hutchison, writing for the majority in *Phalen*, set forth the following factual background, as it related to Mr. Phalen:

> West Virginia law provides that any inmate may be paroled after serving one-fourth of a definite term sentence. W. Va. Code § 62-12-13(b)(1)(A) [2021]. After serving one-fourth of his ten-year definite term sentence for violating conditions of his supervised release, Petitioner Scott Phalen was released on parole. However, he was arrested and reincarcerated six months later because the Division of Corrections and Rehabilitation ("DOCR") determined that he had been released in error based upon an internal policy that inmates who are incarcerated for violating the conditions of their supervised release are neither eligible for parole pursuant to West Virginia Code § 62-12-13 nor entitled to receive commutation from their sentences for good conduct (also referred to as "good time") pursuant to West Virginia Code § 15A-4-17. Petitioner seeks an original jurisdiction writ of habeas corpus to direct Respondent Craig Roberts, Superintendent, South Central Regional Jail, to restore him to parole.

Phalen, at 938.

> In 2011, petitioner was indicted by a Kanawha County Grand Jury on the offenses of first-degree sexual assault, first-degree sexual abuse, sexual abuse by a parent, and incest. The indictment alleged that petitioner's crimes occurred "on or about December 20, 2010." He pled guilty to one count of first-degree sexual abuse, and, on February 14, 2012, he was sentenced to one to five years in prison, pursuant to West Virginia Code § 61-8B-7 [2006] (the first-degree sexual abuse statute) followed by fifteen years of extended supervised release, pursuant to West Virginia Code § 62-12-26(a). See Syl. Pt. 11, in part, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) ("The imposition of the legislatively mandated additional punishment of a period of supervised release [is] an inherent part of the sentencing scheme for certain offenses enumerated in West Virginia Code § 62-12-26."). Petitioner discharged his prison sentence on December 2, 2013, and then commenced the period of supervised release. See W. Va. Code § 62-12-26(d) ("The period of supervised release imposed by the provisions of this section shall begin upon the expiration of any period of probation, the expiration of any sentence of incarceration or the expiration of any period of parole supervision imposed or required of the person so convicted, whichever expires later.").

West Virginia Code § 62-12-26(h)(3) provides that if a circuit court "finds by clear and convincing evidence that the defendant violated a condition of supervised release," then the circuit court may revoke the defendant's release and "require the defendant to serve in prison all or part of the term of supervised release." The circuit court found that petitioner violated the conditions of his supervised release in 2014, for which he was sentenced to five years in prison. After being released to complete the period of supervised release, petitioner again violated the conditions of his supervised release and so, on June 9, 2017, the court ordered that petitioner "be sentenced to confinement ... for a determinate term of ten (10) years" for the violation.

West Virginia Code § 62-12-13(b)(1)(A) [2021] provides that "[a]ny inmate of a state correctional institution is eligible for parole if he or she ... has served one fourth of his or her definite term sentence[.]" After serving one fourth of his definite ten-year term, petitioner appeared before the Parole Board, which determined that petitioner should be released on parole. Petitioner was released on parole on June 29, 2020.

In November of 2020, five months after petitioner's release on parole, the DOCR created new internal policy directives establishing that, among others, "sex offenders and child/abuse neglect offenders" are neither eligible for parole nor shall receive day-for-day good time for incarceration imposed for revocation of supervised release. On December 7, 2020, the DOCR issued a warrant for petitioner's arrest because, pursuant to this new DOCR policy, petitioner had been released from custody on June 29, 2020, due to a "clerical error" or "mistake." See W. Va. Code § 62-8-8(a) [2007] (authorizing the issuance of "an order of arrest for inmates who have been released from the custody of the [now DOCR] due to[,] [inter alia,] a clerical error[ ] [or] mistake").

On December 23, 2020, petitioner filed a petition for a writ of habeas corpus with this Court seeking reinstatement to parole. Following the filing of respondent's summary response to the petition, we issued a rule to show cause and scheduled oral argument for April 14, 2021.

While this case was pending, during the 2021 Legislative session, Senate Bill 713 ("S.B. 713") was introduced to amend the good time statute, West Virginia Code § 15A-4-17, in relevant part, to exclude inmates committed, pursuant to West Virginia Code § 62-

> 12-26, for violating the conditions of their supervised release from being granted good time except that "an inmate who had good time calculated into his or her release prior to October 21, 2020," is entitled to the good time awarded or earned. See W. Va. Code § 15A-4-17(a) [2021].
>
> Senate Bill 713 was passed by the Legislature on April 7, 2021, and approved by the Governor twelve days later. The Legislature made S.B. 713 effective on April 30, 2021. In light of this new legislation, which respondent states is simply a codification of the DOCR's "stance" in Policy Directive 151.06, this Court directed the parties to file supplemental briefs addressing the impact of S.B. 713 on the issues raised in petitioner's habeas petition.

Phalen, 939-41 (footnotes omitted).

Following oral argument and supplemental briefing, the Supreme Court granted Mr. Phalen's requested writ, as moulded, and held that the change in policy could only be applied to persons whose *underlying crimes* transpired prior to the effective date of S.B. 713 (i.e. April 30, 2021). Petitioner Garcia and Petitioner Heckman also filed original jurisdiction habeas petitions, in Docket Nos. 20-1021, and 21-0341, respectively. Petitioner Garcia's petition was ultimately mooted when, prior to S.B. 713's effective date, the DOCR recalculated her time sheet based on the provisions of that statute, and released her on the eve of oral argument. Petitioner Heckman's petition was mooted following the release of the *Phalen* decision, as a result of which the DOCR released Petitioner Heckman prior to the Supreme Court making a decision on the merits of his petition. In October of 2021, the civil action that is now on appeal was initiated with the filing of a Complaint, which sought relief based on a number of causes of action for Petitioner Heckman and Petitioner Garcia, as well as a group of similarly-situated persons that included Mr. Phalen in addition to a number of other unknown people who had been adversely affected.

The Complaint named as defendants Betsy Jividen, in her individual capacity, and in

her capacity as the Commissioner of the Division of Corrections and Rehabilitation; Jeff Sandy, in his personal capacity and in his individual capacity as the Secretary of the West Virginia Department of Homeland Security; and Patrick Morrisey, in his individual capacity and in his official capacity as the Attorney General. (A.R., at 7). The Complaint first sought declaratory judgment and/or injunctive relief concerning a provision of S.B. 713 that purported to grant absolute immunity to the DOCR and related entities for the events complained of in the Complaint, W. Va. Code § 15A-4-17(p). (A.R., at 18-23). The causes of action for money damages asserted in the Complaint all revolved around the arrest and incarceration of the Petitioners following the retroactive policy change. Those causes of action were a federal Civil RICO claim; state law intentional tort claims for assault and battery, false imprisonment, abuse of process, and malicious prosecution; federal civil rights claims under 42 U.S.C. § 1983 for violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments and the Ex Post Facto clause of the United States Constitution; a state constitutional tort claim for a violation of the takings clause; and state law claims for violation of statute, and civil conspiracy. (A.R., at 18-36).

