ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
D. Garrison Hill, Judge

Case No. 2013-CP-23-00994
Appellate Case No.: 2013-001765

Jack Edward Earl Parker,..... Appellant,

v.

State of South Carolina,..... Respondent.

RECORD ON APPEAL

Russell W. Harter, Jr.
Chapman Harter and Harter,P.A.
PO Box 10224
Greenville SC 29603
COUNSEL FOR RESPONDENTS

Carly Marie Harter

Robert C. Childs, III
CHILDS LAW FIRM
2100 Poinsett Highway, Suite D
Greenville, SC 29609

Counsel for Appellant

RECEIVED
SEP 03 2014
SC Court of Appeals

INDEX

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	C.A. No.: 2013-CP-23-00994
Jack Edward Earl Parker,	)	
	)	
Plaintiff,	)	**ORDER**
	)	
vs.	)	
	)	
The State of South Carolina,	)	
	)	
Defendant.	)	
	)	

I. INTRODUCTION/PROCEDURAL BACKGROUND

This is a takings case that the State of South Carolina moves to dismiss for failure to state facts sufficient to constitute a cause of action. For the reasons set forth below, the Court grants the Motion to Dismiss.

According to the Complaint, Plaintiff Jack Edward Earl Parker ("Parker") alleges he was arrested on a murder charge in 2001 and released on bond pending his trial. He was tried for murder in October 2003, and claimed self-defense. The case ended in a mistrial and Parker was free on bond until 2005, when he was retried, convicted by a jury, and sentenced to life in prison. On March 14, 2011, the South Carolina Supreme Court ruled that Parker's second prosecution was barred by the double jeopardy clause of the United States Constitution and the South Carolina Constitution. See State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011). Parker was released from incarceration on April 7, 2011. In the Complaint, Parker claims he was deprived of liberty, property, employment, family, and privacy, and claims damages pursuant to Article I, Section 3 of the South Carolina Constitution, Article I, Section 10 of the South Carolina Constitution, Article I, Section 12 of the South Carolina Constitution, and Article I, Section 13(A) of the South Carolina Constitution.

GH

Defendant filed a timely Answer to Parker's Complaint, setting forth various defenses, including that the Complaint fails to state a claim upon which relief may be granted.

The decision of the Supreme Court provides a detailed factual and procedural history of Parker's trials. In 2005, when Parker was tried for the second time, Judge Few ruled that the second prosecution was not barred by double jeopardy. The Court of Appeals affirmed Parker's 2005 conviction, but he sought review by the South Carolina Supreme Court. The Supreme Court held that because the Solicitor in the first trial had goaded Parker into moving for a mistrial, the subsequent prosecution was barred by the double jeopardy clauses.

Parker asserts that because the 2005 prosecution was precluded by double jeopardy, the resulting incarceration following that conviction "was an unconstitutional taking of [Parker's] property rights to which he is entitled to compensation." Parker further argues that Defendant's actions give rise to a claim of inverse condemnation. Parker acknowledges that his claim is not grounded in tort or upon any statute, but is rather a constitutional claim for a taking.

II. LAW/ANALYSIS

A. Standard of Review for Motion to Dismiss

A ruling on a Motion to Dismiss for failure to state a claim must be based solely on the allegations as are set forth on the face of the Complaint. Rule 12(b), SCRCP. It is also appropriate to view the evidence in favor of the Plaintiff and to give the Plaintiff the benefit of any reasonably deducible inferences. If, however, the allegations of the Complaint do not entitle the Plaintiff to relief on any theory of the case, a Motion to Dismiss must be granted. Brown v. Theos, 338 S.C. 305, 526 S.E. 2d 232 (1999). As a general rule, important questions of first impression should not ordinarily be decided on a Motion to Dismiss; it is, however, proper to decide even novel issues on a Motion to Dismiss when the dispute is not as to the underlying

facts, but rather as to the interpretation of the law. Madison v. Am. Home Products Corp., 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004) (citing Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Servs., 346 S.C. 158, 551 S.E.2d 263 (2001)). Further, novel questions of law may be decided on a Motion to Dismiss when further development of the record would not aid in resolving the issues. Id.

B. Takings

Parker maintains his incarceration and deprivation of liberty constitute a taking of private property pursuant to South Carolina Constitution Article I, Section 13.

Defendant contends that the Complaint, viewed most favorably to Parker, fails to set forth allegations that would amount to a claim under any theory because reversal of a criminal conviction cannot be the basis of any civil claim for a taking.

Article I, Section 3 of the South Carolina Constitution provides that the privileges and immunities of citizens of the state of South Carolina shall not be abridged without due process of law and that no citizen shall be denied equal protection. Article I, Section 10 of the South Carolina Constitution provides that citizens will be secure in their persons, houses, papers, and effects, and are protected against unreasonable searches and seizures. Section 10 further provides that no warrant shall be issued without probable cause. Article I, Section 12 of the South Carolina Constitution provides "no person shall be subject to the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself." Article I, Section 13, Subsection (A) provides that private property shall not be taken for private use without consent of the owner, nor for public use without just compensation first made for the property. The constitutional provisions discussed above are separate and distinct sections of Article I and secure different rights. To the extent Parker argues

he was improperly tried in 2005 in violation of the double jeopardy clause, that fact does not give rise to any claim for compensation or damages.

The double jeopardy protection guaranteed by Article I, Section 12 cannot be bootstrapped to Section 13 to form a takings claim. And while Article I, Section 13 provides for just compensation for citizens whose property is taken from them, a citizen's liberty is not the type of "property" contemplated. It is also clear under the wording of Article I, Section 13 that there was no taking of Parker's property for any "private use" or "public use."

Parker has crafted a creative argument, but there does not appear to be any legal authority to support it. Shaw v. City of St. Louis, 664 S.W. 2d 572 (Mo. 1983) is analogous. Mr. Shaw claimed that his prosecution, conviction, and imprisonment constituted a wrongful taking, use, and appropriation of his liberty and property. The Court, construing Missouri's State Constitution and its taking clause, held that to state a claim for inverse condemnation the Plaintiff must show that property was taken for public use or damaged without compensation. The Court noted "a claim for inverse condemnation does not exist for the taking of a person's liberty." Shaw, 664 S.W.2d at 575.

Parker has not directed the Court to any statute, constitutional provision, or case law that can be reasonably interpreted to support his claims. Although Parker's claim appears to be one of first impression, Shaw provides sound analysis of the issue. Further, it does not appear there is any need to further develop the record to decide the legal issues raised by this motion.

III. CONCLUSION

Defendant's Motion to Dismiss is GRANTED. Parker's Complaint is therefore accordingly DISMISSED.

IT IS SO ORDERED.

July 15, 2013
Greenville, SC

D. Garrison Hill
Circuit Judge

STATE v. PARKER, 391 S.C. 606 (2011)

707 S.E.2d 799

The STATE, Respondent, v. Jack Edward Earl PARKER, Petitioner.

No. 26940.

Supreme Court of South Carolina.

Heard January 5, 2011.

Decided March 14, 2011.

Rehearing Denied April 7, 2011.

Appeal from the Circuit Court, Greenville County, John C. Few, J.

Page 607

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

Page 608

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Robert Mills Ariail, of Greenville, for Respondent.

Page 609

Chief Justice TOAL.

In this case, the Court granted Jack Edward Earl Parker's (Petitioner) request for a writ of certiorari to review the court of appeals' decision in *State v. Parker*, 381 S.C. 539, 673 S.E.2d 833 (Ct.App. 2009) affirming the trial court's decision to deny a motion to dismiss based on double jeopardy.

FACTS/PROCEDURAL HISTORY

It is undisputed that Petitioner shot and killed his sister's boyfriend, Robert Lee Stewart (Victim). In October 2003, Petitioner stood trial for murder. At trial, Petitioner claimed self-defense. The first trial ended when the judge granted Petitioner's motion for a mistrial. When Petitioner was tried again in 2005, he moved to dismiss based on double jeopardy. The circuit court judge at the second trial denied the motion and the jury convicted Petitioner of murder.

