In The
United States Court Of Appeals
For The Sixth Circuit

CASE NO: 12-4476

MICHAEL BRAY; JAYNE BRAY, individually and natural parents and guardians on behalf of A.B., I.B., M.B., N.B., G.B., P.B.; EPIPHANY BRAY; BESEDA BRAY; PERSEVERANCE BRAY; ALETHA BRAY; ISAAC BRAY
Plaintiffs-Appellants,

v.

PLANNED PARENTHOOD COLUMBIA WILLIAMETTE INC.; SQUIRE, SANDERS & DEMPSEY LLP; JOEL KIMMEL; MICHAEL STEVENS; JOHN DOES, One Through Ten; MICAH STEVENSON; UNITED STATES OF AMERICA
Defendants,

and

CHRIS RILEY; JOEL KIMMET
Defendants-Appellees.

ON APPEAL FROM THE SOUTHERN DISTRICT OF OHIO AT COLUMBUS

REPLY BRIEF OF THE APPELLANTS

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STATUTES AND CONSTITUTIONAL PROVISIONS

Appellants Michael and Jayne Bray, Epiphany Bray, Beseda Bray, Perseverance Bray, Alethea Bray and Isaac Bray (collectively "Bray family") hereby reply to the *Brief for Appellees Chris Riley and Joel Kimmet* ("Marshals' Brief") filed on March 22, 2013.

REPLY TO APPELLEES' STATEMENT OF THE ISSUES

Risking redundancy, but wary of the old adage that he who frames the issue wins the debate, the Bray family must begin by reiterating that their claims are not based on the actions of Appellees/Marshals Riley and Kimmet in "enforcing the federal court's writ of execution," (*Marshals' Brief* at 2), but rather on the Marshals' unlawful conduct that exceeded and/or deviated from the order(s) of the District Court.

REPLY TO APPELLEES' STATEMENT OF FACTS

The Bray family submits that at least two of the statements in the *Marshal's Brief* misrepresent the facts as alleged by the Bray family and thereby risk misleading the Court's analysis.

First, the Bray family complaints are not based on the failures of the Marshals to "sufficiently communicate with them" or to "enlist their cooperation in searching the home…." (*Marshals' Brief* p. 3). Neither of those failures, standing alone, would support a claim and neither of the failures violated the District

Court's orders. Those failures do, however, bear on the defenses raised by the Marshals and the reasonableness of the Marshals' conduct.

Second, the Bray family complaints do not include that the Marshals "permitted attorneys for the judgment creditor to be present to identify property subject to seizure." (*Marshals' Brief* p. 3). It is quite clear that the District Court authorized a Planned Parenthood representative to be present for that purpose. Rather, the Bray family complains that multiple other strangers were allowed to be present, to roam about the premises, and to engage in intrusive activities unrelated to identifying "property subject to seizure."[1]

REPLY TO ARGUMENTS OF APPELLEES

FIRST REPLY ISSUE: Absolute Quasi-Judicial Immunity.

A. Philosophical Underpinning: Integrity and Independence of Judiciary.

Apparently missing the irony, the Marshals opened their discussion of absolute quasi-judicial immunity with case law discussing its philosophical underpinnings. Those values include judicial "independence," (*Marshals' Brief* at 18), "ensuring the integrity of the judicial process," (*Id*. at 19), and judicial freedom "to make impartial decisions…." (*Id*). The Marshals seek refuge under

[1] Although the Writ, in plain English, authorized a single Planned Parenthood representative to be present to assist the Marshals, the Bray family would not have complained had two attorneys (rather than one) been present. The Bray family would not be so technical or petty. On the other hand, it is not petty injury to know that unknown agents of your legal and ideological adversaries are rummaging through your underwear drawers.

those principles while asserting that they "are considered an arm of the judicial officer who is immune." (*Id*).

Unfortunately, it is those very values that were violated by the Marshals in this case when they elected to abandon their neutrality and conspired with Planned Parenthood's attorneys to engage in acts not authorized by the Court and violative of the Fourth Amendment. No one valuing the integrity of the judiciary would condone an "arm of the Court" plotting *ex parte* with one party to the detriment of the other, and the Bray family refuses to believe that the District Judge seriously blesses such behavior. The stated philosophical and policy bases for judicial immunity (not to mention public confidence in the judiciary) disappear if judicial "integrity" and "independence" can be exercised in such a way.