The Complaint alleged that Petitioner Heckman was indicted by the Taylor County Grand Jury in 2010 for sexual offenses in case number 10-F-51 and, in accordance with a plea agreement, was committed as a youthful offender, following which he was placed on three years of supervised probation and 10 years of extended supervised release pursuant to W. Va. Code § 62-12-26. Petitioner Heckman subsequently violated probation and was ultimately reincarcerated and discharged the remainder of his custodial sentence. Petitioner Heckman began his 10 year term of extended supervised release upon discharge of his sentence. His supervised release was revoked, and he was ordered to serve all ten years of his period of

supervised release in prison, with no credit for time served on supervised release, with an effective sentencing date of July 20, 2017. On or about June 11, 2020, Petitioner Heckman was released to parole, following the expiry of one fourth of his ten year period of incarceration imposed as a result of the revocation of his supervised release. (A.R., at 9).

The Complaint further alleged that Ms. Garcia was indicted by the Randolph County Grand Jury in 2013, on three felony charges: child abuse resulting in bodily injury, conspiracy, and child neglect resulting in bodily injury, in case number 13-F-71. Via plea agreement, she pleaded guilty to one count of child neglect resulting in bodily injury, and was sentenced to 1-3 years of incarceration, followed by 10 years of extended supervised release pursuant to W. Va. Code § 62-12-26. Petitioner Garcia, while on supervised release, was accused of and indicted for participating in a robbery in Harrison County. As a result, she pleaded guilty in Harrison County case number 16-F-200 to one count of First Degree Robbery, and was sentenced to a determinate sentence of ten years. A motion to revoke Petitioner Garcia's supervised release was granted in Randolph County, with the Petitioner being ordered to serve three years of her supervised release as a period of incarceration, with an additional thirty year period of supervised release being imposed thereafter. Petitioner Garcia began serving these terms of incarceration, which were ordered to run consecutively, on April 12, 2016. On December 5, 2019, Petitioner Garcia was released to parole, after having served in excess of one fourth of the 13 total years of her consecutive sentences. (A.R., at 9-10).

By way of factual background, the Complaint alleged that following the onset of the Covid-19 pandemic, inmates working in Prison Industries, while in the custody of the DOCR, came up with the idea of making masks as a way of “giving back” to the community. “Clean teams” were formed at each facility to assist with the enhanced cleaning and sanitation

necessary to combat Covid-19 introduction and spread in DOCR facilities. The efforts of these "clean teams" contributed significantly to the DOCR's efforts to combat and reduce the spread of the virus. In recognition of the exemplary work of these inmates, it was alleged that Respondent Jividen requested each Superintendent of DOCR facilities to nominate inmates who performed exemplary service related to Covid-19 efforts for an award of meritorious "good time" pursuant to W. Va. Code Section 15A-4-17(i) (2018). (A.R., at 10).

The Complaint asserted that an inmate named Joshua Miller was included in the submission of names from Denmar Correctional Center and Jail, and was recommended to receive 120 days of meritorious "good time" for his efforts in the manufacturing of masks and gowns. Upon receipt of the recommendation, Respondent Jividen's office notified Joshua Miller that he was recommended to receive a meritorious "good time" award for his efforts and that a new time sheet reflecting the same would be forthcoming. (A.R., at 10-11).

The Complaint claimed that as time sheets were being reviewed and calculated for the nominated inmates, an unknown individual or individuals within the DOCR determined that certain recommended inmates were not eligible for the award of "good time." On or before August 7, 2020, Respondent Jividen placed the "good time" award program under review. The Complaint alleged that Respondent Sandy was involved in the decision-making process to put the "good time" award program under review. (A.R., at 11).

At the time this review was taking place, the Complaint alleged that eligibility for good time was governed by DOCR Policy Directive 151.02, which did not limit good time eligibility for persons whose supervised release had been revoked. On or about October of 2020, the DOCR adopted a new policy whereby persons who had been revoked from supervised release pursuant to W.Va. Code Section 62-12-26 were ineligible for both parole and for good time.

Policy Directive 151.06, which purported to remove good time eligibility for inmates who had been revoked from supervised probation, was implemented on November 23, 2020. No written policy directive regarding parole eligibility was issued. (A.R., at 11).

The Complaint stated that on or about December 7, 2020, Respondent Jividen signed a series of warrants, alleging a "clerical error or mistake" as the reason for arrest. This series of warrants included warrants for both Petitioner Heckman, and for Petitioner Garcia, in addition to Mr. Phalen, as discussed above, and other, unknown persons. Respondent Jividen was alleged to have sent a letter on December 8, 2020 to Judge Alan Moats, to inform the latter that Petitioner Heckman was released on June 11, 2020 – a date which was calculated using day-for-day good time credit, which the Division of Corrections has "since determined is not appropriate for sex offenders serving time for a violation of their supervised releases." (A.R., at 11-12).

This letter was appended to the Complaint. (A.R., at 37). The letter from Respondent Jividen stated that Petitioner Heckman would not be eligible to be readmitted to parole, and that since Petitioner Heckman was on parole and being supervised by a parole officer employed by the DOCR, that he was "still subject" to the authority of the DOCR and was thus being re-incarcerated to serve the remainder of his sentence. (A.R., at 12).

The Complaint asserted that although no violation of the terms of parole was alleged against Petitioner Heckman, Mr. Phalen, or Petitioner Garcia, that these individuals were all arrested on December 7 and 8, 2020 by personnel from the Division of Corrections and Rehabilitation. The Complaint asserted that the individuals who arrested these three, in addition to arresting the other unknown, similarly situated individuals, were acting under the purported authority of Respondent Jividen, who had issued warrants in their respective names

based upon a "clerical error or mistake." (A.R., at 12-13).

The Complaint further alleged that Respondent Morrisey defended the DOCR's new good time and parole eligibility policies on the merits. It was asserted that Respondent Morrisey could have recommended, but did not, that the policies were unconstitutional, and that the Petitioners, and members of a class of similarly situated persons, were being held unlawfully.

The Complaint asserted that on or about March 25, 2021, S.B. 713 (2021) was introduced in the West Virginia Senate, after having been authored by personnel of the Department of Homeland Security and/or the DOCR, and introduced directly to the Senate Judiciary Committee. The Complaint alleged upon information and belief that Respondent Sandy was involved in the process of drafting S.B. 713. (A.R., at 13-14).

