IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-781

WEST VIRGINIA ATTORNEY-GENERAL/ MEDICAID FRAUD CONTROL UNIT; and NATHAN R. LYLE, in his individual capacity and in his capacity as an employee of the West Virginia Attorney-General, Medicaid Fraud Control Unit,

Petitioners,

v.

HISEL BAILEY,

Respondent.

PETITIONERS' REPLY BRIEF

From the Circuit Court of Kanawha County,
Civil Action No. 22-C-145

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Sources

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because Petitioners are entitled to qualified immunity.
2. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because, to the extent the Circuit Court determined that Petitioners procured Respondent's prosecution, the Circuit Court was required to find that Petitioners acted as prosecutors and are entitled to prosecutorial immunity.

INTRODUCTION

This case arises out of an adverse employment decision against Respondent Hisel Bailey by his employer, the West Virginia Department of Health and Human Resources ("DHHR"), following an incident in which Bailey was alleged to have abused a patient at Mildred Mitchell-Bateman Hospital ("MMBH"). Following the incident, an investigation was undertaken by Legal Aid of West Virginia, Inc., and the matter was then referred to the Medicaid Fraud Control Unit ("MFCU"), which operates within the Office of the Attorney General. MFCU and Petitioner Nathan Lyle investigated the incident, including an interview of Bailey, and, as alleged, referred the matter to the Cabell County Prosecuting Attorney's Office for possible criminal prosecution. The Cabell County Prosecuting Attorney's Office reviewed MFCU's investigation report and concluded that criminal charges against Bailey were warranted. Subsequently, a Cabell County Magistrate independently reviewed the evidence presented in support of that criminal complaint and determined that probable cause existed to justify issuing an arrest warrant. Bailey was charged with four crimes, but the Cabell County Prosecuting Attorney's Office later unilaterally dismissed those charges by exercising its prosecutorial discretion. Bailey filed a grievance against his employer, DHHR, and succeeded, resulting in DHHR being ordered to return Bailey to his prior employment position and to remit backpay to Bailey. Bailey then filed suit against DHHR, two

DHHR officials, MFCU and Lyle, Legal Aid of West Virginia, Inc., and two employees of Legal Aid.

Before the Circuit Court, Petitioners moved for dismissal of Bailey's claims for alleged violation of his Fourth Amendment right to be free from unreasonable search and seizure through Section 1983 and for malicious prosecution. Petitioners filed a Motion to Dismiss seeking dismissal of Bailey's Section 1983 and malicious prosecution claims on the grounds that Petitioners are entitled to qualified immunity and prosecutorial immunity. Following briefing, the Circuit Court entered an Order denying Petitioners' Motion on August 15, 2022, and this interlocutory appeal followed.

In his Response Brief, Bailey argues that Petitioners are not entitled to qualified immunity because Bailey's Complaint alleges that Petitioners' investigation was false and fraudulent in light of the fact that their interview of Bailey occurred after the West Virginia Public Employees Grievance Board's decision granting Bailey's grievance. Resp.'s Br., pp. 13-14. Bailey also argues that Petitioners are not entitled to qualified immunity because Bailey's Complaint alleges that his interview was a "custodial interrogation" and that Petitioners did not provide Bailey with a reading of his *Miranda* rights prior to his interview. Resp.'s Br., pp. 15-16. Bailey alleges, for the first time, that Petitioners "withheld exculpatory evidence from the prosecutor that he would have been obligated to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963)." Resp.'s Br., pp. 19-20. This allegation does not appear in the Complaint or anywhere else in the record. While Bailey argues that Petitioners are not prosecutors, he alleges, for the first time, that Petitioners were subject to the prosecutorial disclosure requirements of *Giglio v. United States*, 405 U.S. 150 (1972). Resp.'s Br., p. 19. Bailey also alleges, for the first time, that Petitioners' motive for their "malicious" prosecution was "likely Petitioners' support of their fellow state agency and

Defendant herein, DHHR, who sought to retaliate against Respondent ….” Resp.’s Br., p. 22. Again, this allegation does not appear in the Complaint or anywhere else in the record.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter under Rule 19 will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope and involves the Circuit Court’s clear legal error in applying that settled law. W. Va. R. App. P. 19(a)(1) and (4).