Yet, the Bray family recognizes that judicial conspiracies have indeed been immunized, to the great scandal of the judiciary. The most high profile case is *Stump v. Sparkman*, 435 U.S. 349 (1978), where a judge and other parties were awarded absolute immunity for conspiring to sterilize a mentally challenged woman without her consent. A lower profile case, relied upon in this case by the District Court and by the Marshals, is *Cooper v. Parrish*, 203 F.3d 937 (6th Cir. 2000), wherein the judicial officer issuing *ex parte* restraining orders had conferred privately with, and offered "ex parte legal advice" to, the prosecuting attorneys seeking the orders. *Id.* at 942. It is bewildering how such conspiratorial betrayals

of judicial neutrality can serve judicial "independence" or even be deemed a "judicial function."

Fortunately those are not the facts of this case. The District Judge conspired with no one and maintained his neutrality. The U.S. Marshals betrayed that neutrality. The central immunity question presented by this case is whether absolute immunity is appropriately extended to conspiracies by the law enforcement "arm of the court."

B. Fourth Amendment Problems: Allowing Law Enforcement To Treat A Writ of Execution Like A General Warrant.

The District Court never reached a Fourth Amendment analysis because of what it considered the dispositive immunity questions. The *Brief of Appellants*, pp. 22-26, presented a basic Fourth Amendment analysis addressing warrantless searches and seizures to highlight both the unlawfulness and the objective unreasonableness of the Marshals' conduct. The Marshals have responded that the Bray family has forfeited that issue by not developing the argument even further. (*Marshals' Brief* pp. 24-25, n. 2). Not only did the Bray family not forfeit any issue, but the response in the *Marshals' Brief* (pp. 20-24) compels the Bray family to develop it further here.

The Marshals predictably defend the District Court's expansive view of what the Writ of Execution ordered and authorized. In effect, both the District

Court and the Marshals are giving the Writ of Execution the force and effect of the dreaded general warrant.

> It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the *Fourth Amendment*. [21] Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures. As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause. [23]

Payton v. New York, 445 U.S. 573, 583-84 (1980). The Court expounded:

> "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Boyd v. United States, 116 U.S. 616, 625*." *Stanford v. Texas, 379 U.S. 476, 481-482*.

Payton at 583, n. 21.

According to the District Court and the Marshals, a writ of execution knows no bounds. The "writ of assistance" is back! Again assuming facts not pled, the

Marshals argue (p. 23) that they could not have seized the identified items "without searching in and throughout the residence." Such a conclusion assumes, without an order to do so, without evidence and contrary to the pleadings, that the Bray family was engaged in the very "cat-and-mouse games," (*Marshals Brief* at 24), that the Marshals claim they want to avoid. The Bray family is confident that discovery will establish that the "general warrant" approach for searching the entire house was a pre-planned scheme with Planned Parenthood's attorneys, and not something required or necessary as a factual matter.

Consequently, this Court must decide whether a broadly worded writ of execution can, at the sole discretion of law enforcement, be treated as a "general warrant" or "writ of assistance," with the cloak of absolute immunity available to everyone.

C. Distinguishing Court Ordered Conduct from Independent Police Discretion.

All roads still lead back to a determination of what conduct was ordered by the Court and what conduct is charged to the discretion of the Marshals.

The Marshals perilously place almost all of their eggs in the basket of *Cooper v. Parrish*, 203 F.3d 937 (2000), to justify the District Court's "implicit" authorization for the arrest of Mr. Bray and the expansive search of the Bray home. But *Cooper* presents a big problem for the Marshals. In *Cooper,* law enforcement personnel had obtained a temporary restraining order (TRO) specifically

authorizing them to restrain "parties, proprietors, , putative owners, employees, agents …[and] all other persons of any kind or at any place from devaluing, removing diminishing in quality, destroying, deleting , amending or altering the Res.." *Id.* at 949. The TRO further authorized law enforcement to "seize all personal property of any type or kind…whether located on or within the Place or some other location…." *Id.*

So, unlike the writ in this case, the *Cooper* defendants had obtained a judicial order **explicitly** authorizing, in sweeping language, restraints of everyone and seizures of property from everywhere. Cooper does not help the Marshals in this case.