The Complaint asserted that Department of Homeland Security Deputy General Counsel, Stacy Nowicki, an agent of Respondent Sandy, testified before the Senate Judiciary Committee on March 24, 2021 regarding the reasoning for S.B. 713, and stated: "Because of that change, the Division basically removed the good time because they did not feel that it was appropriate to have awarded the good time. Then obviously, lots of lawsuits happened at that point. Parolees, people that had been released from these violations were scooped back up off the street by the Division, excuse the terminology, but they were brought back into custody, and they have also sued us for bringing them back in and inconsistent policy statements, and that's where we are, so." (A.R., at 14).

The Complaint alleged that the lawsuits to which Ms. Nowicki referred included, but may or may not have been limited to, two original jurisdiction mandamus petitions filed by Joshua Miller (Docket No. 20-0628) and Dominic Davis (Docket No. 20-0981), and the two

habeas corpus petitions, from Petitioner Garcia and Mr. Phalen, all of which were later argued before the Supreme Court of Appeals of West Virginia on April 14, 2021. The Complaint asserted that the purported effect of S.B. 713 was to codify the DOCR's new policy concerning the ineligibility of good time for persons revoked from supervised release, and that S.B. 713 was silent on the question of parole eligibility. The Complaint asserted that S.B. 713 also had the purported effect of restoring good time that was previously taken from persons revoked from supervised release, such as the Petitioners, but only that which would have been earned up to October 21, 2020. (A.R., at 14-15).

The Complaint also alleged that SB 713, on its face, confers absolute immunity on the DOCR, and its commissioner, employees, agents, and assigns from "liability arising 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" [§15A-4-17 as amended, §15A-4-17(p)]. (A.R., at 15).

The Complaint alleged that one day before oral argument, on April 13, 2021, the DOCR recalculated Petitioner Garcia's time sheet to give her the purported benefit of S.B. 713, which, although not yet law, would reinstate a portion of her good time sufficient for her to discharge her 3 year period of supervised release if it became law, which would then enable her to have earned enough time to make parole on her 10 year robbery sentence. As a result of this recalculation, Petitioner Garcia was released from incarceration on April 13, 2021, the eve of

oral argument. (A.R., at 15).

The Complaint asserted that during oral argument before the Supreme Court on April 14, 2021, the Assistant Attorney General representing Superintendent Roberts indicated to the Supreme Court that there were, at that time, approximately ninety individuals in DOCR custody serving periods of incarceration following the revocation of their supervised release. The Complaint averred that having passed both houses of the Legislature, SB 713 was signed by Governor Jim Justice on April 19, 2021, with an effective date of April 30, 2021. (A.R., at 15-16).

The Complaint noted that on or about April 27, 2021, Petitioner Heckman filed an original jurisdiction habeas petition in the Supreme Court, predicated on the same grounds as those asserted in the habeas petitions submitted by Petitioner Garcia and Mr. Phalen. The Supreme Court entered orders determining that the Joshua Miller and Dominic Davis mandamus petitions were moot, and dismissing those petitions. The Supreme Court entered an order determining that Petitioner Garcia's habeas corpus petition was moot as a result of her release, and dismissed her petition. On June 16, 2021, the Supreme Court issued a signed opinion in the Scott Phalen habeas matter, *Phalen v. Roberts*, granting the requested writ, as moulded. (A.R., at 16).

The Complaint alleged that the Supreme Court ruled in *Phalen* that, contrary to DOCR's purported policy, individuals who had been revoked from supervised release remained eligible for parole. Syllabus Point 6 of *Phalen* reads: “West Virginia Code § 62-12-13(b)(1)(A) does not exclude from parole eligibility inmates who are incarcerated for violating the conditions of their supervised release pursuant to West Virginia Code § 62-12-26.” The Supreme Court also ruled in *Phalen* that notwithstanding any language in SB 713 to the contrary, the DOCR was

not permitted to reduce eligibility for good time for persons revoked from supervised release whose underlying crimes were committed prior to April 30, 2021, due to *ex post facto* principles. (A.R., at 16).

The Complaint observed that Syllabus Point 8 of *Phalen* reads: "In order to avoid the constitutional prohibition against ex post facto laws, West Virginia Code § 15A-4-17(a) [2021] shall not be applied to those inmates who committed the underlying crimes for which they are incarcerated pursuant to West Virginia Code § 62-12-26 prior to April 30, 2021, the effective date of the statute, regardless of any contrary language contained therein." (A.R., at 16-17).

The Complaint averred that Petitioner Heckman was released from incarceration to parole on June 24, 2021, when Respondent Jividen, as a result of the *Phalen* decision, issued a "Warrant of Arrest Cancellation." The Supreme Court entered an order determining that Petitioner Heckman's habeas corpus petition was moot as a result of his release, and dismissed his petition. The Complaint also alleged that following Petitioner Heckman's release from incarceration, he was required by his parole officer to be on home confinement with electronic monitoring, on which he remained as of August 1, 2021, and that prior to his December, 2020 rearrest, Petitioner Heckman was not required to be on home confinement or electronic monitoring. The Complaint alleged that no misconduct had been alleged by the DOCR as a justification for the more restrictive conditions placed upon Petitioner Heckman. (A.R., at 17).

After the Complaint was filed, in lieu of an Answer, Respondents Jividen and Sandy filed a joint motion to dismiss, and Respondent Morrisey filed his own motion to dismiss. (A.R., at 38-56, 85-104). These motions raised a number of defenses, primarily in the form of a number of theories of qualified and absolute immunity, including claims of sovereign immunity, absolute prosecutorial immunity, absolute immunity related to administrative rule-

making functions, absolute statutory immunity stemming from W. Va. Code § 15A-4-17(p), and qualified immunity, on the basis that no clearly established constitutional violations were perpetuated by the Respondents. The Respondents also raised a number of other non-immunity defenses. The Petitioners filed responses (A.R., at 57-73, 105-122) in opposition to these motions, to which the Respondents replied. (A.R., at 74-84, 123-130). The Circuit Court directed the submission of proposed orders, and held oral argument (A.R., 202-225), prior to adopting the respective proposed orders granting both motions to dismiss. (A.R., at 184-191, 192-201). The Petitioners then filed the instant appeal to this Court of the two final orders.

