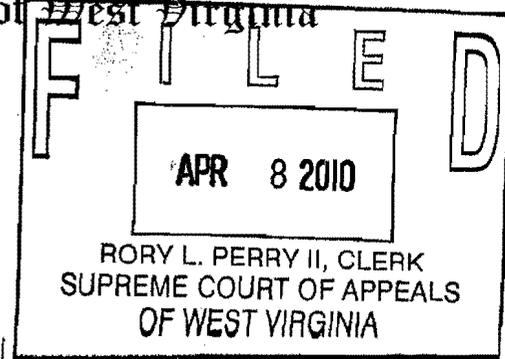


In the Supreme Court of Appeals of West Virginia

No. 35444



**WEST VIRGINIA STATE POLICE,
D.M. NELSON, A.S. PERDUE, and C.E. AKERS,**

Appellants,

v.

BETTY JARVIS and WANDA CARNEY,

Appellees.

Honorable Paul Zakaib, Jr.
Circuit Court of Kanawha County
Civil Action Nos. 09-C-770 & -771
(consolidated for purposes of discovery and pleadings)

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I. INTRODUCTION

In their response, Appellees make two arguments: (1) that the Court should *depart* from federal law and apply *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), an employment-law case, to retaliatory prosecution claims instead of *Hartman v. Moore*, 547 U.S. 250 (2006), a retaliatory prosecution case, and (2) that the Court should "*follow*" federal law and eliminate a decades-old West Virginia rule that qualified immunity is available to State officials sued in both their individual and official capacities for constitutional and common-law claims. As explained below, neither argument has any merit, and Appellees have offered no real reason to take either path other than the fact that there is no other way Appellees can win this case.

II. DISCUSSION OF LAW

A. **Lack of probable cause is an element of a plaintiff's claim for retaliatory prosecution, and probable cause existed in this case as a matter of law.**

Before proceeding with the analysis, it is again important to compare Appellees' characterization of the Appellants State Police officers' roles in this case to the undisputed facts. Appellees call Appellants "the critical law enforcement agency and officials involved in prosecuting Appellees on behalf of the State." (Resp. Br. at 1-2.) In discussing the troopers' roles, Appellees say that "*the State attempted to criminalize Appellees' exercise of their First Amendment rights.*" (*Id.* at 2 (emphasis added); *see also id.* at 11-12 n.3.) But let there be no mistake: Appellants are police officers.

But prosecutors prosecute, and the police police. Here, the prosecutors, for reasons of their own, decided to instead prosecute Appellees for obstruction-related offenses, rather than the crimes that the police investigated (burglary, conspiracy to commit burglary, and

petit larceny).¹ As discussed below, this distinction is critical to understanding why the Supreme Court of the United States' applies—and why this Court should likewise apply—a slightly

¹ Appellees' suggestion that the stolen property could not be used in the federal investigation and therefore the larceny was not a crime is absurd. See W. VA. CODE § 61-3-13(b) ("If a person commits simple larceny of goods or chattels of the value of less than one thousand dollars, such person is guilty of a misdemeanor, designated petit larceny, and, upon conviction thereof, shall be confined in jail for a term not to exceed one year or fined not to exceed two thousand five hundred dollars, or both, in the discretion of the court.").