During the first trial, there was a great deal of animosity between the solicitor and defense counsel. Prior to questioning the first police witness, the solicitor explained that there was a videotape made of the crime scene that included graphic images of Victim's body. The solicitor redacted the original videotape to erase the graphic images and presented defense counsel a redacted copy on the day of trial. However, the original videotape, including the graphic images of Victim's body, was shown to the jury. Petitioner's counsel moved for a mistrial and dismissal with prejudice based on prosecutorial misconduct. Counsel for defense argued the solicitor's case was

not going well and the State was now privy to his defense tactics. The solicitor claimed the tapes were switched unintentionally and inadvertently. The court found the explanation offered by the State "shocking" as to why "such a huge, substantial, material piece of evidence would be handled in such carefree fashion. . . ." The circuit court judge admonished the solicitor, but denied the motion for a mistrial issuing a curative instruction that the jury was to disregard the fact that they viewed the body of Victim.

During the solicitor's closing argument, she accused defense counsel of unethical conduct in coaching witnesses and implied to the jury that it was their community duty to convict Petitioner of murder. After the solicitor concluded her closing

Page 610

argument, defense counsel again made a motion for a mistrial. Defense counsel contended a mistrial should be granted based on prosecutorial misconduct in closing argument in that the prosecution accused defense counsel of coaching witnesses, and argued facts not in evidence. Defense counsel ultimately argued that the cumulative effect of the prosecutorial misconduct warranted a mistrial. The circuit court judge charged the jury and then heard arguments on the mistrial motion. The solicitor contended her closing argument was justified by the evidence and was responsive to the defense's closing argument, thus, the mistrial motion should be denied. The jury then sent a note to the judge that it was deadlocked. The judge gave an *Allen* charge and the jury resumed deliberating. After further deliberation, the jury again reported that it was deadlocked. The judge received the note that the jury remained deadlocked as he was about to rule on the mistrial motion.

The circuit court judge noted he had reviewed the motion for a mistrial, the solicitor's closing argument, and his notes from the testimony. The judge found the statements made about Petitioner's counsel, the exhortation to the jury to convict in order to protect the community, and the introduction of the original videotape warranted a mistrial.

The circuit court judge stated, "In my readings of those opinions it's almost as if . . . this court can infer that the defendant was almost goaded into the position of asking for a mistrial. So based on the totality of the circumstances that [have] occurred in this trial . . . I will declare a mistrial. . . ." The solicitor asked if the mistrial was based specifically on prosecutorial misconduct or the comments in her closing argument. The judge responded, "The comments made in closing arguments, I would consider to be prosecutorial misconduct as well as . . . the video tape. . . . It's the cumulative nature of everything." The State appealed the grant of a mistrial and the court of appeals dismissed the case as not immediately appealable.

Almost two years later, the State retried Petitioner. Petitioner moved to dismiss based on double jeopardy arguing the solicitor at the first trial intentionally goaded him into moving for a mistrial. The circuit court judge at the second trial

Page 611

denied the motion to dismiss. In denying the motion to dismiss that judge made two seemingly inconsistent findings. That judge stated:

> I am resolving this motion completely independent of whether or not the prosecutor intentionally goated [sic] the defense into making a motion for a mistrial.
> . . .
>
> . . . . Even if there had been prosecutorial

> misconduct, it was the fact that the jury was deadlocked that caused the mistrial.
>
> . . . . So regardless of my analysis of what happened in the first trial, this motion to dismiss is denied because it was the jury's being deadlocked that lead to the manifest necessity that lead [sic] to the mistrial.

Shortly after making the above finding, the circuit court judge also found the following:

> I do not find that the prosecutor specifically committed misconduct that was designed to elicit a motion for mistrial from Defendant so that the prosecutor would have another bite at the apple, another time to try the Defendant. I believe that the prosecutor was vigorously trying to win the case and not trying to throw the case in the way of a mistrial. So I am for those reasons, denying the motions [sic] to dismiss based on double jeopardy.
>
> The second trial proceeded and the jury convicted Petitioner of murder. Petitioner appealed to the court of appeals. The court of appeals affirmed the denial of Petitioner's motion to dismiss based on double jeopardy.

ISSUE

> Did the court of appeals err in affirming the circuit court judge's denial of defense counsel's motion to dismiss pursuant to the Double Jeopardy Clauses?

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "This Court does not re-evaluate the facts based on its own

view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

Petitioner argues the solicitor who initially prosecuted Petitioner intentionally provoked defense counsel into moving for a mistrial. We agree.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being twice placed in jeopardy of life or liberty. *See* U.S. Const. amend. V; S.C. Const. art. I, § 12; *Harden v. State*, 360 S.C. 405, 410, 602 S.E.2d 48, 50 (2004) (citation omitted). "Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial."*State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 446 (Ct.App. 2005) (citation omitted).

"Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v. Kennedy*, 456 U.S. 667, 675-76, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982).[fn1]

Hence, a properly granted mistrial poses no double jeopardy bar to a subsequent prosecution. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.* at 676, 102 S.Ct. at 2089; *see also State v. Mathis*, 359 S.C. 450, 460, 597 S.E.2d 872, 877 (Ct.App. 2004) (noting that a defendant who has moved for and been granted a mistrial may invoke the Double Jeopardy Clause to prevent a second prosecution when the prosecutor's conduct giving rise to the mistrial was intended to provoke him into moving for the mistrial). Hence, the deter-mination

Page 613

of whether double jeopardy attaches depends upon whether the prosecutorial conduct was undertaken with the intent to subvert the Double Jeopardy Clause. *State v. Coleman*, 365 S.C. 258, 263, 616 S.E.2d 444, 447 (Ct.App. 2005) (citation omitted). "The trial court's finding concerning the prosecutor's intent is a factual one and will not be disturbed on appeal unless clearly erroneous." *Id.* (citation omitted).

The court of appeals held:

> At the second trial, Judge Few first denied the motion to dismiss based on the jury deadlock. We need not address this issue as we are restricted in our review of his further factual finding that the solicitor had not intentionally goaded the defense into moving for a mistrial. We find support in the record to affirm the finding that the solicitor did not intentionally goad Parker into moving for a mistrial. Accordingly, the trial court did not err in denying the motion to dismiss based on double jeopardy.

Parker, 381 S.C. at 544, 673 S.E.2d at 836. This holding is erroneous because it relies upon a letter not in the record and upon the second judge's incorrect conclusions.

"Case law . . . has consistently emphasized that application of the double jeopardy bar is dependent on a showing of the prosecutor's subjective intent to cause a mistrial in order to retry the case." *U.S. v. Williams*, 472 F.3d 81, 85-86 (3rd Cir. 2007). The intent necessary is not that "a person intends the natural and probable consequences of his or her acts if those acts are knowingly done." *Id.* at 88. If a court focuses on the natural and probable consequences of prosecutorial conduct, rather than the intent underlying that conduct, then any prosecutorial misconduct could bar retrial. *Id.* Hence, courts have to determine whether the subjective intent of the solicitor was to cause a mistrial. This is not an easy task to undertake, because it is almost unimaginable that a solicitor would admit that he or she took certain actions in an effort to cause the defendant to move for a mistrial. In our opinion, it will be rare that the solicitor actually intends to cause the defendant to move for a mistrial. However, in this case, if we do not hold the solicitor intentionally caused the defense to move for a mistrial, then it would seem the only possible way to find that a solicitor intentionally goaded the defense would

Page 614

be for a solicitor to admit he or she took certain actions in an effort to goad the defense.

The judge in the first trial found, "[I]t's almost as if . . . this court can infer that the defendant was almost goaded into the position of asking for a mistrial." We construe this as a holding by the first trial judge that the solicitor intentionally goaded defense counsel into moving for a mistrial. Regarding double jeopardy, the judge at the second

trial held, "So I do not find that the prosecutor specifically committed misconduct that was designed to elicit a motion for mistrial from Defendant so that the prosecutor would have another bite at the apple "It was clearly erroneous for the second judge to find that the solicitor's conduct was not designed to elicit a motion for a mistrial in light of the first judge's finding that Petitioner was goaded into asking for a mistrial.[fn2] In cases of this type, the second trial judge makes a double jeopardy determination based on what the previous court actually held. The second trial judge should have determined what the first trial judge held and then determined whether that finding was supported by the facts. Thus, it was error for the second trial judge to find that the solicitor did not intentionally goad defense counsel.