Nor does *Malley v. Briggs*, 475 U.S. 335 (1986), help the Marshals in this immunity debate. Typically cited for authority on qualified immunity, as did the (*Marshals Brief* p. 27), *Malley* has something to say about absolute immunity.

In *Malley*, the Supreme Court considered and rejected on policy grounds the defense of absolute immunity for police officers who obtain an arrest warrant when probable cause is objectively lacking. The Court stated:

> In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present. True, an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his

> affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.

Id. at 343-44.

With *Malley* denying to law enforcement the blanket of absolute immunity even when a judicial officer signs a warrant, it certainly follows that law enforcement be required to seek a warrant in the first place when executing on a non-specific court order and confronted with facts or circumstances suggesting the need for search or seizure not explicitly ordered. Any contrary result, such as permitting the writ in this case to carry boundless "implied" powers, creates confusion and ill-serves the rule of law.

SECOND REPLY ISSUE: Qualified Immunity.

Predictably, the Marshals invoke qualified immunity in the face of indisputably settled Fourth Amendment case law regarding warrantless searches and seizures, arguing that only precedent with unreasonably high levels of factual correlation can deprive them of that immunity.

The novelty of the events during the raid of the Bray home, created largely by the Marshals' own decision to collaborate *ex parte* with Planned Parenthood's attorneys, does not provide immunity to the Marshals. As this once Court noted:

> The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not

> follow that if such a case arose, the officials would be immune from damages because no previous case had found liability in those circumstances.

McBride v. Village of Michiana, 100 F.3d 457, 460 (6th Cir. 1996) (quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

Construing the allegations in the Complaint most favorably to the Bray family, one must conclude that (i) there was no cause for the Marshals to stage an unannounced raid with firearms and flak jackets in full lock-down mode, (ii) just to retrieve some books, computers, cameras and a small number of other personal items, (iii) that the Bray family was fully prepared to hand over. (*First Amended Complaint (Corrected For Redactions and Signature),* R.13, Para. 4.10, 4.11; Page ID#s 114-115). According to the allegations, the constitutional violations that followed were the result of deliberate choices made by the Marshals to collaborate with Planned Parenthood's view of things, not the result of any judicial order and not the result of any objectively reasonable conclusions from available facts. (*First Amended Complaint (Corrected For Redactions and Signature),* R.13, Para. 4.16; Page ID# 117-119). While maintaining that no clearly established law prohibited such a warrantless raid, the *Marshals' Brief* did knock down some straw men and posit other arguments that require comment.

First, the Bray family will not reply to the Marshals' immunity arguments about the wrongful seizure of certain possessions from the Bray home, (*Marshals'*

Brief pp. 28-29), because those acts do not relate to the unconstitutional arrest of Michael Bray or the warrantless search of the home (Causes of Action One through Four). They relate only to the state law conversion claim (Fifth Cause of Action) which the Bray family is not pursuing on appeal.

Second, the Bray family never argued that immunity should be denied because the Marshals relied on the "assistance of private citizens who can help identify property subject to seizure." (*Marshals' Brief* pp. 29-30). Clearly the presence of a representative of Planned Parenthood was judicially authorized. *Planned Parenthood of the Columbia-Willamette, Inc. v. Am. Coal. Of Life Activists*, Case No. 2:05-mc-002, Doc 43 (S.D. Ohio, Aug. 17, 2006. Rather, it is the Bray family's position that it was highly unreasonable and an egregious privacy violation for the Marshals to have allowed multiple strangers affiliated with Mr. Bray's adversary to roam about the Bray home doing who-knows-what-other-things that did not involve identifying property to be seized. Having a stranger videotape every room in the house was one of those things.[2]

The Marshals cite *U.S. v. Clouston*, 623 F.2d 485 (1980) and *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) ("*Bills II*") to support their right to invite who-knows-who to roam the Bray house, but *Bills II* cuts against granting immunity on the pleadings in those circumstances:

[2] Because Mr. Bray was confined to a sofa, he can only speculate what they were doing. A few depositions will shed some light on this mystery.

