No. 22-ICA-163

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

HANK HECKMAN and LOREN GARCIA,
Petitioners,

v.

PATRICK MORRISEY, in his individual capacity and in his capacity as the Attorney General,
Respondent.

BRIEF OF RESPONDENT

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I. SUMMARY OF THE ARGUMENT

a. The Circuit Court correctly granted Respondents' motion to dismiss.

The Circuit Court correctly determined that the Petitioners' Complaint against Respondent Morrisey and the Office of the Attorney General failed to state a cause of action upon which relief could be granted. Importantly, the Circuit Court agreed with Respondent Morrisey that all of Morrisey's, as well as the Office of the Attorney General's, actions which formed the basis for Petitioners' allegations were subject to immunities afforded Respondent Morrisey in both his individual capacity and official capacity as Attorney General of the State of West Virginia. *See Order* (granting Patrick Morrisey's Motion to Dismiss). In reaching this conclusion the Court analyzed the precedent established in *Jarvis v. West Virginia State Police*, 227 W.Va. 472, 711 S.E.2d 542 (2010) and *Dale F. v. Peters*, No. 19-0594, 2020 W. Va. LEXIS 203 (Apr. 6, 2020), as well as West Virginia Code § 5-3-1 and West Virginia Code § 5-3-2, and determined that Respondent Morrisey was entitled to absolute prosecutorial immunity in his individual and official capacities.

Additionally, the Circuit Court analyzed the precedent established in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) and *Will v. Mich. Dept. of State Police,* 491 U.S. 58 (1989) and determined that Respondent Morrisey could not be considered a "person" under 42 USC § 1983. Further, the Court held that sovereign immunity applied to the cause of action pursuant to the Supreme Court of Appeals of West Virginia's holding in *Parkulo v. West Virginia Bd. Of Probation and Parole*, 199 W. Va. 161, 483 S.E. 2d 507 (1996). Finally, the Circuit Court undertook an analysis of Respondent Morrisey's actions and determined that the same were discretionary and therefore were afforded qualified immunity protections.

b. Statement of the Case.

On or about April 7, 2021, the West Virginia Legislature passed S.B. 713 which modified West Virginia Code § 15A-4-17. Twelve days later, the Bill was executed by Governor Justice and became the law in the State of West Virginia effective April 30, 2021. On or about June 16, 2021, the Supreme Court of Appeals of West Virginia filed its opinion in which it opined that "[i]n order to avoid the constitutional prohibition against ex post facto laws, West Virginia Code § 15A-4-17(a) 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." Syl Pt. 8, *State ex rel. Phalen v. Roberts*, 245 W. Va. 311, 858 S.E. 2d 936 (2021). As a result of the *Phalen* opinion, the public received notice for the first time that the portion of S.B. 713 which dealt with calculation of "good time" ran afoul of the principles of the United States and West Virginia Constitutions. In short, inmates incarcerated prior to the effective date of S.B. 713 could not have their good time calculations altered to comply with the language of S.B. 713.

During the pendency of *Phelan*, the Office of the Attorney General participated in oral arguments as required by West Virginia Code § 5-3-1 which specifically provides that "The Attorney General shall . . . prosecute and defend suits, actions, and other legal proceedings, and generally perform all other legal services, whenever required to do so, in writing , by . . . the head of any state educational, correctional, penal or eleemosynary institution[.]" For reasons unknown, Petitioners incorrectly assert that Respondent Morrisey and the Office of the Attorney General were charged with determining the constitutionality of a duly passed law of the State of West Virginia as opposed to performing the mandated activity of prosecution. Based on this perceived slight, Petitioners filed the underlying action against Respondent Morrisey and the Office of the Attorney General. The Circuit Court correctly determined that Respondent Morrisey, as well as

the Office of the Attorney General, were afforded certain immunities which covered both their actions and inactions as they relate to the allegations set forth by Petitioners and dismissed the subject Complaint as a matter of law. The subject Petition serves as Petitioner's appeal of the Circuit Court's ruling.

It is noteworthy that all actions of Respondent Morrisey were in furtherance of his mandated duties as the Attorney General of the State of West Virginia and in no way were representative of his "individual capacity" as alleged by Petitioners.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents assert that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and 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. However, if the Court believes oral argument is warranted, the Respondents submit that any such argument would be appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled law.