The court of appeals merely mentions that it finds support in the record to affirm the second judge's finding regarding intentionally goading defense counsel, without listing any such evidence. We hold there is no evidence in the record to support the second judge's finding that the solicitor did not intend to elicit a motion for a mistrial. However, there is evidence in the record to support the first trial judge's finding that Petitioner was goaded into seeking a mistrial. The solicitor's statements about Petitioner's counsel, [fn3] encouraging

Page 615

the jury to convict in order to protect the community, and the introduction of the original videotape show that it was the solicitor's intent to cause a mistrial. Standing alone, any one of these actions might not show subjective intent on the part of the solicitor to goad the defense into seeking a mistrial. Rather, similar to what the first trial judge held, the totality of what occurred in the first trial leads to the conclusion that it was the intent of the solicitor to goad defense counsel to move for a mistrial.

The court of appeals relied in part on a letter from Judge Hayes, the judge in the first trial, to Solicitor Robert Ariail. The court of appeals noted, "We first must pay deference to Judge Hayes' [sic] letter indicating he did not rule on the jeopardy issue in granting the motion for a mistrial at the end of the first trial." *Parker*, 381 S.C. at 544, 673 S.E.2d at 836. "Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. The letter from Judge Hayes to Solicitor Ariail is not in the Record. Hence, it was error for the court of appeals to rely on that letter in their opinion.

Additionally, the second trial judge made the legal finding that it was the jury deadlock that caused the mistrial. The first judge, however, never made a ruling that jury deadlock caused the mistrial. Rather, the first judge specifically granted a mistrial based on prosecutorial misconduct. Because the first judge granted a mistrial based on prosecutorial misconduct, the second judge's finding that "it was the fact that the jury was deadlocked that caused the mistrial" was a legal error. We hold the finding that the solicitor did not intentionally goad the defense into moving for a mistrial was clearly erroneous.

CONCLUSION

Because the solicitor intended to goad the defendant into moving for a mistrial, the court of appeals opinion is reversed and further prosecution barred under the Double Jeopardy Clauses.

Page 616

BEATTY, KITTREDGE, JJ., and Acting Justice JOHN H. WALLER, JR., concur.

PLEICONES, J., concurring in result only.

[fn1] "A defendant's motion for a mistrial constitutes `a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.' "*Kennedy*, 456 U.S. at 676, 102 S.Ct. at 2089 (*quoting United States v. Scott*, 437 U.S. 82, 93, 98 S.Ct. 2187, 2195, 57 L.Ed.2d 65 (1978)).

[fn2] We realize the finding by the first trial judge involved actions taken by an attorney, not witnesses. *Cf. Hill v. State*, 377 S.C. 462, 468, 661 S.E.2d 92, 95 (2008) ("[T]he circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony."). We cite to this proposition because the judge at the first trial was not limited by a record and was in a superior position to observe and evaluate the solicitor's intent.

[fn3] "`It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense' or to otherwise denigrate defense counsel." *People v. Woods*, 146 Cal.App.4th 106, 53 Cal.Rptr.3d 7, 14 (2006) (*quoting People v. Bemore*, 22 Cal.4th 809, 94 Cal.Rptr.2d 840, 996 P.2d 1152, 1175 (2000)).

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Jack Edward Earl Parker,)
Plaintiffs,)
)
v.)
)
State of South Carolina,)
Defendant.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No.: 2013-CP-23-00994

COMPLAINT
(Jury Trial Requested)

The Plaintiff, complaining of the Defendant above named, would respectfully show unto the Court as follows:

1. Plaintiff is a citizen and resident of the County of Greenville, South Carolina

2. The Defendant is one of these United States and is a political body and governing authority over the geographical limits of South Carolina.

3. The action is brought pursuant to the Constitution of the State of South Carolina and no federal claims are made.

4. In 2001 the Plaintiff was arrested for Murder by agents or employees of the Defendant after defending his family from an assault by his sister's boyfriend who was armed with a knife.

5. The Plaintiff was released on bond pending his trial.

6. In October 2003 the Plaintiff stood trial for murder.

7. At trial, the Plaintiff claimed self-defense.

8. During the course of the Plaintiff's first trial the Defendant, its agents or employees, encountered numerous difficulties in the trial and the Defendant, its agents or employees made improper statements about Plaintiff's counsel, encouraged the jury to convict in

order to protect the community, and improperly introduced a graphic videotape with the intent to cause a mistrial.

9. The first trial ended when the judge granted Plaintiff's motion for a mistrial on the Defendant's misconduct.

10. The Plaintiff remained free on bond until he was re-tried in 2005.

11. When the Plaintiff was tried again in 2005, he moved to dismiss his charges based on double jeopardy.

12. The circuit court judge at the second trial denied the motion and the jury convicted the Plaintiff of murder.

13. The Plaintiff was sentenced to life imprisonment and incarcerated by the Defendant until 2011.

14. On March 14, 2011 The South Carolina Supreme Court held that the Plaintiff's second prosecution was barred by the double jeopardy clauses of the United States and South Carolina Constitutions.

15. The Plaintiff was released from his incarceration after the Defendant's request for rehearing was denied on April 7, 2011.

16. The Plaintiff had a protected property right in his liberty, property, employment and family pursuant to Article 1, Section 3 of the South Carolina Constitution.

17. The Plaintiff had a protected right to privacy pursuant to Article 1, Section 10 of the South Carolina Constitution.

18. That right to liberty, property, employment, family and privacy was taken by the Defendant in violation of Article 1, Section 12 of the South Carolina Constitution.

19. The Plaintiff's right to liberty, property, employment, family and privacy was taken by the Defendant without just compensation in violation of Article 1, Section 13(A) of the South Carolina Constitution and other provisions of the South Carolina Constitution.

20. As a direct and proximate result thereof, the Plaintiff was unlawfully deprived of his liberty for 6 years, deprived of any gainful employment for 6 years, deprived of his familial relations for 6 years and deprived of his privacy for 6 years, all without just compensation by the Defendant.

21. Furthermore, as a direct and proximate result thereof, the Plaintiff's children are in the care and custody of the State of Florida, his wife deserted him and Plaintiff's future employment prospects are permanently diminished as a result of his long incarceration by the Defendant.

22. Plaintiff is informed and believes that he is entitled to judgment against the Defendant for the damages alleged herein.

WHEREFORE, having fully plead, Plaintiffs pray for the following:

1. A jury trial on all issues to triable.

2. For judgment against the Defendants for actual damages in an amount to be determined by a jury.

3. For such other and further relief as the court deems just and proper.

Robert C. Childs, III, #1218
Attorney for Plaintiff
2100 Poinsett Hwy, Suite D
Greenville, SC 29609
(864) 242-9997
Fax (864) 242-9914

Greenville, South Carolina
Date: 2/15/13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	C.A. No.: 2013-CP-23-00994
Jack Edward Earl Parker,	)	
	)	
Plaintiff,	)	
	)	**ANSWER**
vs.	)	
	)	***(Jury Trial Requested)***
The State of South Carolina,	)	
	)	
Defendant.	)	
	)	

The defendant, by way of Answer to the Plaintiff's Complaint, subject to any and all motions filed or served herewith, would respectfully show unto the Court as follows:

FOR A FIRST DEFENSE

1. That except as is expressly admitted, modified, or explained herein, each and every allegation of the Plaintiff's Complaint is denied and strict proof thereof is demanded.

2. That the defendant is without sufficient information to admit or deny the allegations set forth in paragraph (1) of Plaintiff's Complaint.

3. That as to paragraph (2) it is admitted that the State of South Carolina is a state in the United States.

4. That as to paragraph (3) strict proof thereof is demanded.

5. As to paragraphs (4), (5), (6), and (7) of Plaintiff's Complaint, it is admitted that the plaintiff was charged with the crime of murder. It is admitted that there was a trial and appeal, and it is further admitted, that the South Carolina Supreme Court issued an opinion on January 5, 2011, reversing the plaintiff's conviction in the case captioned The State, Respondent v. Jack Edward Earl Parker, Petitioner, Opinion No. 26940.

