THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

CASE NO. 2016-CP-26-1614

Robert Palmer ..... Appellant

vs.

State of South Carolina, Horry County and David Weaver..... Defendants

Of which State of South Carolina is the..... Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 29, 2015, the South Carolina Supreme Court in *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015) held that Robert Palmer had been wrongfully convicted and found him not guilty of homicide by child abuse and aiding and abetting homicide by child abuse along with unlawful conduct towards a child. Palmer was convicted by a jury four years prior to the Court entering its opinion and had been committed to the South Carolina Department of Corrections until this Court ordered he be freed. In reaching its ruling the Supreme Court stated:

> We find there is no evidence in this record that Palmer either harmed the victim or was aware Gorman was harming him....there is no evidence other than rank speculation that such an incident occurred.... there is no evidence that more prompt treatment would have mitigated the victim's injuries and thus we do not perceive potential liability for the non-abuser even if he or she was aware of the abuse. For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that any delay in seeking medical attention by Gorman caused the victim harm beyond that inflicted by the perpetrator.
> (413 S.C at 423).

In the wake of this Court's opinion in *Palmer supra*, the Plaintiff brought a civil action in the Horry County Court of Common Pleas on March 7, 2016 with Civil Action No. 2016-CP-26-1614. Plaintiff's Complaint had causes of action for malicious prosecution, false arrest, negligence, violation of 42 U.S.C. §1983 and for declaratory judgment. Specifically the declaratory judgment cause of action requested the court to declare a remedy existed for wrongful conviction in South Carolina under both the United States and South Carolina Constitutions. (Complaint, R. p. 31). The Defendant State of South Carolina filed its Motion to Dismiss which was granted by the Circuit Court. Plaintiff then filed a Motion for Reconsideration which the Circuit Court also denied. This appeal was timely filed.

This case involves matters of substantial public importance. Specifically, whether there is a constitutional remedy in South Carolina for the wrongfully convicted and whether there is cause of

action available for those wrongfully convicted. In simplistic terms, is the State required to provide a civil remedy for one who is wrongfully convicted, and if it doesn't, then does the State and Federal Constitution mandate it? Appellant believes the answer to this question is a resounding "Yes.' See *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed.60 (1803). ("the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.")

Currently, twenty-three states, the District of Columbia and the federal government have enacted statutes establishing a claim against the government for wrongful conviction and incarceration. Appellant refers to the following authorities in those states:

> *See* 28 U.S.C. § 1495 (2000); 28 U.S.C. § 2513 (2000 & Supp. 2005); ALA. CODE §§ 29-2-150 to -165 (LexisNexis 2003); CAL. PENAL CODE §§ 4900–4906 (West 2000 & Supp. 2008); D.C. CODE § 2-421 to -425 (2001); 705 ILL. COMP. STAT. ANN. 505/8(C) (West 2007); IOWA CODE ANN. § 663A.1 (West 1998); LA. REV. STAT. ANN. § 15:572.8 (Supp. 2008); ME. REV. STAT.ANN. tit. 14, § 8241–8244 (1964); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (LexisNexis 2006);MASS. GEN. LAWS ANN. ch. 258D, §§ 1–9 (West 2006); MO. ANN. STAT. § 650.055 (West2006); MONT. CODE ANN. § 53-1-214 (2007); N.H. REV. STAT. ANN. § 541-B:14(II) (2006); N.J.STAT. ANN. §§ 52:4C-1 to -6 (West 2001); N.Y. CT. CL. ACT § 8-b (McKinney 1989); N.C.GEN. STAT. § 148-82 to -84 (2005); OHIO REV. CODE ANN. § 2743.48–.49 (LexisNexis1994); OKLA. STAT. ANN. tit. 51, § 154 (2008); TENN. CODE ANN. § 9-8-108(a)(7) (Supp. 2007);TEX. CIV. PRAC. & REM. CODE ANN. § 103.001–.003 (Vernon 2005); VT. STAT. ANN. tit. 13, § 5574(Supp. 2007); VA. CODE ANN. §§ 8.01-195.10 to .12 (2007); W.VA. CODE ANN. § 14-2-13a (LexisNexis 2004); WIS. STAT. ANN. § 775.05 (West 2001).