III. ARGUMENT

a. Petitioners are unable to overcome the protections afforded these Respondents pursuant to the doctrines of qualified immunity and absolute immunity for policy-making acts.

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982)) (internal quotation omitted). Qualified immunity is "an immunity from suit rather than a mere defense to

liability... [and] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 512, 105 S. Ct. 2806, 2808 (1985). Qualified immunity is an immunity afforded to government officials for discretionary activities taken in the individual's official capacity. Once the qualified immunity defense is asserted, the burden then shifts to the Plaintiff to defeat the immunity. Underlying qualified immunity is the need to enable government officials to act decisively without undue fear of judicial second guessing. *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); *Akers v. Caperton*, 998 F.2d 220, 225-226 (4th Cir. 1993).

In *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987), the United States Supreme Court described the substantial threshold showing necessary to defeat a defense of qualified immunity. The standard turns on the "objective legal reasonableness" of the official's conduct, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The United States Supreme Court has consistently held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, *citing Procunier v. Navarette*, 434 U.S. 555, 98 S. Ct. 855 (1978). The Supreme Court of Appeals of West Virginia has followed federal authority on the issues of qualified immunity and has provided clarity in finding that the "public executive" acting within the scope of his/her authority is entitled to qualified immunity from "personal liability." *See* Syl. Pt. 3, *Hess v. W. Va. Div. of Corr.*, 227 W. Va. 15, 705 S.E.2d 125 (2010); *See generally*, *State v. Chase Sec.*, 188 W.Va. 356, 424 S.E.2d 591 (1992).

Offering further guidance on immunities afforded governmental officials, the Supreme Court of Appeals of West Virginia has provided the following:

> 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).

See Syl. Pt. 10, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A. B.*, 234 W. Va. 492, 497, 766 S.E.2d 751, 756 (2014). Once the nature of the action is identified, the reviewing court must then make a determination as to whether the action 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).

See Syl. Pt. 11, *A.B.* at 497. A careful review of the present facts demonstrates that these Defendants'/Respondents' actions were, at worst, discretionary and were therefore entitled to qualified immunity.

First, Petitioners have alleged that Respondent Morrisey advocated for or otherwise assisted in crafting the "policies in question." These actions can only be described as "policy-making" for which absolute immunity attaches pursuant to *Parkulo* and *A.B.* Next, Petitioners allege that the Office of the Attorney General "defended the DOCR's new good time and parole eligibility policies." *See Complaint* at ¶ 53. Finally, Petitioners allege that "Defendant Morrisey could have recommended that policies were unconstitutional." *Id.* ¶ 54. Unfortunately for Plaintiffs/Petitioners, the determination of a law's constitutionality is a function of the judiciary

and it is presumed that legislative enactments are indeed constitutional. *See State ex rel. Blankenship v. Richardson,* 196 W. Va. 726, 729, 474 S.E.2d 906, 909 (1996). "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. [*W.Va. Const.* Art. V, § 1.] 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 . . . [t]he general powers of the legislature, within constitutional limits, are almost plenary." *See Id.* at 731; See Also *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); Syl. Pt. 2, *West Virginia Public Employees Retirement System v. Dodd*, 183 W. Va. 544, 396 S.E.2d 725 (1990); Syl. pt. 1, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991).

As to the "defending the DOCR" claim, the act of "defending" claims at the Supreme Court level can only be described as furtherance of the judicial process. The Office of the Attorney General is indeed charged with the duty to advocate for the State of West Virginia and clearly did so by its participation in the subject appellate process. Any such activities are not only afforded absolute prosecutorial immunity but fall squarely within the absolute immunity mandated by *Parkulo*. Petitioners' "allegation" that Defendant Morrisey "could have" made a recommendation regarding the constitutionality of policies is on its face an averment that said decision is "discretionary" in nature and not mandatory. Again, recommendations on policy are afforded absolute immunity pursuant to *Parkulo.* Notwithstanding that fact, discretionary governmental functions are protected by qualified immunity. *See generally W. Va. DOT, Div. of Motor Vehicles v. King*, 238 W.Va. 369, 795 S.E. 2d 524 (2016).