6. That as to the allegations of paragraph (8) of the Plaintiff's Complaint, strict proof thereof is demanded and said allegations are denied.

7. That as to the allegations set forth in paragraphs (9), (10), (11), (12), (13), (14), and (15) of the Plaintiff's Complaint, reference is craved to the South Carolina Supreme Court Opinion No. 26940 referenced above.

8. That as to the allegations of paragraph (16), (17), (18), (19), (20), (21), and (22) of the Plaintiff's Complaint, strict proof thereof is demanded and said allegations are denied.

FOR A SECOND DEFENSE

9. That the Plaintiff's Complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6).

FOR A THIRD DEFENSE

10. That the Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against these defendants.

FOR A FOURTH DEFENSE

11. The plaintiff has no claim against the State of South Carolina, based on the allegations of the Plaintiff's Complaint, applicable law and the decision of the South Carolina Supreme Court Opinion Number 26940.

FOR A FIFTH DEFENSE

12. That at the time and date of the incident referred to in the Plaintiff's Complaint, upon information and belief, probable cause existed. That the defendant pleads and asserts probable cause as a complete and absolute bar to the plaintiff's claim.

FOR A SIXTH DEFENSE

13. That the defendant specifically pleads and asserts all statute of limitations, conditions of recovery, limitations of recovery, exclusions from liability, and caps on damages as are set forth in the South Carolina Tort Claims Act.

14. Further, the defendant pleads specifically, but without limitation, the provisions of S.C. Code Ann. §15-78-60(1)(2)(3)(4)(5)(6)(21)(23)(25).

15. That the defendant herein plead and assert the South Carolina Tort Claims Act as a complete and absolute defense and bar to the claims set forth in the Plaintiff's Complaint.

FOR A SEVENTH DEFENSE

16. That the defendant pleads and asserts the provisions of S.C. Code Ann. §15-78-30 as a complete and absolute defense and bar to the claims set forth in the Plaintiff's Complaint.

FOR AN EIGHTH DEFENSE

17. That the defendant pleads and asserts the provisions of S.C. Code Ann. §15-78-120 as a complete and absolute defense and bar to the claims set forth in the Plaintiff's Complaint.

FOR A NINTH DEFENSE

18. That to the extent applicable, the defendant pleads and asserts the provisions of S.C. Code Ann. §15-78-110 statute of limitations as a complete and absolute defense and bar as to any alleged state law claims.

FOR A TENTH DEFENSE

19. That the defendant pleads and asserts absolute privilege as a bar and/or defense to any claims by the plaintiff.

FOR AN ELEVENTH DEFENSE

20. That the defendant pleads and asserts qualified and/or conditional privilege as a complete and absolute bar and/or defense to any claims.

FOR A TWELFTH DEFENSE

21. That the defendant pleads and asserts privilege of judicial proceedings and/or public records as a bar to any claims for defamation and/or damage to the plaintiff.

FOR A THIRTEENTH DEFENSE

22. That the defendant pleads and asserts absolute prosecutorial immunity as a bar and/or defense to the allegations of the Plaintiff's Complaint.

FOR A FOURTEENTH DEFENSE

23. That the defendant pleads and asserts the public duty rule and/or public duty doctrine as a complete and absolute defense and/or bar to the allegations of the Plaintiff's Complaint.

WHEREFORE, the within defendant prays as follows:

1. That the Plaintiff's Complaint be dismissed.
2. That this defendant be granted such other and further relief as the Court deems just and proper.

Respectfully submitted,

Russell W. Harter Jr., SC Bar #2778
Chapman, Harter & Harter, P.A.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CIVIL ACTION NO.: 2013-CP-23-00994
Jack Edward Earl Parker,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Defendants.	)	

The defendant, by and through its undersigned attorney, will hereby move before the Court, on the tenth day after service hereof, or as soon as counsel may be heard, for an order of court dismissing the within action, on the following grounds:

1. Statute of Limitations, § 15-78-110, S.C. Code Ann.;
2. Prosecutorial immunity;
3. Section 15-78-60, S. C. Code Ann.;
4. The decision of the Supreme Court in the case of State v. Parker.

Respectfully submitted,

CHAPMAN, HARTER & HARTER, P.A.

Russell W. Harter, Jr.
14 Lavinia Avenue
Post Office Box 10224
Greenville, SC 29603
864/233-4500; 864/232-1710 (fax)

April , 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
	)	
Jack Edward Earl Parker,	)	C. A. No.: 2013-CP-23-0994
Plaintiff,	)	
	)	Set for: 5/30 9:00 a.m.
v.	)	**MEMORANDUM IN**
	)	**OPPOSITION TO**
State of South Carolina,	)	**DEFENDANT'S MOTION**
Defendant.	)	**TO DISMISS**

TO: THE HONORABLE D. GARRISON HILL, PRESIDING JUDGE AND RUSSELL W. HARTER, JR., ATTORNEY FOR THE DEFENDANT.

STATEMENT OF FACTS

The Plaintiff shot and killed Robert Lee Stewart in 2001. Stewart had an extensive violent criminal background and a history of abusive behavior toward Plaintiff's sister, Angela. The police and emergency medical technicians responded to a call to Angela's mother's house after Angela was beaten by Stewart. The following day, Stewart and four or five others arrived at Angela's mother's house. The Plaintiff lived next door to Angela's mother. The Plaintiff shot Stewart multiple times in the driveway. At trial, the Plaintiff claimed self-defense, testifying he feared for his life as Stewart was pulling something from his back pocket and from the back of the truck. Police officer Wayne Campbell testified an open knife was found in the victim's back pocket at the scene. State v. Parker, 673 S.E.2d 833, 381 S.C. 539 (S.C.App. 2009).

Further evidence at trial showed that Stewart had a CDV warrant for his arrest from the vicious assault of the Plaintiff's sister the night before and that Stewart arrived

in a fast moving pickup truck with a group of people inside and jumped out of the vehicle yelling and screaming and making threats to the Plaintiff, Plaintiff's mother and Angela. There were small children in the area and Plaintiff observed an open knife in Stewart's back pocket that Stewart reached for. The pickup truck fled the scene upon the shooting running over Stewart. The Plaintiff was arrested for Murder but remained free on bond pending trial.

In October of 2003, Parker stood trial for murder before Judge Hayes and was represented by Robert C. Childs, III and the State represented by assistant solicitor Mindy Hervey. During the first trial, prior to questioning the first police witness, the solicitor explained that there was a videotape made of the crime scene that included graphic images of Victim's body. The solicitor redacted the original videotape to erase the graphic images and presented defense counsel a redacted copy on the day of trial. However, the original videotape, including the graphic images of Victim's body, was shown to the jury. Defense counsel moved for a mistrial and dismissal with prejudice based on prosecutorial misconduct. Counsel for defense argued the solicitor's case was not going well and the State was now privy to his defense tactics. The solicitor claimed the tapes were switched unintentionally and inadvertently. The court found the explanation offered by the State "shocking" as to why "such a huge, substantial, material piece of evidence would be handled in such carefree fashion...." The circuit court judge admonished the solicitor, but denied the motion for a mistrial issuing a curative instruction that the jury was to disregard the fact that they viewed the body of Victim. State v. Parker, 707 S.E.2d 799, 391 S.C. 606 (S.C. 2011)

During the solicitor's closing argument, the solicitor accused defense counsel of unethical conduct in coaching witnesses and implied to the jury that it was their community duty to convict the Plaintiff of murder. After the solicitor concluded her closing argument, defense counsel again made a motion for a mistrial. Defense counsel contended a mistrial should be granted based on prosecutorial misconduct in closing argument in that the prosecution accused defense counsel of coaching witnesses, and argued facts not in evidence. Defense counsel ultimately argued that the cumulative effect of the prosecutorial misconduct warranted a mistrial. The circuit court judge charged the jury and then heard arguments on the mistrial motion. The solicitor contended her closing argument was justified by the evidence and was responsive to the defense's closing argument, thus, the mistrial motion should be denied. The jury then sent a note to the judge that it was deadlocked. The judge gave an Allen charge and the jury resumed deliberating. After further deliberation, the jury again reported that it was deadlocked. The judge received the note that the jury remained deadlocked as he was about to rule on the mistrial motion. Judge Hayes granted Plaintiff's motion for a mistrial. Parker, 707 S.E.2d 799.

