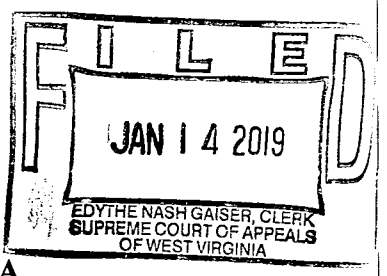

No. 18-0595

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETER LUNSFORD, FRANKLIN KELLY, and LLOYD ERWIN,

Petitioners,

v.

CHRISTOPHER SHY,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

United States Code

West Virginia Rules of Civil Procedure

1. The Trial Court did not err in allowing punitive damages to be recovered without an award of compensatory damages.

2. The Trial Court did not err in its failure to apply the provisions of the Prison Litigation Reform Acts to Petitioners Peter Lunsford and Franklin Kelly.

FACTUAL and PROCEDURAL BACKGROUND

As delineated in his Complaint and throughout the lower Court proceedings, in August, 2015, Respondent Christopher A. Shy (Shy) was incarcerated in Western Regional Jail (WRJ), a jail operated by Defendant below, West Virginia Regional Jail Authority (WVRJA) in Cabell County, West Virginia. During Shy's period of incarceration at WRJ, he was the victim of excessive force at the hands of WRJ correctional officer Petitioners Erwin, Lunsford and Kelly. (Petitioners). Specifically, during the morning of August 23, 2015, Shy was told Petitioner Lunsford wanted to speak with him. While fully restrained with hands cuffed behind his back, leg shackles and a belly chain, Shy was transported to a non-contact visitation room which is about five (5) feet by five (5) feet in dimension. In this small room is a stationary desk and stool which are made of concrete and steel, respectively. (AR 24, 36).

While in the non-contact visitation room and while still fully restrained, Shy was instructed to sit down on the stool and complied. While doing so Shy was grabbed by his shirt and thrown against the glass. Shy was then choked and beaten by the Petitioners for approximately three (3) minutes, all the while begging the Petitioners to stop. After the implementation of the excessive force, Petitioners threatened Shy and informed him that next time "it would be worse."

Due to the excessive force, Shy sustained several permanent physical injuries including, but not limited to, bruised throat with a hand print from one of the Petitioners, back and rib pains,

two black eyes, a swollen/sprained wrist which persisted for no less than three (3) to four (4) weeks, and a bruised and knotted head which likely resulted in a concussion. (24, 36). As of the date of this Brief, Shy continues to suffer from severe headaches and spells of dizziness which affect every aspect of his life. What is most concerning is Shy's deteriorating vision in both eyes. Simply put, his vision has worsened significantly since the incidents of excessive force and he has required various prescription adjustments. After approximately three (3) days, photographs were taken of some injuries but not others such as the bruise/knot on the back of Shy's head and his injured wrists. It should be noted than none of the physical injuries sustained existed prior to the incidents of excessive force.

Shy also suffers from severe emotion injuries such as depression, anxiety, insomnia, paranoia, agoraphobia, night terrors and post-traumatic stress disorder due to the excessive force. (24, 36). His emotional issues were so severe that while Shy was at Recovery Point inpatient rehabilitation center in Huntington, West Virginia, he would often lock himself in the facility's bathroom to sleep as he was too anxious, scared and paranoid when being around others.

After the incidents of excessive force, Shy filed various grievances and received no response to the same. Along with fellow WRJ inmate Anthony Kessich, Shy filed a statement/complaint and mailed to WVRJA headquarters in Charleston, West Virginia. An investigation eventually ensued and, as usual, Petitioners denied any wrongdoing and falsely stated Shy attempted to head-butt Petitioner Erwin. As with other cases in which Shy's counsel has been involved, WVRJA simply swept Shy's serious allegations under the rug, did not inform any legal entity of Petitioners' acts of excessive force and failed to punish Petitioners.