SUMMARY OF ARGUMENT

The Petitioners assert that the Circuit Court erred in its various justifications for granting the motions to dismiss in light of the extensive factual allegations in the complaint, and in light of the lack of legal justification for the various forms of immunity and other defenses proffered by the Respondents. The most critical of these issues is the question of qualified immunity, addressed in the first assignment of error. The Respondents contended below that there was no clearly established law preventing the Petitioners from being arrested and incarcerated based upon a retroactive policy change concerning eligibility for parole and good time. They claimed that they were not on notice of the relevant constitutional principles until the decision in *Phalen v. Roberts*. This is belied both by the state of the law at the time the violations took place, as well as the factual circumstances that indicate government official making an effort to deflect responsibility from themselves while making no effort to correct the injustice of the unlawful incarceration of the people they feared might sue them in the future. The claims of prosecutorial immunity, administrative rule-making immunity, sovereign immunity, statutory immunity, and lack of amenability to a Section 1983 action are similarly

unavailing based upon the facts set forth in the Complaint. The Petitioners request a reversal of the orders granting the motions to dismiss, and a remand for further proceedings on the merits of the case in the Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners assert that this matter is suitable for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because it deals with a question of first impression regarding the constitutionality of a statute. Alternatively, the matter should be set for Rule 19 argument because of a result against the weight of the evidence as asserted in the Complaint. The Petitioners assert that this matter should be disposed of by signed opinion.

ARGUMENT

The Circuit Court erred by granting the respective motions to dismiss of Respondent Morrisey, and Respondents Jividen and Sandy

Standard of Review

The standard of review for a trial court on motion to dismiss under W.Va.R.C.P. 12(b)(6) is as follows: “A trial court may dismiss a plaintiff's complaint for failure to state a claim upon which relief may be granted.” *Collia v. McJunkin*, 358 S.E.2d 242, 243 (W.Va. 1987). “The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint.” *Id*. (citing *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 920 (W. Va. 1978). Under this standard, “the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.” *Mandolidis*, 246 S.E.2d at 920. A trial court must determine whether the allegations contained within plaintiff's complaint “constitute a statement of claim under Rule 8(a),” which requres the pleadings to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” *John W. Lodge Distrib. Co. v.*

Texaco, 245 S.E.2d 157, 159 (W. Va. 1978); W.Va.R.C.P. 8(a). The essential material facts of the case must appear on the face of the complaint and "sketchy generalizations of a conclusive nature unsupported by operative facts to not set forth a cause of action." *Par Mar. v. City of Parkersburg*, 398 S.E.2d 532, 536 (W. Va. 1990). "The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exists." *Fass v. Nowsco Well Serv.*, 350 S.E.2d 562, 563 (W. Va. 1986).

The appellate standard of review has been described by the Supreme Court as follows: "2. 'Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.' Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)." Syl. Pt. 2, *Hill v. Stowers*, 680 S.E.2d 66, 224 W. Va. 51 (2009). Additionally, "…we have held that a 'heightened pleading standard' applies when immunities are implicated." *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996).

1. The constitutional rights that the Respondents were alleged to have violated in the Complaint were clearly established at the time of the violations, and it was error to find the Respondents to be entitled to qualified immunity based on a finding that said legal principles were not clearly established.

The Respondents are not entitled to qualified immunity on the standard described in Syllabus Point 11 of *W. V.a Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492 (W. Va. 2014):

> 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 law 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).

> In the absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

A.B., 234 W. Va. At 497. The Petitioners preserved this issue at length in the responses to the motions to dismiss (A.R., 57-73, 105-122) and the proposed orders denying the motions to dismiss. (A.R., at 132-183).

Under the scheme set forth in *A.B.*, the Respondents cannot obtain qualified immunity. The Respondents, in their motions to dismiss (A.R., at 47-50, 96-101), attempt to plead innocence as to the knowledge of the unlawfulness of their retroactive application of a new good time policy against the Petitioners and the others similarly situated. They claim that because *Phalen v. Robert*s was not decided until June of 2021, that they cannot have been expected to know that what they did was wrong. The body of law on this subject, however, is clearly established beyond doubt, and has been for a very long time. Clearly established law, by both the Supreme Court of Appeals of West Virginia, and the Supreme Court of the United States, wholly foreclosed the retroactive repealer of good time and parole eligibility for persons situated like the Petitioner. The line of ex post facto cases runs all the way back to *Calder v. Bull*, 3 U.S. 386 (1798):

> (1) every law that makes an action done before the passing of the law, which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the commission of the offense, in order to convict the offender.

Id., at 390.

The holdings of *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980); *State*

v. Hargus, 232 W.Va. 735, 753 S.E.2d 893 (2013); *Johnson v. United States*, 529 U.S. 694 (2000); *Lynce v. Mathis*, 519 U.S. 433 (1997); and *Weaver v. Graham*, 450 U.S. 24 (1981); in light of the facts alleged in the Complaint, which must be taken as true for the purposes of a motion to dismiss, straightforwardly demonstrate violations of clearly established law by the Respondents for their roles in the planning, implementation, and execution of the illegal arrest and incarceration of the Petitioners.

In *Adkins v. Bordenkircher*, our state Supreme Court determined that it would violate ex post facto for a modification of good time eligibility to be applied retroactively, as the Court held in the following two syllabus points:

> 1. Under *Ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.
>
> 2. In order to avoid *Ex post facto* principles, W.Va.Code, 28-5-28 (1977), must be construed to apply to those persons who committed offenses after May 1, 1978, and those individuals presently incarcerated in State penal institutions for crimes committed prior to May 1, 1978, are entitled to good time credit as calculated under W.Va.Code, 28-5-27 (1931).

Adkins, 262 S.E.2d at 885.

In *Weaver*, a Florida law which took away eligibility for "gain time" available automatically to prisoners to accelerate their discharge dates (very similar to the operation of "good time" in West Virginia) was held to violate the *ex post facto* clause. This result, in accordance with Adkins, wholly forecloses the applicability of any new good time eligibility policy to persons whose crimes were committed after the policy was enacted. *Weaver*, 450 U.S. at 28-36.

In *Lynce v. Mathis*, 519 U.S. 433 (1997) the United States Supreme Court granted relief to an inmate who had been released under an early-release program designed to alleviate prison overcrowding, but was then, similarly to the Petitioners, rearrested when the policy was modified by an executive agency. The State of Florida argued that the withdrawal of the early-release credits only had a "speculative" and "attenuated" likelihood of increasing punishment, however, the Court stated:

> Given the fact that this petitioner was actually awarded 1,860 days of provisional credits and the fact that those credits were retroactively cancelled as a result of the 1992 amendment, we find this argument singularly unpersuasive. In this case, unlike in Morales, the actual course of events makes it unnecessary to speculate about what might have happened. The 1992 statute has unquestionably disadvantaged the petitioner because it resulted in his rearrest and prolonged his imprisonment. Unlike the California amendment at issue in Morales, the 1992 Florida statute did more than simply remove a mechanism that created an opportunity for early release for a class of prisoners whose release was unlikely; rather it made ineligible for early release a class of prisoners who were previously eligible-including some, like petitioner, who had actually been released.

Lynce, 519 U.S. at 446-47 (boldface emphasis added).