The Plaintiff remained free on bond until he was tried again in 2005 before Judge Few, he moved to dismiss based on double jeopardy. Judge Few denied the motion and the jury convicted Parker of murder. Parker appealed his murder conviction arguing Judge Few erred in denying his motion to dismiss based on double jeopardy. Since the first trial a principal witness concerning the incident (Plaintiff's mother) had passed away and additional witnesses and previous witnesses now familiar with defense strategy testified. Plaintiff was convicted and sentenced to life in prison in October of 2003.

Parker, 673 S.E.2d 833 (Plaintiff argued numerous other errors in the 2005 trial which Plaintiff believes would have reversed his conviction on other grounds.)

Plaintiff remained incarcerated until the South Carolina Supreme Court on March 14, 2011 found that because the solicitor intended to goad the defendant into moving for a mistrial in the first trial the Plaintiff's conviction was reserved and the State was barred from further prosecution under the Double Jeopardy Clauses of the United States and South Carolina Constitutions. Parker, 707 S.E.2d 799. The State filed a petition for rehearing in March of 2011 which was denied on April 7, 2011. In July of 2011 the State filed a petition for writ of certiorari to the United States Supreme Court. On October 3, 2011 the United State Supreme Court denied the States petition for certiorari and the reversal of Plaintiff's conviction was final.

On February 20, 2013 the Plaintiff filed the within action alleging an unconstitutional taking without compensation of Plaintiff's liberty, property, employment, family and privacy over the 6 years of incarceration by the State. Among other things, Plaintiff contends his earnings capacity has been permanently reduced due to his 6 years absence of employment. While incarcerated the Plaintiff worked at his prison employment but that employment is certainly not the type of employment prospective employers might find acceptable despite his now lack of a serious criminal record. In the interim as well, the Plaintiff's children were separated and taken into custody by Florida child welfare officials after their mother neglected them.

STANDARD OF REVIEW

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. . Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The court should not dismiss the complaint merely because it doubts the plaintiff will prevail in the action. Id

As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. Evans v. State, 543 S.E.2d 547, 344 S.C. 60 (S.C. 2001) Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). Garner v. Morrison Knudsen Corp., 456 S.E.2d 907, 318 S.C. 223 (S.C. 1995); See Jackson v. Atlantic Soft Drink Co., 286 S.C. 577, 336 S.E.2d 13 (1985).

ARGUMENT

1. THESE ARE ISSUES OF FIRST IMPRESSION IN SOUTH CAROLINA

The Plaintiff has intentionally avoided a suit in Tort for many of the reasons set forth in the Defendant's motion to dismiss. Although presenting important questions of novel impression the Plaintiff's complaint is quite logical and well grounded in law.

One's liberty, property, employment, family and privacy are clearly a cognizable property interests protected under the South Carolina's equivalent to the United State's Constitution's Fourth Amendment. Plaintiff's case presents an original scenario under extremely limited facts wherein the Plaintiff remained incarcerated for a period of 6 years

in violation of the South Carolina Constitution's prohibition against double jeopardy. The second trial, conviction and incarceration for 6 years are in effect a nullity wherein the Plaintiff's person was held by the State for no legal reason. He thus became the victim of the arbitrary exercise of the State's right to incarcerate.

The Plaintiff is not suing the State over the misconduct of the first prosecutor Mindy Hervey as the Defendant would allege. Indeed, the crux of this suit is that the State violated the South Carolina Constitution's double jeopardy prohibition in the second trial and that Plaintiff's resulting incarceration was an unconstitutional taking of Plaintiff's property rights to which he is entitled to compensation.

Under those very restricted facts, the Plaintiff is entitled to maintain his "inverse condemnation" cause of action for the taking of his liberty, employment, familial relations and privacy over that period of time. All the elements for "inverse condemnation" are present. They are (1) affirmative conduct of a governmental entity, and (2) a taking. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79-80 (2005).

An action for inverse condemnation is appropriate where the government takes private property for public use. Quality Towing Inc. v. City of Myrtle Beach, 340 S.C. 29, 38, 530 S.E.2d 369, 373 (2000). What more of a public use can there be than the State seizing one's person, confining him and requiring his servitude at pennies on the hour.

Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 498,

544 S.E.2d 637, 640 (Ct.App.2001). While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. Horry County, 344 S.C. at 498, 544 S.E.2d at 640. "One basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party." South Carolina State Highway Dep't v. Moody, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976) (quoting 27 Am. Jur. 2d Eminent Domain § 829 (1996). To establish an inverse condemnation, a plaintiff must show: "(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct.App.2002); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1992).

The South Carolina courts have never fully defined the term "private property". The definition of a cognizable property interest should be a fact intensive inquiry along with the degree of permanence of that taking that would be improperly ascertained on a motion to dismiss. However, nothing can be more affirmative, positive and aggressive than the State locking a person behind prison walls in violation of one's right against Double Jeopardy.

The Plaintiff does not argue that a person who might be wrongfully incarcerated for wrongs not clearly defined by the South Carolina Constitution would be entitled to

compensation for a deprivation of his liberty, property, employment, family and privacy interests. Indeed, had the Plaintiff been convicted of a criminal offense as a result of prosecutorial misconduct in his first trial it may well be that he would not be entitled to a recovery for the misconduct of the prosecutor. In effect, had he been convicted in his first trial he may well could not have sued. However, it was the second trial and incarceration in violation of the Double Jeopardy clause of the South Carolina Constitution that creates the unconstitutional deprivation without compensation.

While the Defendant may allege that a South Carolinian may not maintain and inverse condemnation action based upon the deprivation of liberty, property, employment, family and privacy by citing relevant U.S. constitutional cases. There are no such South Carolina constitutional cases. The relationship between the two constitutions is significant because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997); see also State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991). Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. Id.

This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. See Segura v. Texas, 826 S.W.2d 178, 182 [343 S.C. 644] (Tex.App.1992). Thus, South Carolina courts can interpret the state protections to provide greater protection than the federal Constitution. State v. Forrester, 541 S.E.2d 837, 343 S.C. 637 (S.C. 2001).

Especially important in this analysis is South Carolina's explicit constitutional right to privacy which the Plaintiff contends was taken during his incarceration. One can contemplate no greater deprivation of privacy than prison. In addition to language which mirrors the Fourth Amendment, S.C. Const. art. 1 § 10 contains an express protection of the right to privacy:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated,

In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) the South Carolina Supreme Court held that by articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution. This illuminates the ability of our State to further protect our citizens and highlights the novel particularities of Plaintiff's case.

Even in the absence of a specific right to privacy provision, the South Carolina Courts could interpret our state constitution as providing more protection than the federal counterpart. As such, by articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that invasions of privacy that do not offend the federal Constitution may still offend the South Carolina Constitution. Id.

Ten states have express right to privacy provisions in their constitutions. South Carolina and the other states with a right to privacy provision imbedded in their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context. See, e.g., Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993)(finding the state constitutional right to privacy prevented the

forced medication of a death row inmate in preparation of execution). Furthermore, many of the states that have adopted explicit state constitutional right to privacy provisions have read their constitutions as applying protection above and beyond the protection provided by the federal Constitution. See, e.g., State v. Church, 538 So.2d 993 (La.1989)(disallowing a police roadblock under the state constitution's right to privacy even though it did not violate the Fourth Amendment).

The South Carolina Constitution, with an express right to privacy provision favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. Forrester, supra. The issue of this case before this Court is the novel issue as to whether this privacy provision goes so far as to require compensation in the event of a deprivation by the State. Necessarily, this would be a fact intensive inquiry into the nature of that right in respect to Plaintiff's claims.