Significantly, twenty-two states including South Carolina have no remedy established for wrongful conviction.[1] This is a tragedy of epic proportions and has been reported on by the New

[1] South Carolina has also considered a wrongful conviction statute which did not pass the legislature. See Senate Bill 1037 referred to House Judiciary on March 21, 2012 to amend Chapter 13, Title 24 of the 1976 Code to read "Article XXII Compensation for a Wrongful Conviction." The bill did not pass the House, but defines wrongfully convicted as "means a person who was convicted of an offense, was incarcerated for the offense for at least 90 days, was incarcerated solely on the basis of the conviction of the offense and is innocent of the offense." Proposed S.C. Code § 24-13-2310.

York Times in a series of articles and recent studies.[2]

Further, a growing list of law review articles and comments on the issue of the wrongfully convicted have brought national attention to the problem. Indeed there is also a model Act proposed for those wrongfully convicted.[3] The authors of the 1996 book Convicted But Innocent (Huff, Rattner and Sagarin) spent more than a decade studying the persistence of wrongful convictions, gathering evidence and assessments from police administrators, sheriffs, prosecutors, public defenders and judges.[4]

It is against this backdrop that Appellant argues that the wrongfully convicted is constitutionally entitled to a remedy and that this is a matter of substantial importance to the citizens of South Carolina. Specifically, Appellant's counsel believes that South Carolina Appellate Court Rule 204(b) applies to this case because it involves (a) a legal principle of major importance and (b) an issue of significant public interest in this state. (*See In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (S.C. 2009) (Supreme Court could exercise its authority to transfer a matter to the appropriate appellate court.)

STANDARD OF REVIEW

The trial court decided this case under SCRCP 12(b)(6). Thus, the standard of review is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the

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[2] *See Free and Uneasy, Methodology*, N.Y. TIMES, Nov. 25, 2007, available at http://www.nytimes.com/2077/11/25/us/25dna_method.html; Janet Roberts & Elizabeth Stanton, *Free and Uneasy, A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 38; Fernanda Santos, *Free and Uneasy, Vindicated by DNA, but a Lost Man on the Outside*, N.Y. TIMES, Nov. 25, 2007, at 1 [hereinafter Santos, *Free and Uneasy*]; *see also* Fernanda Santos, *Bill Would Give Tax Break to Exonerated Prisoners*, N.Y. TIMES, Dec. 7, 2007, at B4 [hereinafter Santos, *Bill Would Give Tax Break*]; Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, Dec. 2, 2007, at 4; *Exonerated, Freed, and What Happened Then,* N.Y. TIMES (online), Nov. 25, 2007, http://www.nytimes.com/interactive/2007/11/25/nyregion/20071125_DNAI_FEATURE.html (containing an interactive multimedia feature with audio interviews and profiles of dozens of DNA exonerees.

[3] Model legislation: An Act concerning claims for wrongful conviction and imprisonment. The Innocence Project 1 (Dec. 2014).

[4] See Convicted But Innocent: Wrongful Conviction and Public Policy (Huff, Rattner and Sagarin) (1995).

Complaint states any valid claim for relief. *Stiles v. Onovato*, 318 S.C. 297, 457 S.E.2d 601 (S.C. 1995); *Riddle v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009).

ARGUMENT

I. NOVEL ISSUES SHOULD NOT BE DECIDED ON A MOTION TO DISMISS.

It is well settled in South Carolina that novel issues should never be decided on a 12(b)(6) motion. In *Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015), the Supreme Court of South Carolina held when novel issues are raised they should never be resolved by the trial court on a motion to dismiss for failure to state facts sufficient to constitute a cause of action. See *Chestnut*, 776 S.E.2d at 83 ("on appeal from the grant of a Rule 12(b)(6) motion, we are concerned only with whether the allegations of the complaint, which we must accept as true, state a cause of action.")

In this case, Appellant sought a declaratory judgment of the Circuit Court that the United States and South Carolina Constitutions provided a civil remedy for the wrongly convicted in this state. Appellant pointed to the due process clause in both the South Carolina and United States Constitutions and the language in the Constitution itself which provides that "no person shall be deprived of life, liberty and the pursuit of happiness without due process of law." Appellant argued due process and other State and United States constitutional provisions required that the Appellant have a remedy for money damages for being wrongfully convicted and being held in the Department of Corrections against his will for four years. Because these constitutional issues were novel ones, this matter should not have been decided on a motion to dismiss. (See *Chestnut*, "novel issues should not be resolved ion a Rule 12(b)(6) motion") 776 S.E.2d at 83). The facts of this case should have been fully developed and this could only have been done through depositions, discovery and testimony of witnesses.