In *State v. Hargus*, our state Supreme Court commented on *Johnson* as follows:

> In our consideration of this issue, we find the case of *United States v. Johnson*, 529 U.S. 694 (2000), to be persuasive. In *Johnson*, the United States Supreme Court considered an issue that arose under the federal supervised release statute found at 18 U.S.C. § 3583. Like the statute at issue, the Court in *Johnson* explained that the federal statute gives district courts the power to revoke a defendant's supervised release and impose a prison term, and also to impose another term of supervised release following imprisonment. Significantly, the *Johnson* Court attributed post-revocation penalties to the defendant's original conviction and not to a violation of the conditions of supervised release. In explaining this decision, the Court recognized that construing the revocation of a defendant's supervised release and re-imprisonment as punishment for the violation of the conditions of

> supervised release would raise serious constitutional questions.

Hargus, 753 S.E.2d at 899.

The Respondents have taken the position that there was no relevant clearly established law prior to the events alleged to have transpired in the Complaint because it was unclear in *Hargus* whether or not the period of incarceration ordered following the revocation of supervised relief was a “sentence” or a “sanction,” and that it was not possible for the Respondents to have known the answer to this question until after *Phalen v. Roberts* was decided. (A.R., at 205-208).

However, an examination of *Hargus* demonstrates that its entire holding was premised on the fact that the so-called “sanction” was indistinguishable from the underlying sentence, and that it had to be for constitutional reasons. The *Phalen v. Roberts* Court unmistakably rejected the theory that this question had not already been settled in *Hargus*, and repeatedly excoriated the unsupportable arguments offered by the State to that effect:

> We find respondent's interpretation of *Hargus* to be sorely misguided. It is abundantly clear that *Hargus* made no distinction between a "sentence" and a "sanction" but, instead, used those terms interchangeably and without bestowing any special significance upon either of them with respect to post-revocation incarceration, parole eligibility, good time, or otherwise. As further support that respondent completely misapprehends our holdings in that case, he fails to recognize that *Hargus* proceeded to examine the defendants' individual "post-revocation sentences" to determine whether they violated the disproportionality principle that is implicit in the cruel and unusual punishment clause of the state and federal constitutions.

Phalen, 858 S.E.2d at 943.

The Supreme Court was unequivocal, stating:

> Clearly, respondent's attempt to characterize post-revocation incarceration as anything other than a "sentence" is not supported

> by our decision in *Hargus* or elsewhere in the law and cannot stand. As a result, to the extent that the DOCR policy directives are premised upon this faulty interpretation of *Hargus* as justification for petitioner's arrest and reincarceration, they are unenforceable.

Phalen, 858 S.E.2d at 943.

Moreover, the Supreme Court observed that numerous decisions following *Hargus* had dealt with post-revocation incarceration as part of the sentence:

> Furthermore, since *Hargus*, we have applied various aspects of that decision to other cases and, in so doing, have consistently considered the offenders' post-revocation incarcerations as "sentences." See *State v. David T.*, No. 19-0778, 2020 WL 6482740 (W.Va., Nov. 4, 2020) (memorandum decision); *State v. Payne*, No. 17-0195, 2018 WL 1444287 (W.Va., March 23, 2018) (memorandum decision); *State v. Winning*, No. 17-0921, 2018 WL 4944416 (W.Va., Oct. 12, 2018) (memorandum decision); *State v. Parker-Boling*, No. 16-1193, 2017 WL 5629689 (W.Va., Nov. 22, 2017) (memorandum decision); *State v. Roger G.*, No. 14-1200, 2015 WL 5125486 (W.Va., Aug. 31, 2015) (memorandum decision).

Phalen, 858 S.E.2d at 943 n.14.

In essence, the Respondents are requesting that this Court find that merely proffering a decisively unmeritorious argument in defense of an alleged constitutional violation is sufficient to defeat a finding that the law was clearly established at the time the faulty argument was made.

The standard for assessing the existence of clearly established law was described as follows by Justice Cleckley:

> To prove that a clearly established right has been infringed upon, a plaintiff must do more than allege that an abstract right has been violated. Instead, the plaintiff must make a "particularized showing" that a "reasonable official would understand that what he is doing violated that right" or that "in the light of preexisting law the unlawfulness" of the action was "apparent."

> *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Hutchison v. City of Huntington, 479 SE 2d 649, 659 n.11 (W.Va. 1996).

It is apparent beyond question, and was apparent beyond question prior to the decision in *Phalen v. Roberts*, that extended supervised release – including any incarceration ordered when supervised release is revoked – is part of a sentence. See, *Johnson*, and *Hargus*. It is apparent beyond question that the punishment for a crime cannot be retroactively extended after the date of the commission of the offense. See, *Calder v. Bull*. It is apparent beyond question that the rearrest of a former prisoner who was released under the operation of a rule in place at the time of the underlying crime is a violation of *ex post facto*. See, *Lynce*. It is apparent beyond question that both parole and good time eligibility are implicated by the *ex post facto* clause. See, *Adkins*, and *Weaver.* A reasonable government officer would have been aware of the clear unconstitutionality of retroactively lengthening the sentence of an individual who was incarcerated due to the revocation of supervised release.

Contrary to the assertion that the Respondents did not know of the unconstitutionality of their actions, the Petitioners have clearly alleged in the Complaint facts that demonstrate that they did know. There can be no doubt that no later than December 22, 2020, or shortly thereafter at best, the Respondents in this matter were on notice of the *ex post facto* violation. That is the date that Loren Garcia's original jurisdiction habeas petition, which was predicated on the *ex post facto* violation, was filed. (A.R., at 13).[1]

It is also wholly obvious, and straightforwardly pleaded in the Complaint, that Respondents Jividen and Sandy were aware of the potential liability resulting from their

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1 Ms. Garcia's habeas petition can be found on the Supreme Court's website at http://courtswv.gov/supreme-court/calendar/2021/Briefs/april21/april14/20-1021/20-1021%20Petition%20for%20Writ.pdf

unlawful course of action, and as a result crafted the absolute immunity provision contained in SB 713. (A.R., at 14). It strains credulity why such a provision would be placed in a bill if there was no conception of the legal disaster portended by "scooping up" the Petitioners and the others off of the street. Drafting legislation is itself not actionable, but the sequence of events, considered in the light most favorable to the Petitioners, is immensely probative of the malign and knowing mental state of the Respondents as it relates to their continued incarceration of the Petitioners and the others, and must be taken as true on a motion to dismiss. This Court should hold, contrary to the Circuit Court, that the Complaint survives the applicable standard of review on the question of qualified immunity.

2. It was error to determine that the Respondents were entitled to statutory absolute immunity from the Petitioners' federal causes of action pursuant to W. Va. Code § 15A-4-17(p), based upon the Supremacy Clause of the United States Constitution.

W. Va. Code § 15A-4-17(p) reads as follows:

> (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.