Likewise, Appellees' argument (and with all due respect, the Court's similar statement in *Carney I*) that Appellees did not commit unlawful entry of Valerie Friend's residence just because the landlord helped them break in are incorrect. Laws proscribing burglary and unlawful entry are meant to protect present possession (like Valerie Friend's interest), not fee ownership (like owner Charles Burton's interest). See, e.g., *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 303 n.9 (6th Cir. 2005) ("In finding that an ex-spouse could be held criminally liable for trespassing on his own property, the state supreme court held that '[b]ecause the purpose of burglary law is to protect the dweller, we hold that custody and control, rather than legal title, is dispositive.' [*State v. Lilly*, 717 N.E.2d 322, 327 (Ohio 1999).] 'Thus, in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property.' *Id.* That proposition . . . is unremarkable in the landlord-tenant context. See *State v. Brisbin*, No. 54921, 1989 WL 12918, at *4 (Ohio Ct. App. Feb. 16, 1989) (holding that despite the fact that she owned the building, a landlord may be convicted of criminal trespass if she enters a tenant's residence during the term of the periodic tenancy without permission)."); *State v. Schneider*, 673 P.2d 200, 203-04 (Wash. Ct. App. 1983) (upholding conviction of landlord for burglary: "The law of burglary was designed to protect the dweller, and, hence, the controlling question here is occupancy rather than ownership. An owner of property can be guilty of burglarizing that property. For example, it is well established that a landlord can be guilty of burglarizing the premises of his tenant. . . . Finally, as the State argues, the method of entry—breaking the door latch—is inconsistent with any kind of permissive entry.") (citations omitted); *Bradley v. State*, 195 N.E.2d 347, 349 (Ind. 1964) ("In this connection it is well established, for example, that a landlord (the owner of the property) can be guilty of burglarizing the premises of his tenant (the possessor of the property) by breaking and entering without the permission of the tenant. 12 C.J.S. BURGLARY § 26, p. 685 . . .").

Here, it was never suggested that the landlord had the right to present possession of the house or that part of the house that Friend was living in, and it is undisputed that Friend, the occupant tenant, never gave either the landlord or Appellees permission to enter her residence. Furthermore, it is undisputed that Friend wanted Appellees arrested for stealing her camera, Bible, film, and papers. Thus, Burton was incompetent as a matter of law to grant permission for Appellee Jarvis (and a non-party accomplice, Patricia Jablensky) to enter Friend's residence. Jarvis and Jablensky committed a classic burglary, and Appellee Carney conspired with her to do so and aided her. Regardless, Defendants investigated Appellees for burglary, and unauthorized entry is not an element of burglary. See syl. pt. 2, *State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008); syl. pt. 4, *Slater* ("Unauthorized entry is not a required element of the crime of daytime burglary by breaking and entering as defined in W. VA. CODE § 61-3-11(a) (1999).").

In any event, whatever reasonable difference of opinion that exists as to whether Jarvis and Carney could have been convicted of burglary or petit larceny all too clearly serves to illustrate the real points in this case: Is it really appropriate under the circumstances to mulct police officers or their agency for reasonably believing that Appellees' entry into Friend's residents and removal of her property

different burden framework in retaliatory prosecution cases against the police than is applied in retaliatory employment cases against the employer.

Appellees undoubtedly would like the Court to believe that their whole criminal case was all the troopers' idea—because Appellees cannot sue the prosecutors, and they know it. But the record clearly reflects that this assertion—and Appellees' "fudging" to lump the troopers in with the prosecutor and the rest of "the State", or by misleadingly stating that there is evidence to support the assertion that "comments were made by Defendants *or people associated with Defendants* regarding [the allegedly retaliatory motive]" (Resp. at 12 n.3 (emphasis added))—are both undisputedly factually wrong and legally irrelevant.

1. Lack of probable cause is an element of a plaintiff's claim for retaliatory prosecution.

As they do in their qualified immunity argument (stating, as discussed below, that they want the Court to "clarify" that law), Appellees begin by asserting that this Court should "continue" to follow *Mt. Healthy*. Appellees say that "[h]istorically, where a plaintiff asserts he or she suffered some adverse consequence for exercising free speech rights, this Court regularly has followed the burden-shifting formula outlined in [*Mt. Healthy*]." (Resp. at 8-9.) This is misleading, and what Appellees have noticeably left out is the single most important fact to this issue: This Court has *never* applied *Mt. Healthy* where the "adverse consequence" was prosecution, and *all* of the cases that Appellees cite were—just like *Mt. Healthy*—*employment* cases, not—like this case—prosecution cases. Appellees' mischaracterization of the Court's jurisprudence is far too broad.