A Trial in this matter began December 5, 2017 and concluded December 8, 2017. At the close of the Shy's case in chief, Petitioners moved for judgment as a matter of law on all claims asserted by Shy. After considering arguments of counsel and with particular focus upon the evidence presented during the Shy's case in chief, the lower Court denied Petitioners' respective Motions as a Matter of Law with regard to all of Shy's claims. All parties discussed previously submitted jury instructions and agreed on the same. (6). After the lower Court read instructions to the jury, the parties presented their closing arguments and the case was presented to the jury for deliberations. The jury rendered verdicts in favor of Shy in regard to his 42 U.S.C. § 1983/14th Amendment and battery claims against the Petitioners. The jury did not render verdicts in favor of Shy's claims of civil battery, intentional infliction of emotional distress and conspiracy against the Petitioners and/or WVRJA. The jury awarded $1,500.00 in punitive damages each against Petitioners Peter Lunsford, Franklin Kelly and Lloyd Erwin. No compensatory damages were awarded. (56, 100). Upon recognizing the jury did not award compensatory damages, Shy's counsel requested the lower Court not dismiss the jury but rather send them back into deliberations to award at least nominal compensatory damages. Petitioners and Defendant WVRJA objected and the Court dismissed the jury. (7, 72).

On or about December 16, 2017, Petitioners and Defendant WVRJA jointly filed a Motion for Judgment as a Matter of Law arguing, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, Petitioners and Defendant WVRJA were entitled to judgment as a matter of law as the jury did not award Shy compensatory damages, only punitive damages. (61). On or

about February 26, 2018, Shy filed his Response to the Defendants' Motion for Judgment as a Matter of Law arguing that the jury verdict and award should stand. (72). Petitioner and Defendant WVRJA filed a Reply to Plaintiff/Shy's Response on or about March 2, 2018. (76). A Hearing on Petitioners' and Defendant WVRJA's Motion was held March 21, 2018 wherein counsel of record appeared and argued their clients' respective positions. After arguments, the lower Court ordered counsel of record to submit proposed Orders delineating their respective positions, findings of fact and conclusions of law. All parties did so and the lower Court entered its own Order on or about June 1, 2018. (4). It is from that Order Petitioners file this Appeal.

ARGUMENT

Standard of Review

Respondent partially accepts the Petitioners' *de novo* standard of review in regard to a lower Court Order denying a renewed motion for a judgment as a matter of law after Trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure. However, when considering the lower Court standard and burden thereof, Rule 50 states, in pertinent part:

> (b) Renewal of motion for judgment after trial; alternative motion for new trial. —
>
> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) *If a verdict was returned:*
>
> (A) allow the judgment to stand,
>
> (B) order a new trial, or

(C) direct entry of judgment as a matter of law.

The lower Court considered the legal arguments proffered by Petitioners and disagreed with the same. In fact, the June 1, 2018 Order is replete with detailed findings of fact and conclusions of law which clearly solidify Shy's positions. Further, as stated, post-Trial Motions must be taken in a light most favorable to the non-moving and/or prevailing party, in this case, Respondent Shy.

1. The Trial Court did not err in allowing punitive damages to be recovered without an award of compensatory damages.

As argued in the lower Court, Petitioners claim in 42 U.S.C. § 1983 actions, punitive damages cannot be awarded lest compensatory damages are awarded by the jury. However, they base their argument on non-42 U.S.C. § 1983 cases and opinions which defy the standard and uniformity in civil rights violations cases throughout the federal court system, to which Shy believes this Court must adhere.

By way of background, 42 U.S.C. § 1983 was enacted to give people a remedy because it was feared that adequate protection of federal rights might not be available in state courts. To establish a claim under 42 U.S.C. § 1983 against a defendant, a plaintiff must establish, by a preponderance of the evidence, each of the following three elements: First, that the conduct complained of was committed by a person acting under color of state law. Second, that this conduct deprived a plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States. Third, that the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

In making their argument, Petitioners state West Virginia law dictates punitive damages cannot be awarded unless the jury awards compensatory damages as it creates disharmony in both the federal and state levels. While that position may be correct in state

law tort cases, it is inapposite of federal law. First, in regard to 42 U.S.C. § 1983 cases, Petitioners are incorrect as 42 U.S.C. § 1983 is a federal statute in which federal Courts dictate the law. Second, even if their ill-founded argument was legitimate, Petitioners acquiesced when they objected to Shy's request to send the jury into further deliberations to determine compensatory damages, at the very least nominal damages. (7, 72). Respondent Shy cannot be held responsible for Petitioners' disallowance of a curing jury instruction. Curative jury instructions are common in both civil and criminal matters. To that end, Petitioners' position fails.