W. Va. Code § 15A-4-17(p).

It is beyond question that a state Legislature cannot, by statute, grant immunity from a federal cause of action, based upon the Supremacy Clause of the Constitution of the United States. This was even admitted during oral argument by counsel for Respondents Jividen and

Sandy: “I agree with Mr. Cooper to the extent that he states that the immunity statute cannot be used to eliminate any Federal causes of action. Federal causes of action don't allow the State to limit that.” (A.R., at 220). The Petitioners raised this issue in the responses to each motion to dismiss, in addition to oral argument. (A.R., at 136, 147, 217).

Our Supreme Court previously observed that:

> As we earlier explained in *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992),
>
> > [a]nother reason for utilizing the federal law is the holding in *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), that in Section 1983 litigation a state may not create an immunity for state officials that is greater than the federal immunity. The Court in *Howlett* pointed out that Section 1983 suits could be brought in state courts and that under the Supremacy Clause, federal substantive law must be applied in such actions.
> > *Chase Sec., Inc.*, 188 W.Va. at 359, 424 S.E.2d at 594 (footnote omitted); accord *W.Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 504 n.13, 766 S.E.2d 751, 763 n.13 (2014) (citations omitted) (explaining that "nothing herein serves to supplant the federal § 1983 jurisprudence regarding immunity or actionable claims thereunder inasmuch as ‘in Section 1983 litigation a state may not create an immunity for state officials that is greater than the federal immunity.’"); see also *Howlett*, 496 U.S. 356, 110 S.Ct. 2430 (observing that states may not create immunity greater than federal immunity in § 1983 litigation brought in state courts); *Hutchison v. City of Huntington*, 198 W.Va. 139, 152 n.17, 479 S.E.2d 649, 662 n.17 (1996) ("[S]tate immunity laws are not applicable to § 1983 actions.").
>
> Accordingly, federal law will guide our analysis in determining whether the circuit court erred in denying summary judgment to the petitioners based on their assertion of qualified immunity.

Ballard v. Delgado, 241 W.Va. 495, 826 S.E.2d 620, 629 (2019).

Despite the Respondents' clear admission on this issue, the Circuit Court adopted the

following reasoning set forth in its final order granting the motion to dismiss of Respondents Jividen and Sandy: "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.'" (A.R., at 187). This holding is clearly contrary to the law, and cannot stand as a basis for granting the motion to dismiss of Respondents Jividen and Sandy.[2]

3. It was error to determine that the Respondents were entitled to statutory absolute immunity on all causes of action pursuant to W. Va. Code § 15A-4-17(p), based upon the statute's violation of the principles of Article III, Section 17 of the West Virginia Constitution.

The Petitioners contend 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, which states that: "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." The absolute immunity provision of subsection (p) straightforwardly would operate to deny the Petitioners a remedy for the injury done to them. Based on the timeline of the events alleged in the Complaint, the Petitioners' causes of actions had clearly accrued and vested by the time subsection (p) was enacted, as they had already been unlawfully arrested and incarcerated for many months by the legislation's effective date of April 30, 2021.

Our Supreme Court has held that:

> 5. "When 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

2 This reasoning was not present in the order granting Respondent Morrisey's Motion to Dismiss, and Respondent Morrisey never explicitly asserted that he possessed immunity under subsection (p).

> 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." Syllabus Point 5, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991).

Macdonald v. City Hosp. Inc., 227 W.Va. 707, 715 S.E.2d 405 (2011).

Under this standard, there is clearly no alternative remedy set forth in subsection (p). Therefore, the determination of whether the immunity provision may be upheld rests on whether there is (a) "a clear social or economic problem" and (b) whether or not the repeal of the cause of action is a reasonable method of achieving such purpose. Subsection (p) clearly fails to satisfy the first factor. There is no overarching problem, such as medical malpractice rates driving away doctors, that would justify abolishing the accrued causes of action for the Petitioners that were expressly contemplated by this legislation. The allegations in the Complaint, and the scope of the immunity in subsection (p), wholly overlap. There is nothing beyond what has already happened to the Petitioners and the class of similarly situated individuals, that will continue to afflict society at large. The only "social or economic problem," to the extent one exists, is the unlawful conduct of the Respondents in apprehending and caging citizens without lawful authority. The Petitioners preserved this issue in their responses to the motions to dismiss. (A.R., at 60-61, 108-109). Accordingly, this Court should hold that subsection (p) may not be constitutionally applied to deprive the Petitioners of their claims as set forth in the Complaint.

4. It was error to withhold relief on the Petitioners' declaratory judgment claim concerning the constitutionality of W. Va. Code § 15A-4-17(p), which is not subject to the same immunity challenges as claims for monetary damages, and the dismissal of which was not justified on any other basis in the orders on appeal.

The Petitioners requested declaratory judgment and injunctive relief regarding the constitutionality and enforcement of W. Va. Code § 15A-4-17(p), in the first and second causes of action asserted in the Complaint.[3] The Circuit Court did not issue any ruling concerning the question of the constitutionality of subsection (p), as discussed in the preceding two argument sections, except to rule by implication that the statute was constitutional by applying it in favor of Respondents Sandy and Jividen to the detriment of the Petitioners. The Petitioners raised contentions in both the Complaint, and in the responses to the motions to dismiss, that the statute was unconstitutional on the basis, *inter alia*, of violating the Supremacy Clause as it relates to federal causes of action; and that it violated Article III, Section 17 of the West Virginia Constitution as it relates to all causes of action, based on the holding of *Macdonald v. City Hosp. Inc., supra*. (A.R., at 18-21, 60-62, 108-110, 120).

Respondents Jividen and Morrisey asserted the following in their motion to dismiss: "Plaintiff is asking this Court to declare that West Virginia Code § 15A-4-17(p) unconstitutional under the Uniform Declaratory Judgment Act, and this is wholly improper." (A.R., at 101). This assertion was unsupported by any legal authority. The Petitioners contend that declaratory judgment is, indeed, proper to determine the constitutionality of subsection (p), as the Supreme Court has recently considered and opined at length on the appeal of a declaratory judgment action predicated on the constitutionality of a statute in *Morrisey v. Afl-Cio*, 243 W.Va. 86, 842 S.E.2d 455 (2020), without disapproving of the use of declaratory

3 The Petitioners are not assigning error regarding the question of injunctive relief on appeal, and do not intend to pursue injunctive relief in the event of a remand.

judgment for such questions. Even more recently, the Supreme Court decided *State v. Beaver*, No. 22-616 (Nov. 17, 2022), another case sounding in declaratory judgment, and seeking a ruling that a statute was unconstitutional, without disapproving of the appropriateness of that procedural method. *Id.,* at *15. See also, *Id.*, at *21, n. 14, discussing standing of plaintiffs to challenge the constitutionality of a statute.