Further, the South Carolina Supreme Court has also addressed novel issues in regard to a remedy and has held that South Carolina Rule of Civil Procedure 12(b)(6) is not applicable in those situations. See *Keiger v. Citco Coastal Products*, 326 S.C. 369, 482 S.E.2d 792 (1997) (novel issue regarding public policy exception in employment at will contract should not be decided on motion to dismiss). Thus, the Circuit Court erroneously granted the motion to dismiss and should be reversed.

II. APPELLANT HAS A CONSTITUTIONAL RIGHT TO A CIVIL REMEDY FOR A WRONGFUL CONVICTION.

The Fifth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution protect Plaintiff's right to a remedy for a wrongful conviction in South Carolina. The Fifth Amendment states in pertinent part:

"Nor be deprived of life, liberty or property without due process of law."[5]

The Appellant asserts in this case that because there is no state law remedy for wrongful conviction that the South Carolina and United States Constitutions provide one and that the Fifth Amendment and Article I Section 3 so command it.[6] The Fifth Amendment has long been held to require just compensation for taking property for public use.[7] However, court opinions have not specifically discussed whether compensation should be awarded for deprivation of liberty, i.e., a wrongful conviction by the government.

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[5] "The due process clause, like its forbearer in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[6] Article I, Section 3 of the South Carolina Constitution is more expansive than the United States Constitution in that it is found under the subheading "Declaration of Rights." Further, the Preamble to the South Carolina Constitution states: "We the people of the State of South Carolina, in convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same."

[7] South Carolina has its own eminent domain provisions in its Constitution. (See Article I, Section 3).

The United States Supreme Court in the recent case of *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) had the opportunity to discuss the meaning of the term liberty. The Court declared "The Constitution promises liberty to all within its reach...a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." See *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015). While not entirely on point, the fact that the United States Supreme Court found within the liberty provision of the Constitution the right of same sex couples to marry is similar to what Appellant seeks in this case: a civil remedy for those wrongfully convicted against the state.

As to the South Carolina Constitution (Article I, Section 3), our Supreme Court has said that due process must involve deprivation of a liberty interest. See *Kearse v. State Health and Human Services Finance Commission*, 318 S.C. 198, 456 S.E.2d 892 (1995).

The Circuit Court's Order does not address Plaintiff's constitutional claims under either the state or federal constitutions. The Circuit Court simply held:

> "Plaintiff has failed to state any claim upon which relief may be granted as to the Defendant State of South Carolina."
>
> The Circuit Court further stated: "Plaintiff received due process. His conviction was vacated and he was released. He received all the due process available in South Carolina." [8]
>
> Finally, "Plaintiff's analogies to the State and U.S. Constitutions lack statutory or case law support."
>
> (Order of Circuit Court, p. 6.) (R. p. 8).

The Circuit Court's order does not specifically discuss Plaintiff's constitutional claims other than the sentences above. Plaintiff's claims under both the South Carolina and United States Constitutions cannot be trumped by arguments under the South Carolina Tort Claims Act or

[8] This pronouncement by the circuit court is shocking since it holds there is no remedy in South Carolina for wrongful imprisonment and makes no apologies for this significant wrong visited on Palmer.

sovereign immunity. All constitutional claims are always direct actions against state or local government entities and officials. Suits against states under the just compensation clause for harm resulting from wrongful convictions are available under the Fifth Amendment's self-executing just compensation provision. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) (the right to just compensation is guaranteed by the Constitution. A promise is implied because a duty to pay is imposed by the Fifth Amendment). *See also Manning v. New Mexico Energy Minerals and Natural Resources Dept.*, 144 P.3d 87, 96 (N.M. 2006) authorizing direct action against the state under the United States Constitution. While Appellant does concede that no state Supreme Court decision has yet addressed whether wrongful convictions and their right to a civil remedy arise under the United States Constitution or a State Constitution, this Court should so hold in this case.

A. Plaintiff's labor is protected by the State and Federal Constitutions.

Appellant notes that recent Court decisions holding "labor" is a form of property protected by eminent domain principles should enable individuals such as Appellant who were wrongfully convicted to assert that the productive value of their labor was taken from them while they were in prison. There is precedent in United States Supreme Court decisions that compensation is constitutionally mandated for a temporary taking of property and thus should enable individuals to receive compensation for the period during which they were wrongfully confined by the State and incapable of laboring productively for themselves. See *United States v. Lewis*, 342 F.Sup. 833, 836 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973); *accord State v. Superior Court*, 40 P.3d 1239 (Alaska Ct.App. 2002) (relying on *Lewis* to conclude that Due Process principles require compensation when a fine is wrongfully collected); *Ex parte McCurley* 412 So.2d 1236 (Ala. 1982) (same) *People v. Nance*, 542 N.W.2d 358, 359 (Mich. Ct.App. 1995), *appeal denied*, 554 N.W.2d

