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

HANK HECKMAN and LOREN GARCIA,
Petitioners,

v.

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

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

PETITIONERS' REPLY BRIEF

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ASSIGNMENTS OF ERROR

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

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

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

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

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

ARGUMENT

The Petitioners set forth additional argument concerning the first, second, fifth, and seventh assignments of error. The Petitioners stand on the arguments presented in the Petitioners' Brief on the remaining assignments of error.

1. It was clearly established beyond question at the time of the acts alleged in the Complaint that the period of incarceration imposed upon those persons who violate supervised release is part of the underlying sentence, and therefore subject to the same constitutional protections as any other criminal sentence. (First Assignment of Error)

The most critical page in both respective Response Briefs is page "*iv,*" buried within

each table of authorities. There, in each brief, a reader would expect to see the one case that this entire appeal turns on, but instead there is no entry for *State v. Hargus*, 232 W.Va. 735, 753 S.E.2d 893 (2013). *Hargus* is critical for two reasons. The first is that an inexplicable, specious misinterpretation of its holding was the basis for the legal position advocated for by the state-affiliated respondents in the extraordinary writ litigation that led to the *Phalen*[1] decision (the notion that a "sanction" is separate from a "sentence" for constitutional purposes). The second is that the actual holding of *Hargus* was specifically that the "sanction" *cannot* be separate from the sentence for constitutional purposes – the obvious result, supported by precedent of the Supreme Court of the United States in *Johnson v. United States*, 529 U.S. 694 (2000).[2] Because the period of incarceration imposed following a revocation of supervised release is part of the sentence, it cannot be retroactively modified to a defendant's detriment under *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980), among other authority previously discussed in the briefs.

If there is to be qualified immunity, it must be because the rule clearly set forth in *Hargus* – that there is no constitutional distinction between the initial sentence, and a period of incarceration imposed on the basis of the violation of supervised release – was not clearly established when Respondent Jividen effectuated the warrants to arrest the Petitioners. But that rule was, obviously, clearly established – in *Hargus*, in 2013. That the Respondents do not even contend with this case, and argue around it completely, is revealing of the legal vacuum supporting the Circuit Court's finding of qualified immunity.

The Respondents' legal basis for retroactively withdrawing the Petitioners' parole after it had already been granted was not based on a good faith misunderstanding of an unresolved

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1 *State ex rel. Phalen v. Roberts*, 245 W.Va. 311, 858 S.E.2d 936 (2021).

2 *Johnson* is another case that is absent from both response briefs.

legal question. Instead, it was predicated on a legal argument that was “sorely misguided,” “completely misapprehend[ed]” *Hargus*, and was “not supported” by *Hargus* or by any other law. Those are not counsel's words, but the words of Justice Hutchison, writing for the majority. *Phalen*, 753 S.E.2d at 943. The legal question was not “confusing” as suggested by Respondents Sandy and Jividen (Sandy and Jividen Response Brief, at 9). Instead, the issue was clearly decided in *Hargus*, until the Respondents sought to contort that case beyond all recognition in support of an unlawful scheme. The Respondents have lately eschewed the arguments that were actually made at the time of the harm inflicted upon the Petitioners, relying instead upon conclusory adjectives like “confusing,” and the presence of a dissenting opinion in *Phalen*. No authority has been advanced by the Respondents to suggest that a dissent in a subsequent case is relevant to whether or not a law was clearly established, presumably because no such authority exists. Nor is there any authority presented to support the utterly circular argument that each of the Respondents' personal beliefs that their conduct was lawful prior to *Phalen* means the law could not have been clearly established.[3]

Without even acknowledging *Hargus*, Respondents Jividen and Sandy argue that the constitutional principle at issue in this appeal was not decided until *Phalen*. That is unequivocally inaccurate. The *Phalen* Court noted repeatedly that the state-affiliated respondent's entire argument, concerning both the applicability of good time and parole, was that a “sanction” is not a “sentence.” *Phalen,* n.16, n.18. That issue was decided authoritatively in *Hargus*, not in *Phalen*. Thus, the law on this point was clearly established prior to the arrests described in the instant Complaint. The only new constitutional question decided in *Phalen* was what class of people, based upon the date of their crimes, would be

3 This argument about the subjective beliefs of the parties also constitutes a factual assertion outside the scope of the Complaint.

affected by the new provisions of SB 713, *a bill that was not even introduced* until well after the Petitioners, and their similarly-situated class, had already been unlawfully rearrested. *See*, Syl. Pt. 8, *Phalen.* It was inappropriate for the Circuit Court to grant qualified immunity on this factual and legal background.

2. The Circuit Court's order appears to contradict the mutual position of the parties that the W. Va. Code § 15A-4-17(p) may not be construed to confer absolute immunity to the federal causes of action. (Second Assignment of Error).