Because of the meritorious arguments raised (as set forth in the preceding two argument sections of this Brief) against the constitutionality of subsection (p), either as applied to federal causes of action, or on its face relating to all causes of action, and because of the lack of justification for withholding declaratory judgment, the Petitioners assert that the Circuit Court erred in dismissing Count 1 of the Complaint.

5. It was error to determine that Respondent Morrisey was entitled to absolute prosecutorial immunity from the allegations in the Complaint, to the extent that the allegations in the Complaint concerned Respondent Morrisey's role in crafting and executing the policies in question, rather than to his role as an advocate of the policies in a judicial proceeding.

The Circuit Court held that Respondent Morrisey is immune from suit based upon absolute prosecutorial immunity. (A.R., at 195-196). However, the scope of Respondent Morrisey's absolute prosecutorial immunity does not encompass all of his alleged conduct in this case.

> Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process.... It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding.
>
> The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it

> has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.

Mooney v. Frazier, 225 W.Va. 358, 693 S.E.2d 333 n.12 (2010), quoting Franklin D. Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure, § 8(c), at 213 (3d ed.2008).

Thus, the question in this case is whether Respondent Morrisey's acts and/or omissions are of an “investigatory” or “administrative” nature, rather than in the nature of advocacy. In *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), the Supreme Court of the United States held that a state prosecutor was not absolutely immune from suit for acts related to the investigation of a crime (in contrast with the presentation of the information derived from that investigation in court proceedings), or for statements to the media. While neither of these fact patterns appears in the instant case, *Buckley* is an example of prosecutorial conduct that falls outside the scope of the common law absolute immunity.

Another, more salient example, which does implicate the facts of this case, is the Supreme Court's determination in *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), that giving legal advice is outside the scope of absolute prosecutorial immunity. It was incumbent upon Respondent Morissey to provide advice to Respondents Jividen and Sandy. The Complaint alleges facts demonstrating that Respondent Morrisey acted in the capacity of legal advisor for Respondents Jividen and Sandy both prior to the unlawful seizure of the Petitioners, and that he advised them in response to the various original jurisdiction actions. (A.R., at 13-14, 24).

The Supreme Court stated in *Burns*:

> Although the absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, "

> '[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate.' " Ibid. (quoting *Harlow*, 457 U.S., at 819, 102 S.Ct., at 2738). Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice.

Burns, 500 U.S. at 495.

Clearly, based on the overwhelming law regarding *ex post facto* enactments, discussed *infra*, Respondent Morrisey should have advised the other defendants that "scooping up," the Petitioners, in the words of General Counsel Nowicki, was illegal, and in violation of their constitutional rights. At that phase, in his capacity of providing counsel to the other Respondents, he could have put an end to the entire fiasco before ever putting pen to paper as an advocate. This is the theory alleged in the Complaint, and it survives a challenge based on absolute prosecutorial immunity. The Petitioners raised this issue in the responses to Respondent Morrisey's Motion to Dismiss. (A.R., at 62-64). The Circuit Court's finding of absolute prosecutorial immunity was in error.

6. It was error to determine that Respondents Jividen and Sandy were entitled to absolute immunity on the basis of administrative policy-making.

In their motions to dismiss, s Jividen and Sandy cited to *Parkulo v. W. Va. Bd. Of Prob. & Parole*, 483 S.E.2d 507, 510 (W. Va. 1996) for the prospect that they are entitled to absolute immunity related to their administrative rule-making functions as described in the Complaint. The relevant provision of *Parkulo*, which relates to the common-law immunity for policy-making acts, is set forth in Syl. Pt. 7:

> 7. The common-law immunity of the State in suits brought under the authority of W.Va.Code § 29-12-5 (1996) with respect to judicial, legislative, and executive (or administrative) policy-making acts and omissions is absolute and extends to the judicial, legislative, and executive (or administrative) officials when performing those functions."

Id.

Notably, the actual context for this analysis is suits against the state pursuant to the insurance exception to sovereign immunity, which is not wholly on point in relation to the counts of the complaint brought against state officers in their individual capacities acting under color of state law. Nevertheless, even if the common-law immunity described in *Parkulo* is applicable as a general principle in this case, it does not prevent liability nor justify dismissal of any cause of action.

The mere fact that Respondents Jividen and Sandy created a new administrative rule would not, on its own, cause any damage to either Petitioner, or any similarly-situated person, provided that it administrative rule was implemented lawfully. The problem, of course, is that the policy, once devised, was applied in a manner that grossly violated the constitutional rights (the rule against *ex post facto* enactments) of the Petitioners and the other individuals who were paroled following the revocation of their supervised release. Certainly, the drafting and execution of warrants is not an administrative rule-making function. The continued incarceration of individuals in violation of their constitutional rights is not an administrative rule-making function.

Moreover, the new "policy" issued preceding the rearrest of the Petitioners and the other similarly-situated persons purported to take away both good time and parole eligibility. (A.R., at 11). An administrative rule, Policy Directive 151.06, was issued relating to the loss of good time eligibility. (A.R., at 11). However, as alleged in the Complaint, there never was an actual written policy directive issued concerning the loss of parole eligibility. (A.R., at 11). The deprivation of parole eligibility was pure fiat, and can find no succor in the principle of

immunity for administrative rule-making functions, no matter how narrowly or broadly construed, because an administrative rule on the subject is wholly absent.

Because there was no administrative rule regarding parole eligibility, and because the acts complained of were not the issuance of Policy Directive 151.06 so much as the arrest and incarceration of the Petitioners in violation of the *Ex Post Facto* clause, the Circuit Court erred when it held that:

> 47. Plaintiffs' Complaint alleges Jividen and Sandy were the decision makers behind the West Virginia Department of Corrections' policy directive which makes persons who had their supervised release revoked ineligible for both parole and good time and that Jividen ordered Plaintiffs' reincarceration after this policy was implemented.
>
> 48. This conduct clearly stems from administrative policy-making, and those Defendants are absolutely immune. [citation omitted].

(A.R., at 190-191).

To the contrary, 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. The Petitioners raised this issue in their Response to the Motion to Dismiss of Respondents Jividen and Sandy. (A.R., at 111-113). To the extent that the Complaint was dismissed based upon the applicability of the absolute immunity that accrues to administrative policy-making, the result cannot stand.

7. It was error to determine that the Respondents were not amenable to claims under 42 U.S.C. Section 1983 on the theory that the Respondents are not "persons" under that statute.