Instead, what Appellees really want is for the Court to *start* following *Mt. Healthy* and to ignore the perfectly well-reasoned bases that the Supreme Court of the United States gave

constituted crimes, especially if the prosecutor's office goes on to try Appellees for something else completely?

in *Hartman* (as explained in Appellants' Brief) for imposing a slightly higher burden on plaintiffs seeking to hold police officers responsible for the conduct of their prosecution (something that they are forbidden by absolute prosecutorial immunity from laying at the feet of the real decision-makers)—a basis that is equally applicable to state as federal cases. *See generally Hartman*.

And while *Mt. Healthy* has never properly been applied to prosecution cases for all of the reasons that the *Hartman* court made so clear, *Hartman*, on the other hand, *has* been applied outside the confines of prosecution cases. In *Osborne v. Grussing*, 477 F.3d 1002 (8th Cir. 2007), for example, the United States Court of Appeals for the Eighth Circuit applied *Hartman* to a plaintiff's claim of regulatory discrimination:

This case does not involve a public employee seeking to reverse an adverse employment action [as in *Mt. Healthy*]. We deal here with retaliation claims by citizens seeking to avoid the consequences of their illegal actions. **In a regulatory enforcement situation, the government has an even stronger interest in not putting the violator "in a better position as a result of the exercise of constitutionally protected conduct," so it is not surprising that later cases point toward a stricter causation requirement in this context than the burden-shifting standard adopted by *Mt. Healthy* in the public employment context.** For example, the Supreme Court held in *Hartman* that, when the alleged retaliatory injury is a criminal prosecution, proof that the prosecutor lacked probable cause to commence the prosecution is an affirmative element of the plaintiff's case.

Id. at 1005-06 (emphasis added).²

Furthermore, although there are many reasons to follow *Hartman* here, Appellees have not given the Court any *reason* to apply *Mt. Healthy* outside its employment context other than saying that doing so will be "more protective of free speech, and therefore, preferable."

² *See also Whren v. United States*, 517 U.S. 806, 810 (1996) (officer's subjective motivation is irrelevant in Fourth Amendment context because "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred").

(Resp. at 13.) In this context, "preferable" is in the eye of the beholder, and Appellees' argument fails to explain why this Court should ignore the Supreme Court of the United States' thoughtful *balancing* of individual First Amendment rights with the equally important societal interests in the prosecution of crimes and in the encouragement of police efforts in support thereof.

Appellees' own characterization of *Mt. Healthy* as allowing that once a plaintiff establishes her *prima facie* case, "the defendant can defeat the claim by showing that *the prosecution* would have proceeded anyway" (Resp. at 3 (emphasis added)) very well answers the question (even if it assumes something that is untrue—*i.e.*, that *Mt. Healthy* should ever be applied to prosecution cases): police officers like Appellants simply do not decide whether "the prosecution would have proceeded anyway." *Prosecutors* do. The limited fiction in which courts indulge in allowing claims against police officer for retaliatory prosecution has its limits, and the *Hartman* framework is a balanced recognition of those limits.

2. Probable cause existed in this case as a matter of law.

Appellees argue that even if they lose the legal battle, they can win the factual one by asserting that "the absence of probable cause ordinarily will be a fact issue that cannot be resolved by a motion to dismiss or motion for summary judgment." (Resp. at 12.) But this, too, is wrong because of what it fails to acknowledge: *In this case*, probable causes existed *as a matter of law*, a fact that Appellants have already covered in their brief. Thus, Appellees' reliance on the lower court's decision in *Hartman* and a multi-page discussion of other cases for the proposition that the existence of an *indictment alone* is not enough to establish probable cause as a matter of law are simply inapplicable here, because *far more* existed in this case. (*See generally* Appellants' Br. (noting that grand jury indicted Appellees,³ trial court—more than

³ *See, e.g., Rhodes v. Smithers*, 939 F. Supp. 1256, 1274 (S.D. W. Va. 1995) ("Although the converse principle is variously stated, it is equally well established that where an officer presents all

once—denied Appellees' dispositive motions,⁴ and most importantly, jury convicted Appellees⁵.)