ARGUMENT

Bailey has asserted in Count I of his Complaint that Petitioners MFCU and Lyle violated his Fourth Amendment rights by allegedly conducting a “custodial interrogation” and by investigating him for potential crimes. Bailey also asserts in Count II of his Complaint that MFCU and Lyle maliciously prosecuted him, which is a state common law claim. In his Response Brief, Bailey does not distinguish the qualified immunity standards that apply to federal claims and to state claims. Instead, Bailey argues that MFCU and Lyle are not entitled to qualified immunity because (1) the West Virginia Public Employees Grievance Board (“WVPEGB”) had already “exonerated” Bailey; (2) MFCU and Lyle violated Bailey’s clearly established rights by failing to read a *Miranda* warning prior to his “custodial interrogation”; (3) MFCU and Lyle engaged in a *Brady* violation by failing to provide the Cabell County Prosecuting Attorney’s Office with a copy of the WVPEGB decision; and (4) MFCU and Lyle had the malicious motive of supporting DHHR, who sought to retaliate against Bailey. For the reasons stated further below, Bailey’s arguments fail, and Petitioners are entitled to qualified immunity.

In his Response Brief, Bailey argues that MFCU and Lyle are not entitled to prosecutorial immunity because they are not prosecutors despite the Circuit Court’s finding that they procured

Bailey's prosecution. For the reasons stated further below, Bailey's arguments fail, and Petitioners are entitled to prosecutorial immunity.

A. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because Petitioners are entitled to qualified immunity.

1. The West Virginia Public Employees Grievance Board did not "exonerate" Bailey, and the grievance decision has no applicability to MFCU and Lyle's investigation.

Bailey's primary argument is grounded upon the belief that, if the WVPEGB rules on a grievance, no other investigation or action concerning the issues or incident before the WVPEGB should occur. Bailey's argument has previously been considered by this Court and rejected. In the strikingly similar case of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), a criminal defendant, Miller, sought dismissal of charges on the basis of *res judicata* and/or double jeopardy after the grievance board found that her employer "failed to prove, by a preponderance of the evidence that [the] Grievant engaged in patient abuse on February 10, 1992, or at any other time." *Id.* at 8, 459 S.E.2d at 119 (internal quotation marks omitted). There, Miller was employed as a licensed practical nurse at a state-operated facility for individuals with intellectual disabilities. *Id.* at 7, 459 S.E.2d at 118. A co-worker observed Miller slapping a patient's head, and, as a result, Miller's employment was terminated and a battery charge was brought against her. *Id.* Miller claimed that she did not slap the patient, and her co-worker misperceived the incident in which she took action to protect a female patient from a male patient by taking the male patient's arms, pulling him across the room to a couch, and shoving him onto the couch. *Id.* at 7-8, 459 S.E.2d at 118-19. Although the grievance board found that Miller's employer did not meet its burden, the criminal charges proceeded to trial, and Miller was convicted. *Id.* at 7, 459 S.E.2d at 118. Miller appealed, arguing that the trial court erred by refusing to grant her motion to dismiss the battery

charge on the grounds of *res judicata* and/or collateral estoppel because "she was exonerated administratively on the charge of patient abuse[.]" *Id.* at 8-9, 459 S.E.2d at 119-20.