Further, when addressing federal court analyses concerning 42 U.S.C. § 1983, Petitioners fail to make a distinction between non-42 U.S.C. § 1983 cases and other matters. For example, in relying on People Helpers Found. v. City of Richmond, 12 F.3d. 1321 (1993), Petitioners state the Fourth Circuit agrees with their position. People Helpers is likewise a non-42 U.S.C. § 1983 matter in which this Court should give no credence in that regard. However, the fact that the Fourth Circuit stated "[a] majority of the fifty states prohibit punitive damages awards when a finder of fact fails to award compensatory damages" clearly denotes the state common law contention by the Petitioners is correct *in regard to non-42 U.S.C. § 1983 matters.* Shy addresses this portion of the People Helper's opinion to stress the Fourth Circuit's failure to offer an opinion concerning the the issue of 42 U.S.C. § 1983 damages related to this matter in which most federal circuits have found that damages are damages, be they compensatory or punitive.

Petitioners also rely on a federal magistrate's ruling in *Cowick v. Glen Campbell Det. Ctr.*, No. 5:17-cv-03001-JFA-KDW, 2018, (D.S.C. Jan. 3, 2018). In *Cowick*, the *pro se*

inmate plaintiff filed a civil action under 42 U.S.C. § 1983 seeking two (2) remedies of $5,000.00 in punitive damages (plaintiff did not seek compensatory/nominal damages) and that state assault and battery charges be brought against the offending officer. In the federal magistrate's report, it held plaintiff "fails to state a plausible claim for punitive damages against either Defendant because he seeks only punitive damages and does not include a request for compensatory or nominal damages." The plaintiff was permitted to file objections to the magistrate report, failed to do so and the U.S. District Judge dismissed the matter, without prejudice, on February 7, 2018.[1] To that end, Petitioners' reliance on *Cowick* is likewise inapplicable to the facts and law surrounding this matter.

What is applicable is the plethora of federal circuit court opinions in support of Shy's contention and the lower Court's June 1, 2018 Order. As evident by the lower Court's Order, it spent dozens of hours conducting legal research and drafting such a detailed document.[2] To that end, Shy mainly relies on the contents of the June 1, 2018 Order which denied the relief requested by Petitioners in this appeal. However, further legal analysis is warranted.

In Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965), the Third Circuit held federal common law on damages must be applied to 42 U.S.C. § 1983 actions, rather than the state's law on damages, to provide national uniformity in such actions. That Court further held without such uniformity, "the Civil Rights Acts would fail to effect the purposes and ends which [United States] Congress intended." Id. at 86.

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1 As the *Cowick* matter was dismissed without prejudice, it is uncertain if the *pro se* plaintiff obtained counsel and pursued any appellate measures or re-filed pursuant to federal law.

2 Shy would be remiss in not informing the Court that the lower Court disregarded the parties' respective submitted proposed Orders and researched and drafted its own. In fact, Shy's proposed Order was seven (7) pages and Petitioners' proposed Order was six (6) pages. The lower Court's June 1, 2018 Order was twenty (20) pages.