If the circuit court had correctly applied *Hartman*, dismissal for failure to state a claim would have been required because Appellees cannot possibly establish an element of their claim against Appellants.

B. For well-reasoned—and well-explained—policy bases, West Virginia has clearly afforded and should continue to afford qualified immunity to officers of the State sued in both their individual and official capacities for both constitutional and common-law claims, and in this case, Defendant State Police officers were entitled to that qualified immunity.

Here, Appellees have again mischaracterized what they are asking for in an effort to soften it up. Appellees are not asking the Court to "clarify" West Virginia law as to whether a state agency may, under appropriate circumstances, be entitled to qualified immunity (Resp. at 3), nor is there any "apparent confusion" in West Virginia law as to whether qualified immunity applies to individuals and their employer or to negligence as well as constitutional claims (*id.* at 27). And this Court has not "suggested" that these are the law. (*Id.* at 27 & 31.) Instead, what

relevant probable cause evidence to an intermediary, such as a prosecutor, a grand jury, or a magistrate, the intermediary's independent decision to seek a warrant, issue a warrant, or return an indictment breaks the causal chain and insulates the officer from a section 1983 claim based on lack of probable cause for an arrest or prosecution.").

⁴ The Circuit Court of Mingo County denied Appellees' pretrial motions to dismiss the charges and their post-trial motions for a judgment of acquittal. (Compl. ¶ 30.) See also *Carney I*, 222 W. Va. at 155 n.9, 663 S.E.2d at 609 n.9; *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991) (finding it "noteworthy" that court had twice determined officer named in civil rights suit "had demonstrated probable cause" to arrest plaintiffs).

⁵ (See Compl. ¶ 32 (admitting that a Mingo County jury convicted Appellees of obstructing and conspiracy to obstruct a police officer).) See syl. pt. 2, in part, *Boxer v. Slack*, 124 W. Va. 149, 19 S.E.2d 606 (1942) ("A conviction for offense charged, though subsequently reversed, is conclusive evidence of 'probable cause' . . ."); see also syl. pt. 2, *Hoffman v. Hastings*, 116 W. Va. 151, 178 S.E. 812 (1935) (holding that conviction before justice of the peace, even though later reversed, "is conclusive of the existence of probable cause"); *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U.S. 141, 159 (1887) (noting rule that "the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal"); see generally *Carney I*).

Appellees dismissively characterize as "some discussion" in the cases (*id.*) were in fact those cases' *syllabus points*, and this Court has clearly and unmistakably *held* that qualified immunity applies to both individual- and official-capacity claims:

In cases arising under W. VA. CODE § 29-12-5, and in the absence of express provisions of the insurance contract to the contrary, **the immunity of the State is coterminous with the qualified immunity of a public executive official whose acts or omissions give rise to the case.** However, on occasion, the State will be entitled to immunity when the official is not entitled to the same immunity; in others, the official will be entitled to immunity when the State is not. The existence of the State's immunity of the State must be determined on a case-by-case basis.

syl. pt. 9, *Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996) (emphasis added), and to both constitutional and negligence claims:

In the absence of an insurance contract waiving the defense, **the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency** not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W. VA. CODE § 29-12A-1, *et seq.*, **and against an officer of that department acting within the scope of his or her employment**, with respect to the discretionary judgments, decisions, and actions of the officer.

Syl. pt. 6, *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995) (emphasis added).^{6,7}

Moreover, this statement in Appellees' response:

This Court repeatedly has asserted that the development of qualified immunity under state law *must conform* to and follow the federal law of qualified immunity.

(Resp. at 18 (emphasis added)) is patently false. This court has certainly accepted that where federal and state policy overlap, it *makes sense* to align the two bodies of law. In that vein, the

⁶ To the extent that the distinction retains any force, there has (properly) been no suggestion in this case that Appellants' conduct was somehow "ministerial," as the Court discussed that term in *Chase Securities*. Instead, that conduct was plainly discretionary.