This Court rejected Miller's argument and found "the purpose of the grievance procedure … is 'to provide a procedure for the *equitable and consistent resolution of employment grievances*[.]'" *Id.* at 11, 459 S.E.2d at 122 (quoting W. Va. Code § 29-6A-1 (1988)) (emphasis in original). This Court held, "it is clear the Grievance Board has no authority to resolve a criminal matter. Simply stated, the purpose of the Grievance Board is to fairly and efficiently resolve employment problems." *Id.* This Court reasoned that "[t]he procedure employed at a grievance proceeding is obviously much different than that employed at a criminal trial. For instance, a criminal trial is governed by the Rules of Criminal Procedure, while a grievance proceeding is not." *Id.* at 12, 459 S.E.2d at 123. "Moreover, we recognize the issue of whether an individual was terminated wrongfully for patient abuse is not the same issue as whether an individual committed a criminal act of battery." *Id.* "We merely are stating there are differences between a grievance and a criminal proceeding that merit an independent review of the facts and issues. Thus, although the ALJ did not find patient abuse at the grievance proceeding, it did not foreclose the criminal proceeding on the issue of battery." *Id.* at 13, n.15, 459 S.E.2d at 124, n.15.

Our federal courts have similarly found that "West Virginia courts would not give the ALJ's factfindings preclusive effect in a subsequent judicial proceeding." *Durstein v. Todd*, Civil Action No. 3:19-cv-29, 2022 U.S. Dist. LEXIS 156119 *12, 2022 WL 3931461 (S.D.W. Va. Aug. 30, 2022). In *Durstein*, "[i]n proceedings before the West Virginia Public Employees Grievance Board, Administrative Law Judge ("ALJ") McGinley decided whether Plaintiff was unlawfully terminated for exercising her First Amendment rights." *Id.* at *11. The plaintiff subsequently brought a civil action against her employer. *Id.* The employer filed a motion for summary judgment

on the grounds of collateral estoppel based upon the grievance decision. *Id.* Denying the motion on those grounds, the District Court stated, "a West Virginia court would not give these proceedings preclusive effect, and neither will this Court." *Id.* at *15.

Applying *State v. Miller* and *Durstein v. Todd* to the instant case, Bailey's grievance process did not "exonerate" him of any criminal misconduct and did not foreclose a criminal proceeding on the issue of battery. Grievance proceedings do not hold preclusive effect over other proceedings following separate procedures and utilizing different standards. The WVPEGB decision certainly did not relieve MFCU and Lyle of their statutory duties to investigate abuse and neglect of residents in board and care facilities and patients in health care facilities and to refer for prosecution all violations of applicable state and federal laws. W. Va. Code § 9-7-1(b)(1)-(2).

To the extent Bailey argues that the WVPEGB decision constitutes "clearly established law" for purposes of a qualified immunity analysis under either federal or state law, Bailey's argument fails. Bailey concedes that MFCU and Lyle have the statutory powers and duties to investigate and refer for prosecution. Resp.'s Br., p. 25. Bailey has failed to identify any case law that would put MFCU and Lyle on notice that investigating an allegation of patient abuse and referring it for prosecution following a favorable employment decision in a grievance proceeding violated clearly established law.

Regarding the federal standard applicable to Bailey's Section 1983 claim, a defendant violates an individual's clearly established rights only when "'the state of the law'" at the time of an incident provided 'fair warning'" to the defendant that his or her conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question

beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). Thus, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). This Court's qualified immunity test similarly requires a reviewing court to determine whether the plaintiff has shown that the acts or omissions violated "clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive." *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 507, 766 S.E.2d 751, 766 (2014).

Under both standards, MFCU and Lyle are entitled to qualified immunity. It is undisputed that they have the duty and power to investigate and refer for prosecution allegations of patient abuse. Bailey has failed to identify any clearly established law suspending MFCU and Lyle's statutory duties if the subject of an investigation succeeds at an employee grievance hearing. To the contrary, the clearly established law at the time of the investigation stated the opposite: employee grievance proceedings do not have preclusive effect on criminal proceedings. Thus, Bailey's argument fails. MFCU and Lyle are entitled to qualified immunity, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

2. Because a violation of *Miranda* is not a violation of the Fifth Amendment, it cannot serve as a basis to overcome qualified immunity regardless of whether Bailey was subjected to a "custodial interrogation."