899 (Mich. 1996) (same).[9] Accordingly, if a fine which was wrongfully collected because of a conviction should be returned, then logically Appellant has an equal claim for his liberty being restricted as a result of a wrongful conviction and thus the state must provide him a remedy.[10]

Several states have explicitly held governmental appropriation of labor to be protected by state or federal takings clauses, absent a finding of a duty. Those states are Alaska: *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437 (Alaska 1987); Arkansas: *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); Indiana: *Sholes v. Sholes*, 760 N.E.2d 156, 163-164 (Ind. 2001); Kansas: *State ex rel. Stephan v. Smith*, 747 P.2d 816, 842 (Kan. 1987); Iowa: *McNabb v. Osmundson*, 315 N.W.2d 9, 16 (Iowa 1982); Missouri: *State ex.rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985); Oklahoma: *Bias v. State*, 568 P.2d 1269, 1272 (Okla. 1977); Utah: *Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Utah 1968).

Thus, those states and the United States Court of Appeals for the Fifth Circuit have either explicitly held or strongly indicated in dicta that a government appropriation of labor can require just compensation under federal or state takings clauses. While South Carolina courts have not yet ruled on this particular issue the Appellant believes those decisions are support for his position.

Several courts have also applied due process principles directly to claims brought by wrongfully convicted individuals in holding that wrongfully assessed fines must be returned by the government. One influential decision concluded as follows:

> The Fifth Amendment prohibition against the taking of one's property without due process of law demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his

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[9] In *Ex parte McCurley*, Alabama had a specific prohibition in its Constitution against a court awarding a money judgment against the State. The Court applied the Fifth Amendment to order a refund of all fines, *Accord State v. Parker*, 872 P.2d 1041 (1994); *In re Estate of Erdman*, 447 N.W.2d, 356 S.D. (1989).

[10] Numerous United States Supreme Court decisions have required the states to provide a constitutional remedy in the context of taxpayer disputes over refunds of illegally collected taxes. See *Ward v. Love County*, 253 U.S. 17, 40 S.Ct. 419 (1920); *McKesson v. Florida Alcohol & Tobacco Division*, 496 U.S. 18 (1990).

> government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of the prosecution.

See *United States v. Lewis*, 342 F.Sup. 833, 836 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973); see also *State v. Superior Court*, 40 P.3d 1239 (Alaska Ct.App. 2002) (relying on *Lewis* to conclude that Due Process principles require compensation when a fine is illegally and wrongfully collected).

III. THE SOUTH CAROLINA CONSTITUTION PROTECTS APPELLANT'S RIGHT TO A REMEDY (ARTICLE I, SECTION 3).

Appellant also asserts that Article I, Section 3 of the South Carolina Constitution provides the State constitutional authority for a remedy for a wrongful conviction. Article I, Section 3 states as follows:

> The privileges and immunities of citizens of this State of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law nor shall any person be denied the equal protection of the laws.
> (See South Carolina Constitution, Article I, Section 3.)

Appellant maintains that due process of law pursuant to the South Carolina Constitution incorporates the right of Appellant to have a civil remedy for a wrongful conviction despite the fact that no South Carolina statute exists which gives Appellant that right. It is without question that Appellant's liberty interest (his incarceration) was at stake and that there is no due process because there is no civil remedy for his wrongful conviction after his release. Our Supreme Court has said that the Legislature cannot without violating (former Article I Section 5) arbitrarily deprive one of his /her fundamental rights pertaining to life, liberty and property. *See Simmons v. Western Telegraph Co.*, 63 S.C. 425, 41 S.E. 521 (1902).

South Carolina courts have consistently held that a claim of denial of due process must be analyzed in a two part inquiry: (1) whether the interest involved can be defined as "liberty" or "property" within the meaning of the due process clause and if so (2) what process is due under the

circumstances. *State v. Binnarr*, 400 S.C. 156, 733 S.E.2d 890 (2012). (Due process is flexible and calls for such procedural protections as the particular situation demands). *South Carolina Department of Social Services v. Wilson*, 352 S.C. 445, 574 S.E.2d 730 (2002).