⁷ It is undisputed that the insurance policy at issue here does not waive any applicable defenses.

Court has said that "*it would seem appropriate to construct, if possible, an immunity standard that would not conflict with the federal standard.*" *State v. Chase Secs., Inc.*, 188 W. Va. 356, 361, 424 S.E.2d 591, 596 (1992) (emphasis added); accord *Clark*, 195 W. Va. at 277, 465 S.E.2d at 379. But the Court has never said anything nearly so bold or sweepingly categorical as Appellees "must conform" claim.⁸ Affording the State and its officers in their official capacities qualified immunity does not conflict with any federal standard, nor, as Appellees assert, is doing so "contrary to all existing federal law." (Resp. at 28.). It simply supplements it by implementing state public policy that is not present in § 1983 cases or in federal law generally.⁹

Instead, what Appellees want—and what they finally if reluctantly admit—is for this Court to *reverse* West Virginia law (Resp. at 29), something that Appellees provide absolutely no reason for whatsoever, other than, "That's what federal courts do."¹⁰

⁸ It is typically *plaintiffs* who are all too keen to point out that West Virginia's law need not follow federal law and that the State is free to carry out its own policy when dealing with state-made causes of action. Indeed, for good examples of this, we need look no further than Appellees' very own complaint and brief. In their complaint, Appellees are painfully careful to avoid federal subject matter jurisdiction in order to stay in *state* court, but then they spend half of their brief arguing that the Court should ignore state law and instead apply the law of the federal courts that they so meticulously sought to avoid. And in their brief, after arguing for pages about how good federal qualified immunity law is, they then go on to about face and argue that the Court should definitely *not* follow the Supreme Court of the United States' decision to apply one standard to wrongful employment decision cases (*Mt. Healthy*) and another standard to wrongful prosecution cases (*Hartman*).

⁹ Appellees also suggest that affording qualified immunity to officials will result in an impossible test to meet: the "reasonable State" standard. (Resp. at 28.) But they have missed the point: the State acts—and can, under certain circumstances, become liable—only through the acts of its agents, who are humans. The "reasonable person" standard applies to such conduct just as easily in official-capacity claims as it applies to allegations against individual-capacity defendants.

¹⁰ Appellees appear to suggest that this Court may not create a *state-law* qualified immunity rule that affords qualified immunity for *state-law* claims under circumstances where federal law would not afford qualified immunity for analogous federal-law claims. *But see Chase Secs.*, 188 W. Va. at 364, 424 S.E.2d at 599 ("It is obvious that an immunity standard for a public official needs to encompass all types of public official liability, *not just the range of cases covered by Section 1983.*") (emphasis added). Appellees, it appears, have conflated the law of qualified immunity with the unrelated law requiring that a *state's conduct* may not fall below federal constitutional standards even if that state's state-law standards in the same area are less protective, nor may a state purport to immunize itself against federal-standard-based claims (like Florida had tried in *Howlett v. Rose*, 496 U.S. 356 (1990), discussed in *Chase Securities*). But no court has ever held that *state law* may not provide less protection to individuals than

1. **West Virginia should continue to afford qualified immunity to officers of the State sued in both their individual and official capacities for both constitutional and common-law claims.**

Appellees argue that the Court should reverse syllabus point 9 of *Parkulo*, arguing that West Virginia should blindly "follow" federal law in this area. What Appellees overlook is that the circumstances under which federal courts have held qualified immunity inapplicable to § 1983 claims do not mirror this Court's application of the doctrine to official-capacity claims in state constitutional or negligence claims. On the other hand, both this Court¹¹ and the State's Legislature¹² have provided perfectly good policy reasons for, in this instance, departing from the commonly but by no means always followed federal jurisprudence.