> The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly defined. Clouston says they may assist. Ayeni says they may not exploit their role for commercial gain, and Bills I says that the reasonableness of the officer's invitation in this particular case must go to a jury, as it did.

Id. at 603. In *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) ("*Bills I*"), this Court framed "the principal question [as] whether the officers exceeded the scope of their authority under the warrant in inviting [a private party] to conduct an inspection of a private dwelling they controlled." *Bills I* at 705. Citing *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989), the Court concluded that "questions involving the manner in which a search warrant was executed were questions for the jury…." *Bills I* at 705. How much more so this case demands some basic discovery, if not a jury trial, considering that the Marshals were operating without a search warrant.

Nor did the Bray family argue, as suggested at (*Marshals' Brief* p. 30), that the Marshals had a duty "to enlist residents of the place to be searched in a joint enterprise" or that there was clearly established law for that proposition. The Bray family does argue, however, that it was objectively unreasonable under the Fourth Amendment and for immunity purposes for the Marshals to have conducted a warrantless search of the home under the guise of "searching" for property subject to the writ, all the while ignoring (and arresting) the Bray family member(s) who were perfectly prepared to surrender the property. (*First Amended Complaint*

(Corrected For Redactions and Signature)(R. 13; Para. 4.10, 4.12, 4.15, Page ID #'s 114-117). [Pages 8-11])

Assuming facts contrary to the pleadings, the Marshals attempt to justify their indiscrete conduct with case law referencing "uncooperative property owners …who threaten to put the search at risk." (*Marshals' Brief* p. 30). As pled, there were no such people at the Bray house on the day of the raid and no such justification.

Moving on to the defense of qualified immunity for the arrest of Mr. Bray, the Marshals deny that Mr. Bray's detention was an "arrest or similar seizure requiring probable cause," (*Marshals' Brief* p. 31), and reach for support from *Michigan v. Summers*, 452 U.S. 692 (1981). The Marshals' argument fails for two reasons.

First, the Supreme Court confirmed in *Summers* that even a brief detention "constituted a 'seizure' within the meaning of the Fourth Amendment." Id. at 696. Second, the Marshals in this case had neither an arrest warrant not a search warrant for the Bray home. Absent a warrant and any cause to believe that Mr. Bray was a threat or had committed a crime, the Marshals held Mr. Bray under his own home for four hours while they picked up some books and electronic equipment. Nothing in *Summers* supports such a fiasco, and indeed Summers offered the following from *Dunaway v. New York*, 442 U.S. 200 (1979):

> Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion or even "strong reason to suspect" was not adequate to support a warrant for arrest.'

Dunaway at 213; *Summers* at 697.

Summers was decided three years before *Welsh v. Wisconsin*, 466 U.S. 740 (1984), wherein the Supreme Court greatly fortified the sanctity of the home.[3] (See *Brief of Appellants*, pp. 24-25). Thirty-two years after *Summers* was decided and twenty-nine years after *Welsh*, the Marshals have cited no justification for their warrantless conduct at the Bray home and no grounds for qualified immunity.

THIRD REPLY ISSUE: This Case Does Not Involve the Creation of a New Implied *Bivens* Actions

Arguing alternative grounds for this Court to uphold the District Court's judgment, the Marshals erroneously suggest that the Bray family's third cause of action ("warrantless, unreasonable and unconstitutional; search of the Bray home without probable cause") seeks to create a new "implied" remedy under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] It is not insignificant that, aside from having search warrant in hand, the police in *Summers* encountered and detained the resident outside of the home.

(*Marshals' Brief* pp. 33-39). This issue was asserted by the Marshals below but not specifically addressed by the District Court.[4]

The development of and the limitation on *Bivens* claims is set forth in *Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007):

> Bivens…held that the victim of a Fourth Amendment violation by federal officers had a claim for damages, and in the years following we have recognized two more nonstatutory damages remedies, the first for employment discrimination in violation of the Due Process Clause, Davis v. Passman, 442 U. S. 228 (1979), and the second for an Eighth Amendment violation by prison officials, Carlson v. Green, 446 U. S. 14 (1980). But we have also held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a Bivens remedy unjustified.
>
> We have accordingly held against applying the Bivens model to claims of First Amendment violations by federal employers, Bush v. Lucas, 462 U. S. 367 (1983), harm to military personnel through activity incident to service, United States v. Stanley,483 U. S. 669 (1987); Chappell v. Wallace, 462 U. S. 296 (1983), and wrongful denials of Social Security disability benefits, Schweiker v. Chilicky, 487 U. S. 412 (1988). We have seen no case for extending Bivens to claims against federal agencies, FDIC v. Meyer, 510 U. S. 471 (1994), or against private prisons, Correctional Services Corp. v. Malesko, 534 U. S. 61 (2001).