The lower Court further relied on King v. Macri, 993 F.2d 294 (2d. Circ. 1993), wherein the United States Court of Appeals, Second Circuit, held as follows:

> Though case law is divided on whether punitive damages may be awarded in the absence of a compensatory award, *see* 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 6.1(D)(4)(c), (d) (2d ed. 1989), we have indicated that such an award may be made in section 1983 cases, *see* Stolberg v. Members of Board of Trustees, 474 F.2d 485, 489 (2d Cir.1973), as have most courts of appeals, *see* Glover v. Alabama Dep't of Corrections, 734 F.2d 691, 694 (11th Cir.1984), *rev'd on other grounds,* 474 U.S. 806, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985); McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir.1980); Guzman v. Western State Bank of Devils Lake, 540 F.2d 948, 953 (8th Cir.1976); Silver v. Cormier, 529 F.2d 161, 163-64 (10th Cir.1976); Spence v. Staras, 507 F.2d 554, 558 (7th Cir.1974); Gill v. Manuel, 488 F.2d 799, 802 (9th Cir.1973); Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir.1965). We first took this approach at the end of the last century, in a case involving common-law copyright infringement. Press Publishing Co. v. Monroe, 73 F. 196, 201 (2d Cir.), *writ of error dismissed,* 164 U.S. 105, 17 S.Ct. 40, 41 L.Ed. 367 (1896).

Id., at 297-8. The King Court further held "[i]f any threshold requirement is to be imposed upon an award of punitive damages for a claim of excessive force, it should only be that the evidence would have supported an award of compensatory damages, not that compensatory damages were actually awarded." Id., at 298.

The Seventh Circuit Court of Appeals likewise has addressed the issue of punitive damages awarded in the absence of compensatory or nominal damages in 42 U.S.C. § 1983 matters. In Erwin v. County of Manitowoc, 872 F.2d 1292 (7th Cir. 1989), that Court held:

> The question remains whether punitive damages can be awarded when the jury has awarded no compensatory or at least nominal damages to a particular plaintiff. Punitive damages (as awarded here) are applicable even in the absence of actual damages, Sahagian v. Dickey, 827 F.2d 90, 100 (7th Cir.1987); McKinley v. Trattles, 732 F.2d 1320, 1326 (7th Cir.1984), despite local law to the contrary. Wilson v. Taylor, 658 F.2d 1021, 1033 (5th Cir.1981). Although state law may not allow punitive damages without a compensatory award, under federal law, when a jury finds a constitutional violation under a Sec. 1983 claim, it may award punitive damages even when it does not award compensatory damages. The scope of punitive damages in Sec. 1983 actions is governed by the "federal common law of damages" which imposes uniformity when enforcing the Civil Rights Acts. Lenard v. Argento, 699 F.2d 874, 897 (7th Cir.1983); Basista v. Weir,

340 F.2d 74, 87 (3d Cir.1965).

Id., at 1299. Simply put, the Seventh Circuit concurs with the majority of other jurisdictions in that juries can award punitive damages in 42 U.S.C. § 1983 matters without awarding compensatory or nominal damages, even though state laws may disallow the same.

In refuting a similar argument proffered by Petitioners in this matter, the First Circuit Court of Appeals held in Campos-Orrego v. Rivera, 175 F.3d 89 (1st Cir. 1999), that:

> Though couched in terms of familiar principles, Rivera's objection actually rests on a fundamental misapprehension. While it is true that in a typical state-law tort case punitive damages unaccompanied by either compensatory or nominal damages cannot stand, see, e.g., Cooper Distrib. Co. v. Amana Refrig'n, Inc., 63 F.3d 262, 281-83 (3d Cir.1995) (applying New Jersey law); Restatement (Second) of Torts § 908 cmts. b, c (1979), a section 1983 case premised on a constitutional violation evokes a different set of considerations. Several respected courts have ruled persuasively that, as a matter of federal law, a punitive damage award which responds to a finding of a constitutional breach may endure even though unaccompanied by an award of compensatory damages. See, e.g., King v. Macri, 993 F.2d 294, 297-98 (2d Cir.1993); Erwin v. County of Manitowoc, 872 F.2d 1292, 1299 (7th Cir.1989).