One of the many reasons why federal law and state law part ways on this issue is evident in Appellees' at best incomplete assertion that "it cannot be disputed that in a federal constitutional tort action, qualified immunity is only applicable to an individual defendant and not the employer, agency, or State." (Resp. at 26 (emphasis omitted).) This is because there has never been any need to as much as *discuss* qualified immunity in such cases, since there can be

analogous federal law provides, and surely Appellees do not mean to suggest that the United States Constitution somehow *requires* this Court to reverse *Chase Securities*, *Clark*, and their progeny.

¹¹ See, e.g., *Parkulo*, 199 W. Va. at 177-78, 483 S.E.2d at 523-24 (discussing the public's important interest, derivative of the individual officer's interest, in allowing government officials to perform their jobs free of paralyzing timidity, as reflected in, for example, RESTATEMENT (SECOND) OF TORTS 2d § 895D & cmt. j (1979): "[W]e endorse the principle, expressed in the RESTATEMENT, that the immunity of the State is ordinarily coterminous with the qualified immunity of the public executive official whose acts or omissions give rise to an action We have applied that principle . . . in *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). . . . Qualified immunity is said most often to be available to protect the public executive officer because . . . an officer should not be faced with the choice of doing his duty and being constantly faced with litigation for doing so. **The public interest is that the official conduct of the officer not be impaired by constant concern about personal liability.**") (emphasis added).

¹² The Legislature has by statute, for example, afforded local governments a substitute for qualified immunity, and "absent other legislative direction or express insurance contract provisions, we will apply to the issue of the State's liability in W. Va. Code § 29-12-5 cases the immunities and defenses that have been sanctioned in analogous governmental tort cases, including cases involving the immunity of local governments not entitled to the sovereign immunity of the State, with careful sensitivity to the limitations on such cases that have been judicially developed or are reasonably implied by that development." *Parkulo*, 199 W. Va. at 176, 483 S.E.2d at 522.

no liability at all against the "employer, agency, or State." See *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989). So Appellees are at best hyper-technically correct in their assertion that § 1983 law does not afford qualified immunity to state defendants, because there is no § 1983 law on qualified immunity where the defendant is a state.

Another difference was explored in *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980), a § 1983 case against a municipality:

In each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. *But there is no tradition of immunity for municipal corporations*, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.

445 U.S. at 638 (citations and footnote omitted); see also *id.* at 638-44 (discussing same). Thus, the reasons for not affording local governments qualified immunity include a recognition of the lack of an historical basis for doing so.¹³ As discussed in *Will* and other cases, however, there is a solid history in affording states such immunity—one that counsels against arbitrarily applying *Owen* to state agency official-capacity claims.¹⁴

¹³ Furthermore, affording state-law qualified immunity to the State protects the same important governmental interest that the strictures imposed by *Monell v. City of N.Y. Dept. of Social Servs.*, 436 U.S. 658 (1978), do by shielding local governmental entities from frivolous claims.

¹⁴ Appellees suggest that individual qualified immunity serves to protect individuals in a way that is inapplicable where it will be the State's coffers that will take the hit. (Resp. at 26.) Not only does that assertion overlook the reality that even in individual-capacity defendant cases, these very same government funds will (directly by indemnity or indirectly through insurance) pay most if not all judgments (so even while the kind of "personal liability" that Justice Brennan said motivated affording individuals qualified immunity in *Owen*, 445 U.S. at 653, has all be vanished, if it ever existed, certainly nobody would argue that this means federal individual-capacity-defendant qualified immunity should be

This history also includes examples of the Supreme Court of the United States expressly affording state executive-branch officials qualified immunity. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (in granting qualified immunity to Ohio National Guard adjutant general and governor for Kent State shootings, holding: "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."), *overruled on other grounds, Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Appellees have offered no reason to overrule *Parkulo*, and there are manifold reasons to adhere to it, not the least of which is the value in "the important principle that the law by which people are governed should be 'fixed, definite, and known,' and not subject to frequent modification in the absence of compelling reasons." *Bradshaw v. Soulsby*, 210 W. Va. 682, 690, 558 S.E.2d 681, 689 (2001) (Maynard, J., dissenting) (quoting *Booth v. Sims*, 193 W. Va. 323, 350 n.14, 456 S.E.2d 167, 194 n.14 (1995)).