In *W.Va. DOT*, the Plaintiff received injuries as the result of a multi-vehicle accident. Plaintiff alleged that the West Virginia DOT was negligent in medically approving Defendant's driver's license application without first submitting the same to the Driver's License Advisory Board. The DMV filed a motion for summary judgment arguing that it was entitled to qualified immunity on the basis that referral to the advisory board was "discretionary." The lower court denied the DMV's motion concluding that the referral was "nondiscretionary." After thorough review, the Supreme Court of Appeals of West Virginia determined that the "referral" was indeed discretionary, and overturned the lower court's decision and remanded the action to the lower court for an order granting the DOT's motion for summary judgment. Clearly, the *W.Va. DOT* holding is applicable to this matter's synonymous discretionary function analysis. In short, governmental officials are entitled to the benefits of qualified immunity when either choosing to or choosing not to undertake a discretionary function.

Petitioners have not and cannot demonstrate that any acts or omissions of the Office of the Attorney General violated a clearly established constitutional right or law. In fact, the opposite is true. During the subject habeas proceeding, Respondent Office of the Attorney General advocated for SB 713 which governed certain parole calculations. Clearly, the act of providing guidance to the DOCR must be considered an administrative policy-making act which is entitled to absolute immunity. *See A.B., supra; See Also R.Q. v. W. Va. Div. of Corr*, 2015 W. Va. Lexis 517. The fact that Petitioners disagree with the outcome of or the manner in which advocacy was utilized in the formation and/or appellate support of a law passed by the West Virginia Legislature does not diminish the undeniable finding that advocacy is part and parcel of administrative policy making decisions.

In sum, Plaintiffs'/Petitioners' Complaint fails to make allegations sufficient to overcome these Respondents' prosecutorial, absolute and qualified immunities. The Office of the Attorney General's actions were just, proper and clearly within the subset of activities which it is charged with performing and as such Petitioners' claims must be dismissed as a matter of law.

b. Petitioners' second and fourth assignment of errors are without merit to the extent that the Circuit Court did not apply West Virginia Code § 15A-4-17(p) to any cause of action alleged against these Respondents. In fact, the subject code provision only addresses immunities afforded to certain DOCR personnel which are clearly inapplicable to these Respondents.

c. Petitioners are afforded multiple means of redress for alleged constitutional deprivations.

Petitioners are correct in asserting that Article III, Section 17 of the West Virginia Constitution provides that every person shall have remedy by due course of law. However, the Constitutional provision cited does not specify as to the means for redress available to the individual. It is axiomatic to state that the West Virginia Legislature has the ability to create and/or abolish causes of action. "It is beyond dispute that the legislature has the power to alter, amend, change, repudiate, or abrogate the common law. This Court has recognized that 'by virtue of the authority of Article 8, Section 13 of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the legislature to enact statutes which abrogate the common law.'" *Estate of Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406 (2001) (citing Syllabus, *Perry v. Twentieth St. Bank*, 157 W. Va. 963, 206 S.E.2d 421 (1974)); *Gilman v. Choi*, 185 W. Va. 177, 186, 406 S.E.2d 200, 209 (1990) ("The indisputable fact [is] that the legislature has the power to change the common law of this State."). Here, Petitioners assert that they are unable to pursue a specific remedy due to restrictive language found in West Virginia Code § 15A-4-17(p). This contention ignores the fact that Petitioners have alternative means to seek redress.

Here, Petitioners have a variety of paths forward to obtain relief for alleged constitutional deprivations. These include initiating actions pursuant to 42 U.S.C. § 1983. Additionally, there are no restrictions placed on Petitioners' right to seek habeas relief for perceived constitutional slights. As such, Petitioners' ability to seek redress is not limited by any clause or language contained in West Virginia Code § 15A-4-17(p).

d. Petitioners are unable to overcome protections afforded these Respondents pursuant to the doctrine of qualified immunity. Moreover, absolute immunity is applicable to the alleged policy-making activities of these Respondents.

The Supreme Court of Appeals of West Virginia has recognized that "Prosecutors in West Virginia . . . enjoy absolute immunity under our common law." *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 478 n.5, 711 S.E.2d 542, 548 n.5 (2010) (citing *Mooney v. Frazier*, 225 W. Va. 358, 370 n.12, 693 S.E.2d 333, 345 n.12 (2010)). Citing the *Mooney* Court, the Supreme Court of Appeals of West Virginia in *Dale F. v. Peters,* identified the scope of prosecutorial immunity by holding:

> "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.

