

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2023-000607

James John Todd Kincannon,

Petitioner,

v.

Ashely Suzanne Griffith,
Moore Taylor Law Firm, P.A.,
Vance Stricklin, and Amber
Fulmer,

Respondents.

**PETITIONER'S REPLY TO RESPONDENTS' RETURN TO
PETITIONER'S PETITION FOR WRIT OF CERTIORARI**

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Jul 26 2023

S.C. SUPREME COURT

**PETITIONER’S REPLY TO RESPONDENTS’ RETURN TO
PETITIONER’S PETITION FOR WRIT OF CERTIORARI**

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 I. This is a very narrow case which cleanly presents an issue of great importance. Either South Carolina’s abuse of process tort applies where the alleged victim in a criminal case attempts to extort non-restitutionary money or property from the criminal defendant in exchange for dropping the charge, or it does not.....3

 II. Even if this Court’s intention is to affirm the Court of Appeals, this Court should grant the certiorari petition to clarify the issues in this case for the benefit of South Carolina lawyers and judges and participants in criminal cases. Some lawyers and litigants are engaged in conduct that other lawyers and litigants believe to be unlawful and unethical, and this Court should clarify the matter one way or another4

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REPLY ARGUMENTS

- I. **This is a very narrow case which cleanly presents an issue of great importance. Either South Carolina's abuse of process tort applies where the alleged victim in a criminal case attempts to extort non-restitutionary money or property from the criminal defendant in exchange for dropping the charge, or it does not.**

Respondent's Return argues that this case is not proper for certiorari. Petitioner respectfully submits that this is exactly the sort of case for which a writ of certiorari should issue. This is a narrow case which directly presents a single issue which could not be more cleanly presented:

Respondents claim that this Court's holding in Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) permits the alleged victim in a criminal case, acting with a cooperative prosecutor, to demand **non-restitutionary** money or property from a criminal defendant in exchange for dropping the criminal charge. Petitioner contends that Johnson v. Painter only permits a victim and prosecutor to demand bona fide restitution and nothing else, since anything beyond restitution would be blackmail, pure and simple.

The lower courts agreed with Respondents and, by doing so, indisputably legalized blackmail in South Carolina criminal cases. According to the trial court's order, affirmed by the Court of Appeals, there is absolutely no limit to what the victim and prosecutor in a criminal matter can demand from a criminal defendant in order to make a criminal case go away. As the trial court stated in its order, which was affirmed by the Court of Appeals:

The fact that *Johnson* [v. *Painter*] is about restitution and this case is not has no bearing on whether or not Defendants' actions were appropriate. *Johnson* provides that a Solicitor and a victim may

agree to drop charges in exchange for out-of-pocket medical expenses. It is not a far stretch to apply that same premise to a Solicitor and a victim that agree to drop charges in exchange for a pet.

J.A. 5.

There is no limit to this. If an alleged victim can demand the criminal defendant surrender a dog, in connection with a criminal case having nothing to do with a dog, then the alleged victim could demand anything: a car, a large sum of money, a house, anything. If anything beyond restitution is permitted, then, logically, everything is permitted. This cannot possibly be the law.

This Court plainly did not intend for Johnson v. Painter to legalize blackmail of criminal defendants, and Petitioner asks the Court to make that clear to all participants in state criminal prosecutions by issuing a writ of certiorari in this case and issuing an opinion clearly stating that Johnson v. Painter is limited to restitution and that efforts by an alleged victim to obtain money or property **beyond** restitution from a criminal defendant, in exchange for dropping the criminal charge, are illegal and actionable as abuse of process.

II. Even if this Court's intention is to affirm the Court of Appeals, this Court should grant the certiorari petition to clarify the issues in this case for the benefit of South Carolina lawyers and judges and participants in criminal cases. Some lawyers and litigants are engaged in conduct that other lawyers and litigants believe to be unlawful and unethical, and this Court should clarify the matter one way or another.

This Court should grant certiorari even if this Court is inclined to affirm the Court of Appeals and the trial court so as to advise all South Carolina lawyers and judges and persons involved in criminal matters what the boundaries are on

an alleged victim seeking to use a criminal prosecution to gain money or property from a criminal defendant. The Court of Appeals' decision is unpublished and is therefore likely to create confusion among the bench and bar as to where exactly the line now is between proper advocacy in connection with a criminal prosecution and outright blackmail, which is not only unethical but criminal.

Petitioner has no doubt that there are many lawyers and judges in South Carolina who, at present, believe that the conduct engaged in by Respondents in this matter is tortious, unethical, and potentially criminal. And there are clearly other lawyers and judges who seem to believe such conduct is entirely lawful. The unpublished Court of Appeals decision leaves that ambiguous situation in place, since it is not entirely clear whether or not a lawyer can rely on an unpublished Court of Appeals decision when determining whether or not a contemplated course of conduct is lawful and ethical.

The practice of law is difficult enough without there being this type of severe ambiguity around what prosecutors and lawyers representing an alleged victim in a criminal matter can and cannot do in connection with a plea bargain, and there is just as much ambiguity surrounding what a criminal defense lawyer confronted with an apparently extortionate demand should do in response, both with respect to what he or she advises the client and what he or she tells the court. Judges in criminal matters must also know where the lines are, since many judges would undoubtedly be inclined to reject a plea bargain premised on the criminal defendant surrendering non-restitutionary money or property to the alleged victim in exchange for the criminal charges being reduced or discontinued.

However this Court might ultimately rule, issuing a writ of certiorari is clearly the right thing to do to clarify all of these issues for lawyers, judges, and others involved in criminal cases in South Carolina.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests the Court issue a writ of certiorari to the Court of Appeals in the above-captioned action, reverse the Court of Appeals as to the issues described in Petitioner's Petition and this Reply, and remand the case to the Lexington County Court of Common Pleas with instructions to the trial judge to allow Petitioner to submit an Amended Complaint setting forth a single cause of action for abuse of process, as Petitioner's suggested amended cause of action would be within the scope of Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) and Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991) and not subject to dismissal pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) or for any other reason.

CERTIFICATE OF SERVICE

The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing on opposing counsel.

July 26, 2023

Respectfully submitted,

s/James John Todd Kincannon

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