Similarly, Appellees have offered no sound reason for overruling *Clark's* rule that qualified immunity is not limited to constitutional claims. "The phrase 'constitutional or statutory rights' [in the rule] is not to be thought of as a term of limitation." *Chase Securities*,

eliminated), it also requires incorrectly assuming that the State somehow has less of an interest in protecting its taxpayers' resources than individuals have in protecting their own, individual resources. As the Court has observed, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (quoted in *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465, 465 (1987), *overruled in part on other grounds, Chase Securities*). Appellees have offered no reason that a police *department's* lot should be any unhappier.

188 W. Va. at 362 n.17, 424 S.E.2d at 597 n.17 (1992) (citing *Davis v. Scherer*, 468 U.S. 183 (1984)). As the Court has recognized, the concepts of qualified immunity and negligence are hardly incompatible, since "in immunity cases . . . the official's act must be shown to have violated clearly established law of which a reasonable person would have known. The concept of a reasonable person is not entirely foreign to common law principles of negligence." *Chase Securities*, 188 W. Va. at 364, 424 S.E.2d at 599 (footnote omitted).

Similarly, federal law also does not *deprive* state defendants of qualified immunity in negligence cases. As with *Will*, there would be little reason for any such doctrine to have developed, given that negligence is not cognizable under § 1983, *see, e.g., Daniels v. Williams*, 474 U.S. 327 (1986), and there is little other "federal negligence" law, especially that might apply against non-consenting states, *see* U.S. CONST. Am. XI.

Finally, this Court is hardly alone in refusing to constrain qualified immunity as narrowly as Appellees propose. *See, e.g., Popow v. Town of Stratford*, No. 3:07-CV-1620 (VLB), 2010 WL 537752, at *6 & *11 (D. Conn. Feb. 12, 2010) (Conn. law applies qualified immunity to negligence claims); *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (same, Ky. law); *Grawey v. Drury*, 567 F.3d 302, 315-16 (6th Cir. 2009) (same, Mich. law); *Hannon v. State*, 786 N.Y.S.2d 613 (N.Y. App. Div. 2004) (same, N.Y. law); *Frields v. St. Joseph's Hosp. & Med. Ctr.*, 702 A.2d 353, 355 (N.J. Super. Ct. App. Div. 1997) ("This test recognizes that even a person who acted negligently is entitled to a qualified immunity, if he acted in an objectively reasonable manner."); *J.R. v. Gloria*, 593 F.3d 73, 82 (1st Cir. 2010) ("Rhode Island law allows state officials like Gloria to invoke qualified immunity against state law negligence claims.").

2. **In this case, Defendant State Police officers were entitled to qualified immunity because they did not violate any of Appellees' clearly established rights.**

Appellees argue that even if qualified immunity applied, the circuit court nonetheless still did not err because the right that Appellees claim was violated was clearly established. Appellees' argument about how specific conduct must have been previously held to be violative of a constitutional right before it is clearly established (*see* Resp. at 21-23), however, is at best, incomplete and at worst incorrect. They argue that they need not "cite cases in which the specific sort of conduct complained of was found to be unlawful" (*id.* at 22 (quotations and citation omitted)) so long as if "*a court* were presented with such a situation, the court would find that plaintiff's rights were violated" (*id.* (emphasis added) (quotations and citation omitted)).

None of these cases was decided in this circuit, and none properly reflects the law of qualified immunity, as carefully explained by the Supreme Court of the United States in the cases that this Court has adopted. In *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), the Supreme Court of the United States was careful to explain—at length—that it is not enough to ask in the abstract whether the asserted right was clearly established:

This inquiry, it is vital to note, must be undertaken *in light of the specific context of the case, not as a broad general proposition*; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

Id. at 201. Appellees would have the Court apply a blunt instrument to qualified immunity analysis. But proper analysis is far finer (and also make perfectly clear that the question is not what a court would later think in the solitude of chambers, but what a reasonable police officer would, under the circumstances, think):