Dale F. v. Peters, No. 19-0594, 2020 W. Va. LEXIS 203, at *5-6 (Apr. 6, 2020); *see also* Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 8(c), at 213 (3d ed. 2008; *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976) (extending absolute immunity to prosecutors from civil rights claims).

Here, Petitioners concede that the Office of the Attorney General's participation in the Scott Phelan habeas proceeding necessarily garnered absolute prosecutorial immunity. Petitioners

correctly recognize that participation in these types of proceedings is clearly a subset of prosecutorial functions for which immunity is extended. Recognizing the shortcomings of an attack focused on appellate participation, Petitioners have evolved their theory to focus on events which occurred prior to the passage of S.B. 713. More directly, Petitioners' assignment of error asserts that Respondent Morrisey is unable to rely on the same prosecutorial immunity protections for his alleged involvement in the policy review and modification of parole eligibility and good time calculations at issue as he did for appellate participation. Notwithstanding the fact that the subject Complaint offered no facts supporting its proposition that neither Respondent Morrisey personally nor the Office of the Attorney General participated in any such activities, policy review is necessarily protected by absolute immunity. *See Parkulo, supra.* As detailed hereinabove, absolute immunity is extended to administrative policy-making functions, including those activities alleged by Petitioners. It is inarguable that the basis of Petitioners' claims center on the issue of governmental policy decisions. Assuming *arguendo* that Respondent Morrisey was indeed attempting to advance the interests of the executive branch, any such attempts at advancement would necessarily be administrative policy- making for which absolute immunity applies.

Petitioners have offered no support for their proposition that any acts attributable to either Respondent Morrisey or the Office of Attorney General are violative of their constitutional rights, a necessary pre-requisite in defeating qualified immunity protection. Moreover, Petitioners fail to recognize that policy review and modifications of policies are not synonymous with the passage of laws for which the West Virginia Legislature exercises exclusive control. "It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation." *See Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 728, 791 S.E.2d 168, 174 (2016).

In a final effort to defeat immunity protections afforded these Respondents, Petitioners mistakenly rely on the holding of *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934 (1990) in which providing legal advice was not considered an activity for which prosecutorial immunity was controlling. *See generally Id.* The *Burns* Court addressed a situation in which a confession was obtained during a hypnosis session. During a probable-cause hearing, the Attorney for the State proffered that the defendant. had confessed to the underlying crime without informing the judge that the confession was made while the defendant was under hypnosis. The defendant/petitioner argued that the actions of the prosecutor during the hearing and the prosecutor's advice to the police regarding the legality of utilizing hypnosis were both violative of her rights. The *Burns* Court held that absolute prosecutorial immunity indeed availed protection for all of the probable-cause hearing events but declined to extend those protections to the prosecutor for the advice concerning the legality of utilizing hypnosis. Importantly, the *Burns* Court emphasized that "the qualified immunity standard is today more protective of officials. . . . As [the standard] has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *See Id.* at 494, 495 (citing *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986)).

As detailed hereinabove, S.B. 713 was not found violative of any constitutional provision until after the subject events had occurred. Moreover, the Supreme Court of Appeals of West Virginia has steadfastly recognized that a public official "is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known." *See* Syl. Pt. 8, *Parkulo v. W.V. Bd. of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

In sum, advocacy for administrative policies and modification of the same are necessarily policy-making activities for which absolute immunity applies. Petitioners' attempt to circumvent

this protection by its reliance on *Burns* is improper inasmuch as the *Burns* Court emphasized the qualified immunity protections afforded public officials and did not address the issue of whether activities are indeed considered administrative policy-making activities.

e. Assignment of error 6 does not address allegations against these Respondents.

f. Petitioners' reliance on *Hafer* is improper as to these Respondents.

42 U.S.C. § 1983 specifically provides that "[e]very **person** who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" *See* 42 U.S.C § 1983 (emphasis added). As such, in order to prevail on a 42 U.S.C. § 1983 claim, a Plaintiff must demonstrate that he or she was injured by a "person" acting "under color of state law." *See generally Dep't of Social Services*, 436 U.S. 658 (1978); see also *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 60 (1989) (Claims under 42 U.S.C. § 1983 are specifically directed at "persons").