Additionally, the Plaintiff contends a deprivation of his familial relations. Our Supreme Court has recognized the liberty interest which parents have in the care, custody, and management of their children Hooper v. Rockwell, 513 S.E.2d 358, 334 S.C. 281 (S.C. 1999). The Plaintiff was deprived of that strand of his liberty rights by the State for 6 years over a nullity. The evidence will show that not only was he unable to manage his children but that his children were eventually separated and placed into the custody of Florida child welfare officials. Something his incarceration necessitated.

The Plaintiff served a sentence of 6 years when there was no sentence. The State contravened S.C. Const, art, I, Section 12 in its taking of Plaintiff's liberty, property, employment, family and privacy. Our South Carolina Supreme Court recognizes those

interests at least on par and in many cases above the United States Constitution. State v. Dykes, 728 S.E.2d 455, 398 S.C. 351 (S.C. 2012).

Of the 7 reported double jeopardy cases in South Carolina involving alleged prosecutorial misconduct only the Plaintiff's case involves a second trial and conviction that was found in violation of the Double Jeopardy Clause. See, State v. Inman, 720 S.E.2d 31, 395 S.C. 539 (S.C. 2011); State v. Mathis, 597 S.E.2d 872, 359 S.C. 450 (S.C.App. 2004); State v. Parker, 707 S.E.2d 799, 391 S.C. 606 (S.C. 2011); State v. Thrift, 440 S.E.2d 341, 312 S.C. 282 (S.C. 1994); State v. Coleman, 616 S.E.2d 444, 365 S.C. 258 (S.C.App. 2005); State v. Barroso, 462 S.E.2d 862, 320 S.C. 1 (S.C.App. 1995); State v. Plath, 313 S.E.2d 619, 281 S.C. 1 (S.C. 1984). Only the Plaintiff was incarcerated for 6 years for a trial that should not have occurred and a sentence that was never lawfully imposed. The singularity of Plaintiff's circumstances makes a motion to dismiss inappropriate.

The Defendant will naturally raise the South Carolina Torts Claim Act and prosecutorial immunity. Of course, the Tort Claims Act governs all tort claims against governmental entities. Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct.App.2003). It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C.Code Ann § 15-78-70(b) (Supp.2003); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 215, 544 S.E.2d 38, 49 (Ct.App.2001); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct.App.1998). However, the term 'inverse condemnation' describes an action grounded on the constitution as opposed to statutory law. Vick v. South Carolina Dep't of Transp., 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct.App.2001). Accordingly the Plaintiff does

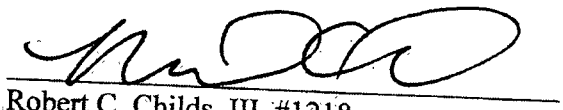
not raise a "tort" claim grounded on statute but a constitutional claim. In effect, Plaintiff rightfully contends the South Carolina Constitution "trumps" a statute.

As to prosecutorial immunity, it is obvious that the Plaintiff is not suing a prosecutor. Plaintiff's counsel, as a former prosecutor, respects and acknowledges this strong public policy granting immunity to a prosecutor. American courts have long recognized the existence of immunity for public officers from personal liability for tortious acts committed while serving in an official capacity. Williams v. Condon, 553 S.E.2d 496, 347 S.C. 227 (S.C.App. 2001). While not discerning a case that bars recovery against the State for the misconduct of it's employee the prosecutor, this lawsuit is over the constitutional deprivations resulting from the second trial and 6 years of incarceration. The Plaintiff certainly does not allege any actionable misconduct by prosecutors in that second trial. Therefore, prosecutorial immunity simply does not apply.

CONCLUSION

Novel circumstances have raised issues of novel impression. An inquiry into the nature of the Plaintiff's interests that were deprived for 6 years in violation of the South Carolina Constitution's prohibition against double jeopardy is necessarily fact intensive. The singularity of these circumstances and the uncertainty of South Carolina Jurisprudence as it relates to these issues require further factual inquiry and development and thus these pleadings are not susceptible to a SCRCP Rule 12(b)(6) motion to dismiss. The defendants motion to dismiss should be denied.

Respectfully submitted;



Robert C. Childs, III, #1218
Attorney for Plaintiff
2100 Poinsett Hwy, Suite D
Greenville, SC 29609
(864) 242-9997
Fax (864) 242-9914

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE JACK EDWARD EARL PARKER, PLAINTIFF, vs. STATE OF SOUTH CAROLINA, DEFENDANT.	COURT OF COMMON PLEAS 2013-CP-23-00994 TRANSCRIPT OF RECORD ORIGINAL

May 30, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE.

A P P E A R A N C E S:

ROBERT C. CHILDS, III, ESQ.
Attorney for the Plaintiff

RUSSELL W. HARTER, JR., ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

PROCEEDINGS

THE COURT: This is 2013-CP-23-994, Parker v. State of South Carolina. It's a motion to dismiss.

Mr. Harter.

MR. HARTER: Good morning, Judge.

THE COURT: Good morning.

MR. HARTER: Judge, I've -- we have filed a motion to dismiss in this case. It's in the file. We've stated several grounds. Let me clarify. And Mr. Childs and I spoke. This is, also -- one of the grounds is a 12(b)(6) motion. I think Mr. Childs is clear about what I'm arguing here.

MR. CHILDS: That's correct.

MR. HARTER: In my years of practice, I've dealt with a lot of smart lawyers, and Mr. Childs is in that group. Okay. And I hope he maybe has not outsmarted me on this. Although, I think he's very smart. And he has a very interesting argument here. I think he's not right. So I think -- I'm asking you to do the right thing here and grant our motion in this case.

Judge, it -- this -- it is a very unusual type of case. And in that -- and I've passed up a timeline that might be helpful. And I don't think anybody really disagrees with this timeline.

But what happens is in 2001, Parker kills Stewart.

And then in 2003, Parker is tried for murder here in Greenville with Judge Hayes presiding.

THE COURT: Yes. I remember all the chronology.

MR. HARTER: Okay. And so we've worked through all of this chronology. And this case is a filing by Mr. Parker where he alleges that the ruling by Judge Few in the second trial that indicated his claim -- that was not -- the Prosecution was not barred by double jeopardy is a violation of Mr. Parker's rights, and that this claim is based on inverse condemnation.

It is not a Tort Claims Act case. It is not a 1983 claim. It is not a claim based on any misconduct by anybody in the case.

And I do glean that now after reading Mr. Childs' memo, he admits and says that it is not a tort claim. He has purposefully not pursued a tort claim. There is no accusation of any prosecutorial misconduct by any of the folks involved in the prosecution. It is solely -- and that's why I think the case is appropriate for dismissal on a motion for summary judgment, because it's none of those things.

And what we're looking at is a lawsuit where Mr. Parker claims that because he was tried in court -- the Judge made a ruling on the double jeopardy issue. The jury made a unanimous finding of his guilt, and he was

sentenced. That his incarceration after sentencing is somehow a violation of his rights and entitles him to recover on a theory of inverse condemnation.

Although, he says it is not a tort claim, as I look at it from every possible angle, it is a tort claim masquerading as an inverse condemnation claim. As you know, Judge, the elements of inverse condemnation, I believe, are an affirmative, positive, aggressive act on the part of a government agency, a taking for a public use, and a permanent taking.

Now, he relies on provisions of the South Carolina Constitution. And I tried to print out, I think, in the packet of material that's attached to the timeline the Constitutional provisions that he's referred to in his complaint. And, certainly, I don't think there's any merit or even there's a claim that there was a violation of the Constitution, based on the fact that he was denied due process. I mean, he had due process.

I think his claim, as I understand it, is, basically, part of an inverse condemnation theory under Article 1, Section 13, which is -- it reads, Taking private property, economic development, remedy of life. And it provides, Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just

compensation being first made for the property. Private property must not be condemned by imminent domain for any purpose or benefit, including but not limited to the purpose and benefit of economic development, unless the condemnation is for public property.