In light of that history, all of the Marshals' arguments attacking the Bray family's *Bivens* claims lack merit. Primarily, the Marshals are wrong because the Bray family's third and fourth causes of action involve no novel theories or

[4] The District Court did conclude that the Bray family's Third and Fourth Causes of Action are redundant (*Opinion and Order*, R.42, Page ID# 346), a conclusion that the Bray family does not oppose for purposes of this appeal.

expansions of the *Bivens* remedy. As the Marshals acknowledge, *Bivens* involved "a citizen alleging that federal law enforcement officers violated his Fourth Amendment rights by arresting him and searching his home, all without a warrant…." (*Marshals' Brief* pp. 33-34). The "search of the home" without a warrant (and without probable cause) is the exact basis for the Bray family's claim in this case. As the *Bivens* Court stated:

> [T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S., at 684 (footnote omitted); see Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 36 (1933) (Cardozo, J.); The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.).

Bivens at 392. The Marshals have cited no authority for the proposition that the warrantless search of an entire home, while executing a writ for the seizure of personal property, somehow departs from the Fourth Amendment remedy originally established in *Bivens*.

Moreover, the Marshals are wrong when they blithely assert that the Bray family had an "opportunity to 'defend and make good' on [their] position in federal proceedings," (*Marshals' Brief* p. 37), and that the underlying collection action

provided "alternative processes to protect the interests of the plaintiff…." (Id. p. 38). The Marshals' befuddling argument is wrong for three reasons.

First, the third and fourth causes of action were not limited to seeking recovery of property wrongfully seized and removed from Bray home (an injury which itself could only be remedied by money damages proportionate to the deprivation after the property was returned). Rather, they were primarily about constitutional injury for the unlawful intrusion into the home and violation of Fourth Amendment privacy interests. Absent extreme procedural anomalies, remedies for such violations would not easily flow from a collection action.

Second, that is especially true when most of the parties to this *Bivens* action were not even parties in the underlying collection action. *Planned Parenthood Columbia Willamette v. ACLA*, Case No. 05-mc-002, was filed in the District Court to enforce and collect from Michael Bray a judgment obtained in the State of Oregon. (*First Amended Complaint (Corrected For Redactions and Signature),*R. 13, Para. 4.7, Page ID # 114). No other members of the Bray family were parties to that action until Jayne Bray later intervened *solely* to assert her spousal interest in personal property to be seized, (*Id.* Para. 4.9, Page ID# 114). None of the Bray children were parties to the underlying collection action.

Third, Appellees Riley and Kimmet were never parties to that 2005 action, and the Bray family had no claims against them until the October 1, 2007 raid on

the Bray home. In essence, most of the parties to this action would have had to intervene in the underlying collection action, willingly or unwillingly, for the Bray family to pursue the identical constitutional *Bivens* claims that they have asserted in this action.

In the end, the Marshals appear to be saying that these *Bivens* claim should not be recognized because they could have somehow been litigated in the underlying action. The Marshals' befuddling *Bivens* arguments are meritless and should be rejected.

CONCLUSION

Based upon the foregoing, the judgment of the District Court should be reversed and this case should be remanded for discovery and trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2013, I filed this Reply Brief of Appellants electronically so that it will be served on Counsel for Appellees via the Court's electronic filing system.

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CERTIFICATE OF CONFORMITY

Pursuant to FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type limitations of these Rules.

1. Exclusive of the exempted portions in FRAP 32(a)(7)(B)(i) and (iii), the brief contains 4,203 words in its entirety.

2. The brief has been prepared in 14-point Times New Roman typeface using Word.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate of the FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Thomas W. Condit
Thomas W. Condit, Attorney

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