Bailey's next argument is that MFCU and Lyle violated clearly established law by conducting a custodial interrogation of Bailey and by not providing him with *Miranda* warnings. First, Bailey's allegation that MFCU and Lyle conducted a custodial interrogation is a legal conclusion, which the Court is not required to accept as true. *See Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014) ("[A] trial court is free to ignore legal

conclusions, unsupported conclusions, unwarranted references and sweeping legal conclusions cast in the form of factual allegations.") (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, § 12(b)(6)[2], at 384 -88 (4th ed. 2012) (footnotes omitted)). Bailey's Complaint fails to plead sufficient facts to establish that a custodial interrogation warranting *Miranda* warnings occurred. Regardless, *Miranda* cannot serve as a basis to overcome qualified immunity.

Bailey argues that *Miranda* is clearly established law because it was decided in 1966 and because "[a]nyone who has watched an episode of 'Law and Order' is familiar." Resp.'s Br., pp. 15, 24. Fortunately, courts determine whether a law is clearly established for purposes of qualified immunity, and the Supreme Court of the United States has already determined that failure to provide a *Miranda* warning is not itself an actionable claim nor is it sufficient to overcome a qualified immunity defense.

In *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003), the Supreme Court held that an officer's "failure to read Miranda warnings to [the arrestee] did not violate [the arrestee]'s constitutional rights and cannot be grounds for a § 1983 action." *Id.* at 772-73. *See Connecticut v. Barrett*, 479 U.S. 523, 528, 93 L. Ed. 2d 920, 107 S. Ct. 828 (1987) (*Miranda*'s warning requirement is "not itself required by the Fifth Amendment . . . but is instead justified only by reference to its prophylactic purpose"); *Michigan v. Tucker*, 417 U.S. 433, 444, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974) (*Miranda*'s safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"). Because a failure to provide a *Miranda* warning did not violate clearly established law, the Supreme Court held that the officer was entitled to qualified immunity. *Chavez*, 538 U.S. at 772-73. The Supreme Court recently reaffirmed *Chavez*, holding, "**Because a**

violation of *Miranda* is not itself a violation of the Fifth Amendment, and because we see no justification for expanding *Miranda* to confer a right to sue under §1983, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion." *Vega v. Tekoh*, 142 S. Ct. 2095, 2108, 213 L. Ed. 2d 479 (2022).

Thus, regardless of whether MFCU and Lyle conducted a custodial interrogation that would warrant *Miranda* warnings, the law is clearly established that failure to read *Miranda* warnings is not a violation of Bailey's constitutional rights and is not actionable. Therefore, the alleged failure to read *Miranda* warnings cannot overcome MFCU and Lyle's qualified immunity defense, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

3. Bailey's assertions of new allegations of a *Brady* violation and a motive are not in the record on appeal, should not be considered, and do not overcome qualified immunity.

In an effort to overcome Petitioners' qualified immunity defense, Bailey asserts new allegations that MFCU and Lyle had a duty to and failed to turn over the WVPEGB decision to the Cabell County Prosecuting Attorney's Office in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that MFCU and Lyle referred the matter for prosecution for the "malicious purpose" of supporting DHHR in its alleged retaliation against Bailey for refusing to testify for DHHR in another grievance matter. Resp.'s Br., pp. 19, 22. Neither of these allegations appears in the Complaint or anywhere else in the record.[1] Regarding the alleged *Brady* violation, Bailey does not allege that MFCU or Lyle had an obligation to or failed to provide a copy of the WVPEGB decision to the prosecutor. Regarding the "malicious purpose" allegation, Bailey does not make allegations against MFCU or Lyle related to the prior WVPEGB proceeding. Instead, Bailey alleges that "[t]he conduct of Defendants WVDHHR, MMBH and Richards was also retaliatory against Plaintiff

[1] The MFCU and Lyle deny both of these new allegations that were raised for the first time in the Respondent's Brief.

Hisel Bailey related to his participation in the *Rees* matter before WVPEGB." JA 053. Bailey claims that he made a patient safety complaint against MMBH and that MMBH attempted to get him to lie at a WVPEGB hearing. JA 054. Bailey's Complaint does not assert that MFCU or Lyle were involved in the *Rees* matter at all.