Judge, I just submit to you respectfully that based on the allegations of this complaint, that's what his claim is. It is nothing else. We can twist it around and look at it from every other angle. And to -- with these facts -- and I think we pretty much agree on the facts, or we agree to the facts for purposes of this motion as are pled in the complaint.

It is simply not a claim that will lie under any decided case law that I'm aware of that would stand for the proposition that -- based on this case history. And as you, also, know, there was a -- the Supreme Court's decision was January 5, 2011, Opinion 26940, which reversed Judge Few and reversed the conviction.

But simply -- I think simply stated, the issue of Mr. Parker's liberty and his rights are not protected property for purposes of public use in an inverse condemnation setting. It just -- it is putting a -- trying to put a square peg in a round hole. And, you know, 12(b)(6) is appropriate in this case for those reasons.

Anyway you look at it, I just don't see how there's any supported law for this proposition. I know, as I said, smart lawyers can come up with, certainly, good ways to pursue claims. But I think the idea or notion that a ruling by a judge in a criminal case -- that if it is ever reversed can result in an inverse condemnation claim is just -- I miss the disconnect there. I mean, I just -- I don't see how that can possibly translate.

And that is exactly what the Plaintiff is trying to advocate in this case is that there was no misconduct by anybody. There was a judicial ruling that ended up being reversed, eventually, by the Supreme Court, although that ruling was affirmed by the Court of Appeals.

Judge, there is, as I said, no case I've been able to uncover anywhere in South Carolina that would support this proposition. And I'm not to say that just because there's some -- not some decided case that that -- that it can't work. But there is no logical extension from any case that I've been able to uncover or any statute that would support this claim.

The only law that I've been able to uncover that's even close would be the case of Jones, which we've handed up, Jones v. United States. And, in that case, we had exactly -- or pretty much the same factual scenario. You had somebody that was convicted in a criminal proceeding.

They asserted a claim later that there was a taking of their property because of the criminal proceeding and their incarceration. And that court said the taking clause -- explained depriving one of a personal liberty and property due to incarceration is not an Unconstitutional taking. And it is not the kind of property that is contemplated by the taking clause.

Also, the case of Shaw v. City of St. Louis, which we've handed up, is another decided case that says that their finding and holding as a claim of inverse condemnation does not exist for the taking of a person's liberty.

Judge, there -- you know, there are new theories of law that come out every day. But I respectfully submit to you that the notion or idea in this context of taking a criminal proceeding where there has been no misconduct by anybody involved in the case, there has been a judicial ruling that was affirmed by one appellate court and then reversed by another appellate court translates into some type of claim for a Constitutional violation and/or a claim for inverse condemnation.

And it's, also, interesting that in Article 1, Section 13, I think we, clearly, know the kinds of property that we're talking about -- or that the drafters were talking about when they say, Private property shall

not be taken for private use without consent of the owner, nor for public use without just compensation being first made for the property.

It is clear that this does not contemplate a person's personal liberty to be something that they're compensated for as a result of incarceration for a crime. And there is simply -- and, further, as a matter of further comment, there's no public use. We didn't seize Mr. Parker as a matter for any public use. Mr. Parker was incarcerated because he was tried in a court, according to the rules of court, and convicted by a jury on a charge that was later reversed on appeal.

And I'll be glad to try to answer any questions, Judge, or submit any additional authorities that might be appropriate. But I haven't found any case law that would support any theory like this.

I would, also, respectfully submit that we shouldn't have to invest the time and the energy into defending and engaging in the costly discovery that a case like this might necessarily involve just because these allegations are made. If the -- if it's a case that doesn't state a claim, fails to state sufficient facts to state a cause of action based on existing law, I respectful submit under Rule 12(b)(6) that the complaint should be dismissed.

Thank you.

THE COURT: Thank you, Mr. Harter.

Does it make any material difference that the State action, I suppose, here was something that was later found to constitute double jeopardy?

MR. HARTER: I don't think so, Judge.

I don't know that -- I mean, the only State action was the ruling, you know. Whether it was double jeopardy or not, I mean, you know, I'm not really sure I grasp fully the issue with that.

I mean, it was, to me, just a court ruling. It could have been on an evidence issue. It could have been on, you know, any other ground. I don't think it matters necessarily that it's a double jeopardy issue. I don't see the difference between that -- I mean, what we have is we have a proceeding, we have a judicial ruling that at one point in time made the case go forward, as opposed to not making the case go forward just like you would make a ruling on an evidence issue, or maybe the sufficiency of evidence.

I don't think that that is -- I don't think that a judge ruling on an issue is -- if that's the argument, an affirmative, positive, aggressive act on the part of the government if that's the -- if that's where the query is.

THE COURT: What about immunity? Does that have any bearing on --

MR. HARTER: Pardon.

THE COURT: Immunity.

MR. HARTER: Immunity. Well, when I drafted the motion, I'll tell you, I tried to look at the case. And I tried -- okay, what could possibly be out here? What claims could possibly be out here, you know? And my motion was drafted to address all of those.

To the extent -- I mean, this was a judicial act. There's absolute judicial immunity that would implicate here. And I imagine, you know, if there is any claim -- if the complaint does state a claim, if it does, then there would be absolute judicial immunity, in my view.

THE COURT: But he didn't sue --

MR. HARTER: Pardon.

THE COURT: He just sued the State; right?

MR. HARTER: That's right.

And I don't know. I mean, you might be the State, you know. But -- and that was what I was wondering. When he initiated the proceeding against the State, I mean, I know, at one point, the Attorney General's Office was involved in the appeal. And I was wondering, you know, what is the -- what's the theme here?

But, you know, that's -- there's immunity for the State, you know. And there's judicial immunity. And there's prosecutorial immunity. But I don't think we even

get to that. Because we don't have -- you know, that, normally, comes up, at least in my view, in the context of a claim that, at least, meets the threshold of stating a claim --

THE COURT: Okay.

MR. HARTER: -- you know, a 1983 claim, or a Tort Claims Act case.

THE COURT: Right.

MR. HARTER: We see those. I mean, you know, we -- you know, we do defend some of you judges that get sued for, you know, things. You might shouldn't, but, sometimes, you do, I mean, or you get named. I'll put it that way. But that's a defense, you know. And that's immunity. But I don't think we get there with this.

THE COURT: Okay. I understand.

Thank you, sir.

Mr. Childs.

MR. CHILDS: Your Honor, let me first say that the two cases cited by Mr. Harter, which is Jones v. United States and Shaw v. City of St. Louis, are both predicated on the United States Constitution on Article 5, the Fifth Amendment to the United States Constitution. We have not alleged a violation of the Fifth Amendment of the United States Constitution. We have alleged a violation of Article 1, Section 13 of the South Carolina Constitution.

And in both -- in Jones -- Jones alleges his personal property was -- he was not allowed to possess that property during his incarceration. And Jones said that does not make a federal claim for depravation of property. Shaw said his liberty was deprived. And the Court said liberty is not a recognized property depravation under the Fifth Amendment.

But you raised an issue that I think needs to be, initially, talked about, which is in my brief. Double jeopardy does make a difference, I think, in this case. And I've been clear in my memo that not just any ruling by a Court or not just any circumstance that may arise would give a cause of action to a plaintiff. But in this particular case, which is very isolated in circumstances where a guy was in jail for six years in violation of his Constitutional right against double jeopardy, gives rise to this South Carolina Constitutional cause of action.

The Plaintiff alleges that he was deprived of his protected property rights of not only his liberty, which Mr. Harter might have addressed in the federal cases, but his employment, his familial relations, his relations with his family, and his privacy for those six years. We've pled that there was aggressive, affirmative conduct on behalf of the State by incarcerating him.

I couldn't imagine any greater property right than

one can contemplate other than their liberty. But employment is another one that's important, nor a greater public use than the State holding his body. And most particularly -- again, this occurred in violation of his rights against double jeopardy under the South Carolina Constitution.

So if the Government takes your means of earning a wage, essentially, making your family destitute -- my client's children, ultimately, were in the care of child welfare people in Florida, because he was incarcerated for six years. I think that entitles us to compensation under inverse condemnation.