Id., at 97. Concerning Shy's efforts to correct what Petitioners claim to be an inconsistent jury verdict, the First Circuit held "[p]arties confronted by an internally inconsistent jury verdict have an obligation to call the inconsistency to the trial judge's attention. See, e.g., Toucet v. Maritime Overseas Corp., 991 F.2d 5, 8 (1st Cir.1993); Austin v. Lincoln Equip. Assocs., Inc., 888 F.2d 934, 939 (1st Cir.1989)." Id., at 98. Basically, Petitioners had an obligation to attempt to rectify the jury verdict but, as stated, failed to agree with Shy and send the jury to further deliberate compensatory or nominal damages.

The First Circuit further relied on Campos-Orrego v. Rivera in distinguishing between state tort cases and 42 U.S.C. § 1983 matters in other opinions. In De Jesus Nazario v. Morris Rodriguez, 664 F.3d 196 (1st Cir. 2009), that court not only subscribed to Campos-Orrego v.

Rivera, but also listed several other circuit courts which did the same. The First Circuit held:

> The other circuits that have considered this issue unanimously follow the rule announced in Basista. *See, e.g.*, Robinson v. Cattaraugus County, 147 F.3d 153, 161 (2d Cir.1998); King v. Macri, 993 F.2d 294, 297-98 (2d Cir.1993); ACORN Fair Hous., 211 F.3d at 302 (*citing* Ryland v. Shapiro, 708 F.2d 967, 976 (5th Cir. 1983); Wilson v. Taylor, 658 F.2d 1021, 1033 (5th Cir. Unit B. Oct.1981); McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980)); Erwin v. County of Manitowoc, 872 F.2d 1292, 1299 (7th Cir.1989); Salitros v. Chrysler Corp., 306 F.3d 562, 574 (8th Cir.2002) (*citing* Goodwin v. Cir. Ct. of St. Louis County, 729 F.2d 541, 548 (8th Cir.1984); Risdal v. Halford, 209 F.3d 1071, 1072 (8th Cir.2000)); Gill v. Manuel, 488 F.2d 799, 802 (9th Cir.1973); Searles v. Van Bebber, 251 F.3d 869, 880-81 (10th Cir.2001); Davis v. Locke, 936 F.2d 1208, 1214 (11th Cir.1991) (*citing* Wilson v. Taylor, 658 F.2d at 1033).

Id., at 205. The First Circuit further stressed the importance of uniformity among the circuits concerning this issue. Id.

In Davis v. Mason Cty., 927 F.2d 1473 (9th Cir. 1991)(superseded by other grounds), the Ninth Circuit Court of Appeals had an opportunity to address the 42 U.S.C. § 1983 damages issue. The Davis plaintiff was awarded $0.00 in compensatory damages and $25,000.00 in punitive damages in his 42 U.S.C. § 1983 lawsuit. That Court upheld the verdict, stating "[t]he deputies' argument that the jury erred in awarding punitive damages while not awarding compensatory damages fails. The [United States] Supreme Court has held that punitive damages may be available under Section 1983 where there has been a violation of constitutional rights even though the victim is unable to show compensable injury. Smith v. Wade, 461 U.S. at 55 n. 21, 103 S.Ct. at 1639 n. 21."[3]

While Shy could continue citing and referring to many United States Circuit Court opinions, the information would lead this Court to one conclusion – in 42 U.S.C. § 1983 civil

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3 [21]. "Moreover, after Carey punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." Carlson, 446 U.S., at 22, n. 9, 100 S.Ct., at 1473, n. 9.

actions, a prevailing plaintiff can recover punitive damages in the absence of compensatory and nominal damages and uniformity among the circuits is paramount. Petitioners offer no case law to counter this undisputed fact save for a federal magistrate's ruling in South Carolina wherein the facts are not remotely similar to the facts of this matter and the many opinions addressed above. Further, the lower Court's June 1, 2018 Order is replete with law, analyses and theories which disputes Petitioners' contentions. To that end, this Court should summarily DENY Petitioners' appeal concerning the 42 U.S.C. § 1983 damages issue.

2. The Trial Court did not err in its failure to apply the provisions of the Prison Litigation Reform Act (PLRA) to Petitioners Peter Lunsford and Franklin Kelly.