Respondents Sandy and Jividen argue that the Petitioner's second assignment of error is misplaced because the Circuit Court granted qualified immunity, and did not grant absolute immunity under W. Va. Code § 15A-4-17(p) regarding the Petitioners' federal causes of action. "The circuit court did not grant Respondents immunity under this statute and instead granted them qualified immunity on these claims[...]" (Sandy and Jividen Response Brief, at 14).[4] However, the Order in question, drafted by counsel for Respondents Sandy and Jividen, reads as follows: "23. Thus, Defendants have been 'granted absolute immunity' from this action because it is a 'matter or claim arising out of good time calculations or awards.'" (A.R., at 187). There is no further discussion about state versus federal causes of action, nor any discussion of the Supremacy Clause. If the Circuit Court did not intend to order that Respondents Sandy and Jividen possess absolute immunity under the aforementioned statute, it had a strange way of expressing that intent. To the extent that said Respondents are again conceding (as they openly and admittedly did during oral argument before the Circuit Court) that the state statute cannot confer immunity regarding the federal causes of action, then the Petitioners agree with that position. However, the Petitioner is constrained to contend with

4 Curiously, Respondents Sandy and Jividen later specifically argue that the Circuit Court's order "clearly granted Respondents immunity under West Virginia Code Section 15A-4-17(p)" in a subsequent section of their Response Brief. (Sandy and Jividen Response Brief, at 18). The Petitioner will leave it to this Court's powers of discernment to untangle this particular web of logic, because the undersigned counsel cannot.

what was written in the Court order, and it appears that the Court's written order did not correspond to the agreed position of the parties on this issue.

3. The question of whether Respondent Morrisey's conduct is within the scope of the *Burns* exception to absolute immunity has been pleaded sufficiently to survive a motion to dismiss. (Fifth Assignment of Error).

Respondent Morrisey's defense to the applicability of the qualified immunity standard (as opposed to absolute immunity) for his conduct other than the actual litigation of the extraordinary writs[5] is that "S.B. 713 was not found violative of any constitutional provision until after the subject events occurred." (Morrisey Response Brief, at 11). This fact is irrelevant, however, because the Complaint alleges misconduct by Respondent Morrisey from far earlier in the proceedings than the decision in *Phalen*. Specifically, the Complaint alleges that Respondent Morrisey gave improper advice to the other members of the executive branch concerning the legality of the scheme that resulted in the unlawful re-incarceration of the Petitioners. (A.R., at 13-14). If the Petitioners can prove that this faulty advice was given (just as the prosecutor gave faulty advice in *Burns*), and can show that the advice contradicted clearly established law, then the claim can be sustained against Respondent Morrisey. At the motion to dismiss stage, the allegations in the Complaint must be accepted as true. To the extent that Respondent Morrisey is arguing that the Petitioners are simply factually mistaken, then such an argument is insufficient to sustain the motion to dismiss at the instant stage of the proceedings. *See*, *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 920 (W. Va. 1978).

4. The Circuit Court appears to have dismissed the claims against the Respondents in both their personal and official capacities on the basis that they are not proper persons under 42 U.S.C. § 1983, despite the concession of Respondents Sandy and Jividen that only the official capacity claims were entitled to relief on this theory. (Seventh Assignment of Error).

5 *See*, *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

Again, Respondents Jividen and Sandy have suggested that the Petitioners have misunderstood the Circuit Court's order to go further than it actually does, and again, the plain language of the order appears to say otherwise. Respondents Jividen and Sandy, on page 21-22 of their Response Brief, appear to concede that the question of personhood under § 1983 should only serve to prevent claims against the Respondents in their official capacities.[6] However, the language of the order, even the section specifically quoted by said Respondents, says nothing about limiting the scope of this theory to the Respondents in their official capacities. Instead, it seems to adopt the theory that the Respondents cannot be sued under § 1983 based on conduct "while acting as employees of the [state agencies]". (App., at 187). Such a holding would clearly be contrary to the holding of *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), as discussed in greater detail in the Petitioners' Brief. Actionable conduct while acting as an employee of a state agency is within the scope of a personal capacity claim under § 1983, and thus the Circuit Court's ruling was in error.

CONCLUSION

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

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

Respectfully submitted,

Hank Heckman, and Loren Garcia,
Petitioners, by counsel,

6 The Petitioner only seeks redress against the "official capacity" parties in the scope of non-monetary relief; i.e., declaratory judgment.

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CERTIFICATE OF SERVICE

On this 27th day of March, 2023, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Reply Brief to William Murray and Jim Muldoon, by e-filing.

/s/ Jeremy B. Cooper

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