In its analysis of § 1983 causes of action, the *Will* court correctly concluded that the Eleventh Amendment affords states protection from suit. The *Will* court further reasoned that suits against state officials acting in their official capacity were also to be considered suits against the state; thus invoking § 1983 protection. *See also Smoot v. Green*, 2013 U.S. Dist. LEXIS 156887 (S.D. W. Va. Nov. 1, 2013) (state officers and agents sued in their official capacity are considered arms of the state and not persons). Given the foregoing, the Circuit Court found that the Office of the Attorney General is clearly an arm of the State of West Virginia and as such is not considered a "person" for § 1983 purposes.

Confronted with this precedent, Petitioners seek redress from Respondent Morrisey in his individual capacity, relying on *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991). In *Hafer*, the newly elected Auditor General of Pennsylvania fired individuals who allegedly secured their employment through improper payments to a former employee of the office. One of Hafer's campaign promises was to terminate those individuals who had availed themselves of improper means in obtaining their position; Hafer made good on her promise and indeed fired those suspected of corruption. The *Hafer* Court was unwilling to foreclose individuals from seeking redress for constitutional violations and determined that "state officials, sued in their individual capacities are "persons" within the meaning of § 1983." *See Id.* at 31. Unfortunately for Petitioners, the *Hafer* Court emphasized that those "persons" must have directly participated in the constitutional deprivation. "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, "on the merits," to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, **caused** the deprivation of a federal right." *Hafer* at 25 (quoting *Ky. v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985)) (bold emphasis added). Here, the cause of Petitioners' alleged deprivation undoubtedly occurred when their parole was extinguished and they were physically returned to the custody of the State. Respondent Morrisey does not and did not possess the authority to extinguish parole statuses nor does he possess the requisite police power to impact an individual's liberty interest. Those powers rest squarely outside of Respondent Morrisey's individual capacity and any suggestion otherwise has no basis at law.

g. Respondent Office of the Attorney General is afforded sovereign immunity protections and Respondent Morrisey is afforded immunity protections making the issue of sovereign immunity moot.

In their assignment of error, Petitioners concede that the Office of the Attorney General is immune from suit and cannot be made a defendant in this matter. In short, "[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State." Syl. pt. 2, *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). As "*Pittsburgh Elevator* approved only those suits against the State which allege that recovery is sought under and up to the limits of the State's liability insurance coverage, . . . pleadings should state that qualification, limiting the relief sought to the coverage actually provided by the applicable insurance policies." *Parkulo*, 199 W. Va. at 169, 483 S.E.2d 507 (internal quotations omitted). The *Parkulo* court went on to state that "[i]n the future, 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). Here, Petitioner's Complaint fails to aver these procedural prerequisites and thus fails as a matter of law.

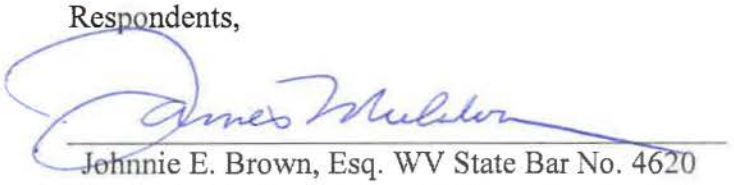
In an effort to avoid their procedural infirmities, Petitioners now assert that sovereign immunity is unavailable to Respondent Morrisey in his individual capacity. Although sovereign immunity is inapplicable to the individual state actor, Respondent Morrisey has availed himself of prosecutorial immunity, absolute administrative policy-making immunity, and qualified immunity, which make this assignment of error moot.

IV. CONCLUSION

The Circuit Court of Kanawha County correctly found that summary judgement was proper in this matter inasmuch as the Complaint failed to state a cause of action upon which relief could be granted. Respondent Morrisey's actions, whether in his personal capacity or otherwise, fell squarely within the subset of activities which are afforded immunity protection. This court should affirm these findings.

Respectfully submitted, PATRICK MORRISEY, in his individual capacity and in his capacity as the Attorney General,

Respondents,



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CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondents, does hereby certify on this 2nd day of March, 2023, that a true copy of the foregoing "**BRIEF OF RESPONDENTS**" was served upon counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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