In this litigation, for instance, there is no doubt that [*Graham v. Connor*, 490 U.S. 386 (1989)], clearly establishes the general proposition that use of force is contrary to the Fourth

Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in [*Anderson v. Creighton*, 483 U.S. 635 (1987),] "that the right the official is alleged to have violated must have been 'clearly established' *in a more particularized, and hence more relevant, sense*: The contours of the right must be sufficiently clear *that a reasonable official* would understand that what he is doing violates that right." 483 U.S., at 640. The relevant, dispositive inquiry in determining whether a right is clearly established is *whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted*. See *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

Id. at 201-02 (parallel citations omitted) (emphasis added).

In other words, "[i]f the law did not put *the officer* on notice that *his conduct* would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202 (emphasis added) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")); *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("A police officer should prevail on an assertion of qualified immunity *if a reasonable officer possessing the same information could have believed that his conduct was lawful.*") (emphasis added); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (when legality of particular course of action is open to reasonable dispute, officer is not liable: under doctrine of qualified immunity, "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines"), *cert. denied*, 506 U.S. 1080 (1993).

Here, as the record reflects, Appellants reasonably (indeed, correctly) believed that Appellees had committed burglary, conspiracy to commit burglary, and petit larceny. They investigated Appellees for those crimes. Another (non-party) officer drew up the charging instrument for those crimes. But the prosecuting attorneys' office subsequently prosecuted Appellees for other crimes, for which a grand jury indicted and a trial jury convicted Appellees,

although the Court subsequently vacated those convictions. Appellees suggest that there is some difference between whether the elements of cause of action for the violation of a right are clearly established versus whether the right itself is clearly established. Even if that were true in the abstract, in this case, it makes no difference, because until this case is decided, it remains firmly *unclearly* established whether a police officer who allegedly harbors a retaliatory motive (accepting Appellees' allegations as true) can nonetheless constitutionally arrest a criminal if that officer has objectively reasonable probable cause. Thus, the existence of probable cause to arrest is, in this case, an element of both the right at issue *and* the cause of action for an injury to that right. Until this case, the elements of that right—and the elements of that cause of action—will be hotly disputed, but in any event not "clearly established."

III. CONCLUSION

As for the elements of Appellees' claims, this case should be governed by the same standard set out in *Hartman*. Because probable cause existed as a matter of law, Appellees could not possibly establish an element of their claims. That forms an independently adequate basis to hold that the circuit court erred in not granting Appellants' motion.

As for qualified immunity, this case is (and should remain) governed by *Parkulo*, and *Clark*, and the circuit court erred in refusing to apply those clear standards. The Defendant officers are public officers; they were acting within the scope of that employment; they exercised discretionary judgment to investigate and subsequently arrest Appellees for unlawfully breaking into a residence and taking property that was not theirs—clear violations of the law. The prosecutor—who cannot be and thus is not a party to this case—decided to prosecute Appellees for different crimes, for which a jury convicted Appellees (although this Court subsequently reversed those convictions). Because the contours of the rights Appellees claim Appellants violate will not be clearly established until this Court rules on the previous issue and

in any event because probable cause existed as a matter of law, the circuit court should have afforded the State Police defendants qualified immunity in their individual and official capacities for all of Appellees' claims.¹⁵

Appellees are barred from suing the prosecutors, so they have turned to suing the police. Understandably, Appellees do not like *Hartman*, or *Clark*, or *Parkulo*, and they ask the Court to ignore all of these cases. But Appellees have not given the Court any good reason to do so, other than it is the only way Appellees can win. Appellants submit that this is not a good enough reason, and furthermore they have demonstrated on the other hand that there continue to exist many good reasons to reject Appellees' theories.

Dated this 8th day of April 2010.

**WEST VIRGINIA STATE POLICE, D.M.
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¹⁵ See syl. pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996) ("The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a *bona fide* dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.").

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2010, I served the foregoing *Reply Brief of Appellants* on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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