Petitioners contend the lower Court erred in not applying the Prison Litigation Reform Act to all three (3) individual offending officers, Petitioners in this matter. However, they offer no meaningful or plausible analysis to counter the lower Court's June 1, 2018 Order. The Prison Litigation Reform Act of 1995 (PLRA) was passed to limit frivolous lawsuits filed by incarcerated individuals. Another aspect and reason for the PLRA was to limit attorney fees at one hundred-fifty percent (150%) of recovered damages in regard to lawsuits filed on behalf of incarcerated litigants. When lawsuits are filed on behalf of formerly incarcerated litigants, the PLRA is inapplicable.

In this matter, it is undisputed Shy was incarcerated when his first lawsuit (Civil Action No.: 16-C-156) was filed on February 29, 2016. (24). However, Petitioners Lunsford and Kelly were dismissed, without prejudice, by and through a December 8, 2016 Order. (35). Having sole discretion in allowing the 16-C-156 matter to proceed without Petitioners Lunsford and Kelly, Shy decided to re-file against these officers on or about March 9, 2017 and that civil matter is denoted as Civil Action No.: 17-C-155. (36). It is also undisputed Shy was not incarcerated at

the time of the filing of his second Complaint. An Order consolidating the two (2) cases was entered on July 19, 2017. (54). However, all parties continued filing pleadings, discovery, discovery responses and Trial documents under both civil action numbers and the verdict form denotes the same. In fact, Petitioners' Notice of Appeal and subsequent appellate documents, including Petitioners' Brief, contain both civil action numbers.

First, in response to Petitioners' claim Shy is to blame for not being able to serve Petitioners Lunsford and Kelly, both of these offending officers had left the employ of Western Regional Jail when the original Complaint was filed as they were terminated. Petitioner Erwin was served at WRJ as he was the remaining officer employed there. Also, Petitioners' counsel refused to accept service on behalf of Lunsford and Kelly in the 16-C-156 matter upon request from Shy's counsel. As Shy's counsel has been involved in several lawsuits with WVRJA and its offending officers, this is common. Basically, Shy did not rest on his laurels in attempting to serve Petitioners Lunsford and Kelly and should not be blamed for failure to timely serve the summonses and complaints. Nevertheless, that issue is irrelevant.

Second, Shy and his counsel did not know Shy would be released at any time after his conviction and there was no strategy involved regarding the same. Cabell County Circuit Court Judge Paul T. Farrell sentenced Shy to a lengthy sentence prior to the inception of the first civil matter and that sentence was not adjudicated to an alternative sentence until shortly before filing the re-filed Complaint. (36).

Third, Judge Jane Hustead's December 8, 2016 Order dismissed Petitioners Lunsford and Kelly without prejudice. (35). At that time they were not parties and there were many reasons why they should or should not be brought back into litigation. However, after consultation with

counsel, Shy decided to initiate another lawsuit as it was his right under West Virginia law.

Fourth, it is obvious from the Agreed Order Consolidating Civil Matters that no party objected to the contents of the Order. (54). If Petitioners believed it was in their best interests to proceed under one case, 16-C-156, and dismiss the 17-C-155 matter to their benefit, they had ample opportunity to address the issue. However, the Order of Consolidation was agreed upon, signed by all parties and acquiesced. Also, if Petitioners desired additional language denoting the positions they hold in this appeal, they should have voiced the same and not agreed to the contents and holdings in the Agreed Order. They did not and their objections should be waived.

Fifth, Shy did not have to agree to consolidate the civil matters pursuant to Rule 42 of the West Virginia Rules of Civil Procedure. Out of judicial economy Shy chose to consolidate both lawsuits and, as stated above, the parties agreed. There is nothing in the record or any evidence Petitioners can allude to which denotes the Agreed Order consolidating the two (2) civil matter entered on July 19, 2017 was a dismissal of the 17-C-155 matter.