But, more importantly, these issues and the South Carolina courts determination of what exactly is private property, we know private property is something more than real estate. We know it's something more than wages. But the South Carolina courts haven't said a lot on that issue and have, generally, addressed the issues based on the U.S. Constitution. These are novel issues that should not be decided on a 12(b)(6) motion.

Perhaps, the Defendant might have an opportunity for summary judgment at a later stage of these proceedings. But I think we are entitled to all the reasonable inferences on our behalf. And we've properly pled a cause of action.

Again, contrary to deciding cases in reliance of the Fifth Amendment of the Unites States Constitution, the federal Constitution sets the floor for rights. The State courts set the ceiling. And as I've argued in my brief as put out well in there, as such, our state is free to determine that liberty is a compensable taking where the federal courts might say that it's not under Article 1, Section 13.

Additionally, the Defendant cites no state or federal cases for the lack of a taking of a person's employment, familial relations, and privacy. And, by the way, privacy is another one of those rights under the South Carolina Constitution where our courts have set a higher ceiling than the federal Constitution's right to privacy. South Carolina has a greater Constitutional right to privacy than the federal courts.

THE COURT: Well, they say that, but what is a concrete example of where they've, actually --

MR. CHILDS: Well, they haven't provided us with any concrete examples, Your Honor.

But my position is that this is a novel issue. And I disagree with Mr. Harter's allegation that any judge's ruling could give rise to this. That is not what we contend. We have purposely not pled a Tort Claims Act. We've purposely not individually sued anybody involved in

this case.

What we say is for six years, in violation of our double jeopardy rights, my client was behind bars unable to earn a living. His privacy was taken away. His liberty was taken away. And his familial relations were taken away. And I think, at this stage, what the Court has to do is look at the issues. And if there's a novel issue, it's not appropriate under the 12(b)(6) motion.

THE COURT: What makes the double jeopardy violation unique?

MR. CHILDS: Well, first of all, it's a Constitutional violation as alleged to a violation of evidence, or an error in the charge of law, and that type of thing.

So, essentially, the Supreme Court voided out that second trial entirely and said it should have never taken place. And so there is my client serving six years in prison for a nullity. And so I think it is significant that it was a Constitutional provision that was violated, as opposed to some other right, some other implied right of due process or some -- you know, judge's ruling on the cross-examining of the witnesses, or something like that. This here is an explicit provision of the South Carolina Constitution that was violated, really, for six years.

THE COURT: But what makes that different from, say,

prosecutorial misconduct in the closing argument that is so egregious that it violates due process and the Defendant has been in prison for five years until the Supreme Court reversed on that ground? What's the difference?

MR. CHILDS: Well, as I stated in my brief, the difference is the Defendant in this case went through that first trial, and there was a mistrial granted. He was not incarcerated as a result of that. Then he went to a second trial where he was incarcerated as a result of that.

But I would say that the difference is that the Constitution does not explicitly state that a prosecutor can't make improper comments in his arguments. The Constitution of South Carolina explicitly states a person may not be incarcerated in violation of the double jeopardy clause.

THE COURT: Well, it explicitly says due process, doesn't it?

MR. CHILDS: It does.

THE COURT: So what's --

MR. CHILDS: But a determination of what that might be is entirely unclear. But it's entirely clear that double jeopardy is pretty clear.

Again, it's a novel issue. So I'm arguing that the

Court can't really -- shouldn't really rule on a novel issue under 12(b)(6). That's the standard of review at this stage.

THE COURT: Thank you.

Mr. Harter.

MR. HARTER: Judge, it's so novel it's wrong. Okay.

And I would like to point out that on the Shaw v. St. Louis case, I do believe the issue there was an issue or claim made similarly to this under the -- a Constitutional provision in the Minnesota -- excuse me, the Missouri Constitution. Okay. So I do think that was not just a decision based on federal -- the federal -- U.S. Constitution, but, also, that state's Constitution.

And, you know, again, I just don't see the connection here with a viable claim based on the history of this case. And the history of this case is pretty much undisputed. And, in fact, that -- the interesting thing is the trial -- the second trial, which is the one that resulted in Mr. Parker being incarcerated, there was never any issue about any misconduct by anybody or anything, except the issue about whether or not Judge Few was right or wrong in his ruling on double jeopardy.

And I would point out that the -- under the South Carolina Constitution, Article 1, Section 12 deals with double jeopardy. And it says no person shall be subject

to the same offense to be twice put in jeopardy of life, liberty, nor shall any person be compelled in any criminal case to be a witness against himself. That's the right. That is the right secured under Section 12. It doesn't say but if somebody violates this right it translates into some kind of claim or entitlement to some compensation. That is Article 12.

Article 13 deals with an entirely different matter. It deals with the issue of protecting property rights, which are recognized and which have been established through this Constitutional section and through decided case law, which we have.

So there ain't a connection between -- I mean, that double jeopardy clause is great. I mean, it protected Mr. Parker. And it's there. And it prevented him from being in prison now. But it does not translate into any kind -- state action could appoint, say, an aggressive act or a taking.

And, as you pointed out, I mean, I think there was every element of due process here. So it might be novel, but that doesn't make it legitimate. And I submit that we shouldn't have to prolong the discovery with this. And we'll be back in front of some other judge, maybe you, at a later time with possibly the same issues and the same arguments.

But I respectfully submit, Judge, that, you know, the criminal process worked. Mr. Parker got his freedom through good lawyering and judicial decisions. But this does not meet the requirements or elements of an inverse condemnation claim to entitle him to pursue this kind of damage at this time.

MR. CHILDS: Let me clarify. There were lots of issues of error in that second trial. But we knew and believed that the one issue on the double jeopardy claim was the one raised on appeal because it would prevail. But there was more than enough sufficient other errors during the course of that trial. It's irrelevant since we ran it on the double jeopardy clause.

THE COURT: Well, what kind of further discovery would need to be done?

MR. CHILDS: Not much.

MR. HARTER: You know, Judge, we may have to take some depositions. Certainly, Mr. -- to the extent this gentleman claims extensive damages to his family relationship and to his economic loss, I mean, that's -- we would be engaged in extensive discovery, I imagine, with that, at least -- and I don't know to the extent there's any suggestion that there was any, you know, impropriety in that second trial. That would be an issue, if that was claimed.

I mean, if we have a stipulation that the only basis is a ruling by a judge, then that could limit it. But I do think we'll -- you know, in the interest of -- I don't -- I think it's a legal question. But to the extent there's damages claimed in this case, and there are, and they're not inconsequential, there could be extensive discovery on there.

THE COURT: Okay. Well, I thank you for your fine arguments.

And, Mr. Childs, I applaud your creativity. However, I am going to grant Mr. Harter's motion. I don't believe that it is a viable cause of action. And based on the complaint and construing all the inferences in Mr. Parker's favor, I don't believe you can find any relief under any theory of this case.

So if you could just submit a proposed order and share it with Mr. Childs, I will review that.

Thank you.

**********END OF TRANSCRIPT OF RECORD**********

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
D. Garrison Hill, Judge

Case No. 2013-CP-23-00994

Jack Edward Earl Parker,..... Appellant,

v.

State of South Carolina,..... Respondent.

CERTIFICATE

I certify that on September 2, 2014, I served the Record on Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

Russell W. Harter
14 Lavina Avenue
Post Office Box 10244
Greenville, SC 29603
Counsel for Respondent

Respectfully submitted,

Robert C. Childs, III
CHILDS LAW FIRM
2100 Poinsett Highway, Suite D
Greenville, SC 29609

Counsel for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 03 2014
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
D. Garrison Hill, Judge

Case No. 2013-CP-22-000994

Jack Edward Earl Parker,..... Appellant,

v.

State of South Carolina,..... Respondent.

CERTIFICATE

I certify that the Record on Appeal contains all of the matter designated by the Parties and no irrelevant matter.

I further certify that the Record on Appeal has been redacted in compliance with the Supreme Court's Order 2009-03-18-01.

Robert C. Childs, III
CHILDS LAW FIRM
2100 Poinsett Highway, Suite D
Greenville, SC 29609

Counsel for Appellant