This Court has held that parties "cannot now assert new facts as a way to justify their defective pleading." *Wolford v. Mt. Top Hunting Club, Inc.*, No. 14-0963, 2015 W. Va. LEXIS 1136 *12 (W. Va. Nov. 20, 2015). Instead, "this Court's appellate review is limited to the record presented on appeal." *Id.* (citing *DeVane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999)). This Court has held that a heightened pleading standard is applied to claims implicating qualified immunity, and, as a result, "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.'" *W. Va. State Police v. J.H.*, 244 W. Va. 720, 736, 856 S.E.2d 679, 695 (2021) (quoting *A.B.*, 234 W. Va. at 517, 766 S.E.2d at 776) (citation omitted). Thus, for consideration by this Court, Bailey was required to include these allegations in his Complaint. Because these allegations do not appear in the appellate record, this Court should not consider them. Bailey is asking this Court to pick up its judicial pen and write into his Complaint factual allegations sufficient to overcome Petitioners' qualified immunity defense. Bailey's new allegations, however, are not sufficient to overcome qualified immunity.

Regarding the new allegation that MFCU and Lyle failed to disclose to the prosecutor the WVPEGB decision, this allegation cannot legally support a *Brady* violation. First, *Brady* protects a criminal defendant from suppression of material evidence *from* the criminal defendant. *See Bowman v. Stirling*, 45 F.4th 740, 752 (4th Cir. 2022) ("A *Brady* violation requires the defendant to prove three elements: (1) '[t]he evidence at issue must be favorable to the accused, either

because it is exculpatory, or because it is impeaching'; (2) 'that evidence must have been suppressed by the State, either willfully or inadvertently'; and (3) that evidence must be 'material either to guilt or to punishment.'" (quoting *Strickler v. Greene*, 527 U.S. 263, 280-282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)) (additional citation omitted). There is no allegation that MFCU or Lyle had material evidence and suppressed it from Bailey. Rather, Bailey now claims that MFCU and Lyle withheld the grievance decision from a prosecutor, but Bailey was aware of the grievance decision, and it was not "suppressed" from him. "No *Brady* violation exists when the evidence is 'available to the defense from other sources' or through a 'diligent investigation by the defense.'" *United States v. Catone*, 769 F.2d 866, 871-72 (4th Cir. 2014) (quoting *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011) (internal quotation marks omitted)). Furthermore, "'[p]ublicly available information which the defendant could have discovered through reasonable diligence cannot be the basis for a *Brady* violation.'" *Id.* at 872 (quoting *United States v. Willis*, 277 F.3d 1026, 1034 (8th Cir. 2002) (internal quotation marks omitted)). Bailey asserts that the WVPEGB decision was "public information readily available," was "publicly known," and was "a matter of public record." Resp.'s Br., pp. 2, 8, 14. Thus, Bailey's new allegation cannot support a legal finding of a *Brady* violation. Therefore, Bailey's new allegation cannot establish a violation of a clearly established law to overcome qualified immunity, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Additionally, Bailey's new allegation that MFCU and Lyle referred the matter for prosecution for the "malicious purpose" of supporting DHHR in its alleged retaliation cannot overcome MFCU and Lyle's qualified immunity defense. If this Court considers it, Bailey's new allegation is entirely conclusory, and the Court is not required to accept it as true. Bailey's new allegation states, "Petitioner investigated and reported a man who had been exonerated by a neutral