Sixth, Respondent Shy finds it ironic, and somewhat insulting, that Petitioners invoke a "public policy" doctrine in making their argument. Petitioners claim they should not be held responsible for their respective 42 U.S.C. § 1983 violations due to the timeliness of Shy not serving them while all the while knowing their counsel refused to accept service of the first Complaint, Since Petitioners brought up the "public policy" argument, Shy believes it is incumbent to respond and expound in this manner: how about the public policy of thousands of WVRJA/WVDOC inmates living in cells replete with urine and feces? Or the hundreds of inmates who are not afforded proper medical care? How about the public policy of dozens of victims/inmates, like Shy, of excessive force at the hands of correctional officers? Or the female

inmates that are raped and sexually assaulted by correctional officers? Did "public policies" prohibit the beating of Christopher Shy at the hands of correctional officers or is it just something nice to recite when pressed to do so?

Regardless of public policy, the law is on Shy's side. The Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e, defines a prisoner as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). If a former prisoner files a lawsuit against offending parties, the PLRA is inapplicable. Again, as stated repeatedly, it is undisputed Shy was not a prisoner/inmate the date Civil Action Number 17-C-155 was filed. To that end, the PLRA does not apply in regard to Petitioners Franklin Kelly and Peter Lunsford, only to Petitioner Lloyd Erwin.

The Eleventh Circuit addressed the PLRA and prisoner confinement status in Harris v. Garner, 216 F.3d 970 (11th Circ. 2000), in which it held the PLRA "turns upon the confinement status of the plaintiff at . . . the time the lawsuit if filed." The Court continued:

> It is confinement status at the time the lawsuit is "brought," i.e., filed, that matters. The same rule of decision has been applied by the other circuits that have had occasion to speak to the issue. See Greig v. Goord, 169 F.3d 165, 167 (2d Cir.1999) ("Appellees acknowledge that Greig was a parolee at the time he filed his complaint ....") (emphasis added); Doe v. Washington County, 150 F.3d 920, 924 (8th Cir.1998) ("When he filed this complaint, Doe was neither incarcerated nor detained in any jail, prison, or correctional facility.") (emphasis added). Plaintiffs have been unable to cite a single decision of any district court or court of appeals holding that section 1997e(e) turns upon the confinement status of the plaintiff at any time other than the time the lawsuit is filed.

Id., at 975. To that end, a clear reading of the PLRA undisputedly does not apply in Shy's 17-C-155 matter against Petitioners Kelly and Lunsford. Moreover, Petitioners pose no valid

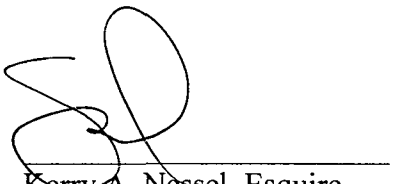
authority, reasoning or argument that disputes this or the lower Court's position. Therefore, Petitioners arguments concerning the PLRA's applicability fails as a matter of law.

CONCLUSION and PRAYER

When reviewing the facts of this matter with an analysis of various case law, documents contained in the Appendix Record as well as the rulings delineated above, it is undisputed Petitioners Erwin, Lunsford and Kelly's Appeal should be DENIED in total. As noted in the several United States Circuit Court of Appels' opinions, under 42 U.S.C. § 1983 a prevailing plaintiff need not be awarded compensatory or nominal damages in order to recover punitive damages. When reviewing these opinions, it seems the federal court system demands uniformity among the circuits on this issue. As for the PLRA, it is also undisputed it is inapplicable to Petitioners Kelly and Lunsford due to the clear meaning of the statute and the supporting law. In sum, Petitioners Erwin, Kelly and Lunsford provide this Court with no valid law, rules, facts or analyses which proves the lower Court erred in its June 1, 2018 Order.

WHEREFORE, Respondent Christopher Shy respectfully requests this Honorable Court DENIES Petitioners' Appeal, in total, and affirms the rulings contained in Cabell County Circuit Court Judge Gregory L. Howard, Jr.'s June 1, 2018 Order.

Respondent Christopher Shy
By Counsel



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