The Respondents alleged in their motions to dismiss, that as officers in their official capacities, they are not "persons" within the scope of Section 1983, pursuant to the holding of *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989). This assertion, while true as it relates to the Section 1983 causes of action against the Respondents in their official capacities, does not operate to prevent a Section 1983 claim against any of them in their individual capacities. As the style of the case indicates, all Respondents in this case are being sued not only in their official capacities (as is necessary, for instance, in the context of a declaratory judgment claim), but in their individual capacities as well. The mere fact that Respondents are state officers does not exclude them from individual liability from Section 1983 claims, presuming that they acted under "color of state law." This is the holding of *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), issued two years after *Will*.

Hafer's syllabus succinctly gives lie to the contention advanced by the Respondents and adopted by the Circuit Court that because Respondents Jividen, Sandy, and Morrisey were acting within the scope of their public offices when the alleged events took place that they somehow retain blanket immunity from suit under Section 1983:

> (b) State officials, sued in their individual capacities, are "persons" within the meaning of § 1983. Unlike official-capacity defendants—who are not "persons" because they assume the identity of the government that employs them, *Will*, supra, at 71, 109 S.Ct., at 2311—officers sued in their personal capacity come to the court as individuals and thus fit comfortably within the statutory term "person," *cf*. 491 U.S., at 71, n. 10, 109 S.Ct., at 2311, n. 10. Moreover, § 1983's authorization of suits to redress deprivations of civil rights by persons acting "under color of" state law means that Hafer may be liable for discharging respondents precisely because of her authority as Auditor General. Her assertion that acts that are both within the official's authority and necessary to the performance of governmental functions (including the employment decisions at issue) should be considered acts of the State that cannot give rise to a personal-

> capacity action is unpersuasive. That contention ignores this Court's holding that § 1983 was enacted to enforce provisions of the Fourteenth Amendment against those who carry a badge of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. *Scheuer v. Rhodes*, 416 U.S. 232, 243, 94 S.Ct. 1683 1689, 40 L.Ed.2d 90. Furthermore, Hafer's theory would absolutely immunize state officials from personal liability under § 1983 solely by virtue of the "official" nature of their acts, in contravention of this Court's immunity decisions.

Syl., *Hafer,* 502 U.S. at 21-22.

The meaning of "color of state law" in Section 1983 is coextensive with the meaning of "state action":

> Congress enacted § 1983 " 'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.' " *Scheuer v. Rhodes*, 416 U.S. 232, 243, 94 S.Ct. 1683 1689, 40 L.Ed.2d 90 (1974) (quoting *Monroe v. Pape*, *supra*, 365 U.S., at 171-172, 81 S.Ct., at 475-476). Because of that intent, we have held that in § 1983 actions the statutory requirement of action "under color of" state law is just as broad as the Fourteenth Amendment's "state action" requirement. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 102 S.Ct. 2744 2749, 73 L.Ed.2d 482 (1982).

Hafer, 502 U.S. at 28.

Thus, the mere fact that the Respondents were engaged in the activities of their respective offices while engaging in constitutional violations does not prevent them from being made defendants in a Section 1983 suit. For the Respondents to rely upon *Will* without acknowledging *Hafer* borders on the disingenuous. For the Circuit Court to rule, as it did, that the Respondents were not "persons" under Section 1983, based upon the holding of *Will* was clearly erroneous. The Circuit Court held that "As Defendant Morrisey is an agent of the State of West Virginia while acting in his official capacity, he is not a 'person' under 42 U.S.C. §

1983 and is not subject to suit under that statute." (A.R., at 197). Regarding the other two Respondents, the Circuit Court held that "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." (A.R., at 188). The Petitioners raised this issue in their responses to the motions to dismiss. (A.R., at 64, 110). To the extent that the final orders on appeal were justified by the Circuit Court's reliance on *Will*, they cannot be sustained, and must be reversed under the applicable standard of review.

8. It was error to determine that Respondent Morrisey was immune from suit based upon a theory of sovereign immunity.

The order granting Respondent Morrisey's motion to dismiss, although not the one granting the motions to dismiss of Respondents Jividen and Sandy, rested in part on the following theory:

> 17. The Supreme Court of Appeals has held that the grant of sovereign immunity also extends to State agencies and instrumentalities. *See Parkulo v. West Virginia Bd. Of Probation and Parole*, 199 W.Va. 161, 167-68, 483 S.E.2d 507 (1996).
>
> 18. The Supreme Court of Appeals of West Virginia has held that "this Court will not review suits against the State brought under the authority of W. Va. Code § 29-12-5 unless it is alleged that the recovery sought is limited to the applicable insurance coverage and the scope of the coverage and its exceptions are apparent from the record. Syl. Pt. 3, Parkulo, 199 W.Va. 161, 483 S.E.2d 507; *see also*, Syl. Pt. 5, *West Virginia Lottery v. A-1 Amusement, Inc.*, 240 W.Va. 89, 807 S.E.2d 760 (2017).
>
> 19. Plaintiff's failure to provide a verified Complaint alleging that recovery is sough under or up to the limits of the State's liability insurance policy is dispositive and entitles Defendant Morrisey to sovereign immunity.

(A.R., at 197-198).

This analysis is inapposite to the case at hand. As discussed in the preceding argument section, the Petitioners are not bringing a suit for monetary damages against the actual State itself. Monetary damages are only sought against the three named Respondents in their individual capacities. The only relief requested of the actual state agencies represented by the the named Respondents is prospective and non-monetary (i.e., declaratory judgment). As discussed in *West Virginia Lottery*, supra:

> Constitutional torts, as the name implies, seek recovery of money damages for constitutional wrongs. Most commonly, these actions are brought under 42 U.S.C. § 1983 which enables a private citizen to seek money damages in tort against a government official in his or her personal capacity for constitutional wrongs to be taken from the state official's pocket, not the state treasury's.

W. Va. Lottery v. A-1 Amusement, Inc., 807 S.E.2d at 774.

The Petitioners seek monetary judgments against Respondents Sandy, Jividen, and Morrisey in their personal capacities. (A.R., at 64). The Petitioners are not seeking funds from the State Treasury. Because the Petitioners have not brought suit pursuant to W. Va. Code § 29-12-5, the Circuit Court's reasoning in denying relief on this basis is in error.

CONCLUSION

Based upon the foregoing, the Petitioners request that this Court grant the following relief:

1. That this Court reverse the Circuit Court's orders granting the motion to dismiss.
2. That this Court remand this matter for the Circuit Court for further proceedings.
3. That this Court grant any other relief the Court deems just and proper.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-163

HANK HECKMAN and LOREN GARCIA,
Petitioners,

v.

JEFF SANDY, BETSY JIVIDEN,
and PATRICK MORRISEY,
Respondents.

(An appeal of the final orders of Kanawha County Circuit Court, Case Nos. 21-C-903 and 904)

CERTIFICATE OF SERVICE

On this 18th day of January, 2023, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Brief to William Murray and Jim Muldoon, by e-filing.

/s/ Jeremy B. Cooper
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