tribunal (WVPEGB). This strongly suggests that their motive was some malicious purpose. That malicious purpose was likely Petitioners' support of their fellow state agency and Defendant herein, DHHR, who sought to retaliate against Respondent for his refusal to testify … in a prior grievance …." Resp.'s Br., p. 22. Thus, Bailey's new allegation is entirely based upon the flawed legal conclusion that grievance decisions exonerate grievants from wrongdoing and preclude criminal proceedings. As discussed above, grievance proceedings cannot serve as the basis of *res judicata*, collateral estoppel, or double jeopardy for criminal proceedings. Thus, "although the ALJ did not find patient abuse at the grievance proceeding, it did not foreclose the criminal proceeding on the issue of battery." *State v. Miller*, 194 W. Va. at 13, n.15, 459 S.E.2d at 124, n.15. Bailey's new allegation is based upon a legal fiction, which cannot serve as the basis for a factual inference of malice. Therefore, Bailey's new allegation cannot establish malicious conduct to overcome qualified immunity as to Bailey's malicious prosecution claim, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Furthermore, the federal qualified immunity standard does not include an exception for "otherwise fraudulent, malicious, or oppressive" conduct like this Court has established. Instead, the test for qualified immunity is a two-pronged inquiry: (1) whether a constitutional right has been violated on the facts alleged; and (2) whether the right was clearly established at the time, such that it would be clear to an objectively reasonable officer that his conduct violated that right. *Short v. Walls*, Civ. Action No. 2:07-00531, 2009 U.S. Dist. LEXIS 29499, 2009 WL 914085 *9 (S.D.W. Va. Mar. 31, 2009) (citing *Saucier v. Katz*, 533 U.S. 194, 200-02 (2001)). Thus, even if this Court considers Bailey's new allegation and even if this Court determines that the new allegation is sufficient to satisfy the malice exception to qualified immunity under state law, Bailey's new allegation does not satisfy the federal standard applicable to Bailey's Section 1983 claim.

Therefore, MFCU and Lyle are entitled to qualified immunity, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

B. The Circuit Court erred by denying Petitioners' Motion to Dismiss seeking dismissal of Respondent's claims for violation of his Fourth Amendment rights and for malicious prosecution because, to the extent the Circuit Court determined that Petitioners procured Respondent's prosecution, the Circuit Court was required to find that Petitioners acted as prosecutors and are entitled to prosecutorial immunity.

The Circuit Court erroneously found both that MFCU and Lyle procured Bailey's prosecution and that MFCU and Lyle did not act as prosecutors. Because the Circuit Court found, based on the Complaint, that MFCU and Lyle procured Bailey's prosecution, the Circuit Court was required to find that they acted as prosecutors and are entitled to prosecutorial immunity.

In his Response Brief, Bailey argues that the Circuit Court correctly concluded that MFCU and Lyle procured his prosecution and that they engaged only in investigatory functions to which prosecutorial immunity does not extend. Resp.'s Br., pp. 25-27. Bailey cannot have it both ways. The Circuit Court found that MFCU and Lyle procured Bailey's prosecution. A finding of procurement of a prosecution is a finding that MFCU and Lyle did more than simply investigate and refer for prosecution, which goes beyond the allegations in the Complaint.[2] This Court has held that "procurement, within the context of a malicious prosecution action, 'requires more than just the submission of a case to a prosecutor; **it requires that a defendant assert control over the pursuit of the prosecution**.'" *Goodwin v. City of Shepherdstown*, 241 W. Va. 416, 423, 825 S.E.2d 363, 370 (2019) (quoting *Norfolk Southern Railway Company v. Higginbotham*, 228 W. Va. 522, 528, 721 S.E.2d 541, 547 (2011)) (emphasis added). Thus, having found that MFCU and

[2] MFCU and Lyle deny that they procured Bailey's prosecution; however, the Circuit Court made that finding, which is a finding that MFCU and Lyle asserted control over the prosecution, and, therefore, they are entitled to prosecutorial immunity.

Lyle asserted control over the pursuit of the prosecution, the Circuit Court was required to find that MFCU and Lyle engaged in prosecutorial actions.

Bailey argues that *Brodnik v. Lanham*, Civ. Action No. 1:11-0178, 2016 U.S. Dist. LEXIS 100051 (S.D.W. Va. Aug. 1, 2016) and *Joseph v. Shepherd*, Nos. 04-4212, 05-4181, 211 F. App'x 692, 697 (10th Cir. Dec. 15, 2006) are not reliably analogous law because *Brodnik* applied to an IRS agent who recommended prosecution and because *Joseph* applied to an investigator in the same office as the prosecutor. Resp.'s Br., p. 28. Bailey instead relies upon *Nogueros-Cartagena v. United States Dep't of Justice*, No. 03-1113, 75 F. App'x 795 (1st Cir. Sept. 26, 2003), which affirmed dismissal of a *Bivens* malicious prosecution claim against an FBI agent because "[t]he existence of absolute prosecutorial immunity is a matter of function; it depends not on the title or position of the official involved, but, rather, on the specific conduct in question." *Id.* at 798. *Nogueros-Cartagena* is consistent with *Brodnik* and *Joseph*. All three cases are rooted in the principle that an individual, regardless of whether his or her job title is "prosecutor" or "investigator," is entitled to prosecutorial immunity when that individual is engaged in prosecutorial conduct.

MFCU and Lyle are entitled to prosecutorial immunity regardless of their status as prosecutors or investigators. Like the defendant in *Brodnik*, Lyle, as an agent of MFCU, allegedly investigated Bailey for criminal activity and referred him to the Cabell County Prosecuting Attorney for prosecution. Thus, as the *Brodnik* Court held, MFCU and Lyle are entitled to absolute immunity for their investigation and referral regardless of whether they procured Bailey's prosecution. Based upon the Circuit Court's procurement finding, however, MFCU and Lyle acted in an even more prosecutorial manner than the defendant in *Brodnik* and asserted control over the pursuit of the prosecution.

To the extent that MFCU and Lyle procured the prosecution of Bailey by the Cabell County Prosecuting Attorney, they did so pursuant to their statutory duties and powers. Bailey cannot credibly claim that MFCU and Lyle simultaneously procured and controlled his prosecution but were not engaged in prosecutorial conduct. Based upon the Circuit Court's finding that MFCU and Lyle procured and controlled the prosecution, they engaged in prosecutorial actions that are absolutely immune from Plaintiff's Section 1983 and malicious prosecution claims. Therefore, MFCU and Lyle are entitled absolute immunity, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

Finally, in passing, Bailey mentions in his Brief that Lyle has been sued in both his individual capacity and his official capacity, and Bailey argues that official capacity claims are not subject to immunity. Resp.'s Br., pp. 25-26. Official capacity claims are claims against an office or position as the real party in interest, not the individual. "A suit against a state official or employee in her official capacity is not a suit against the official or employee but is a suit against the state office or state position she holds, and as such, is no different than a suit against the state itself." *Woods v. S. C. HHS*, Civil Action No. 3:18-cv-834, 2018 U.S. Dist. LEXIS 242220 *11-12 (D.S.C. Oct. 5, 2018) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). Thus, "Defendants can be sued in their official capacities for injunctive relief or in their individual capacities for monetary damages." *Edwards v. Rubenstein*, Civil Action No. 2:14-cv-17, 2016 U.S. Dist. LEXIS 15237 *18, 2016 WL 519641 (N.D.W. Va. Jan. 20, 2016) (citing *Will*, 491 U.S. at 71). Bailey's Complaint does not seek injunctive relief. JA 062-063. Rather, Bailey's Complaint only seeks monetary damages, and, to the extent Bailey seeks relief from Lyle in his official capacity under Section 1983, Bailey's claim fails as a matter of law. *See Will*, 491 U.S. at 71 (finding that Section 1983 claims may only be asserted against "persons"

and "neither a State nor its officials acting in their official capacities are 'persons' under § 1983."). Thus, Bailey's official capacity argument fails as a matter of law, and the Circuit Court erred in denying Petitioners' Motion to Dismiss.

CONCLUSION

Petitioners request that this Court reverse the Circuit Court's order denying Petitioners' Motion to Dismiss and remand this case with instructions to the Circuit Court to enter an order finding that MFCU and Lyle are entitled to qualified immunity and prosecutorial immunity for Counts I and II of Respondent's Complaint.

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CERTIFICATE OF SERVICE

I, Caleb B. David, counsel for Petitioners, hereby certify that I have served a true and accurate copy of the foregoing "Petitioners' Reply Brief" upon counsel of record by utilizing the Court's e-filing system, on this day, February 27, 2023, as follows:

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