In this case, Appellant's wrongful conviction surely involves his liberty within the meaning of the due process clause; and second, Appellant is entitled to a meaningful remedy to compensation once it has been determined he is wrongfully convicted. In essence, because Appellant's liberty interest is implicated, the South Carolina and United States Constitutions require that he be provided a remedy for his wrongful conviction.[11]

As an example, this Court relied on a United States Supreme Court decision and found an indigent accused of a crime had a due process right to counsel to assist him. See *State v. Cowart*, 251 S.C.360, 162 S.E.2d 535 (S.C. 1968). Other examples include *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (tenured professor had property interest in continued employment which is safeguarded by due process.); *see also, Ex Parte Rice*, 307 S.C. 469, 415 S.E.2d 819 (S.C. 1991) (prisoner denied due process because of family court's denial of leave to proceed *in forma pauperis* where the family court found that the prisoner was not indigent based on earned monthly income of $36.50 per month and a monthly expenditure of $35.00 and that it would take him almost four years to afford the filing fee and service of process charge.

IV. THIS COURT SHOULD REMEDY A GRAVE INJUSTICE BY REQUIRING A REMEDY FOR WRONGFUL CONVICTIONS.

Our courts have consistently held that due process is violated when a party is denied fundamental fairness such as what has occurred in this case. See *Theisen v. Theisen*, 382 S.C. 213,

[11] There is ample support for this position when taxes are paid and the state provides no remedy. *See Ward v. Love County*, 235 U.S. 17 (1920) (County may not collect taxes by compulsion and have no obligation not to repay them); *McKesson v. Florida Alcohol and Tobacco Div.*, 496 U.S. 18, 110 S.Ct. 2238 (1990) (State must offer remedy on unlawful taxes).

676 S.E.2d 133 (2009), *rehearing denied*; and *Hipp v. South Carolina Department of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009).

The Supreme Court of South Carolina has been consistent about fundamental fairness and injustice. Some of the most significant examples in which the Court has remedied serious and significant injustices include *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) in which the Supreme Court overruled sovereign immunity. The Court in that same opinion recounted other cases in which it felt fundamental fairness was at stake. See also *Kensey Construction Co. v. South Carolina Department of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978) (court eliminates immunity from suit for state based upon contractual obligations); *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association*, 277 S.C. 1, 282 S.E.2d 230 (1981) (abolishing charitable immunity).

Other major cases regarding fundamental fairness principles include *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (Supreme Court adopts comparative negligence as the law in South Carolina); and the most recent and notable case, *Abbeville County School District v. State of South Carolina*, 410 S.C. 619, 767 S.E.2d 157 (2014) (Supreme Court rules students in economically disadvantaged school districts were entitled to the same education as students in other areas of the state).

In this case, the grave injustice is an unlawful conviction in which Appellant was deprived of his liberty and imprisoned for four years. Under those circumstances and because South Carolina has not yet adopted a wrongful compensation statute the only remedy is to find that the South Carolina and United States Constitutions both explicitly and impliedly require the State to offer a fair and speedy remedy for the wrongfully convicted as a matter of fundamental fairness.

V. SOUTH CAROLINA'S CONSTITUTION REQUIRES A REMEDY FOR EVERY WRONG (ARTICLE I, SECTION 9).

The South Carolina State Constitution is different from the United States Constitution in many respects. One of the unique features is Article I, Section 9 entitled Courts: Speedy Remedy. It provides as follows:

> All courts shall be public and every person shall have speedy remedy therein for wrongs sustained.

Appellants assert this provision of the South Carolina Constitution mandates that there be a remedy for every wrong including a wrongful conviction. The case law supports this idea. See *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171 (1911) in which the Supreme Court defined the term wrongs "in its broadest legal sense embracing every injury to or impairment of legal rights of person or property." See also *State v. Lagerquist*, 254 S.C. 501 (1970), 176 S.E.2d 141, *cert denied*, 91 S.Ct. 912, 401 U.S. 937, 28 L.Ed. 2d 216 (1970) (which cites with approval the definition of wrongs).

Here, Appellant has sustained a serious wrong (a wrongful conviction and four years in prison) and there is no statutory remedy. The South Carolina Constitution provides a speedy remedy under Article 1 Section 9 and thus provides the mandate to correct the injury to the Plaintiff. Article 1 Section 9 contemplates freedom from bodily restraint and mandates a civil remedy if one is illegally restrained. This is especially true since the meaning of liberty is to be determined in its broadest sense. *See Boling v. Sharp*, 347 U.S. 497; 74 S.Ct. 693, 98 L.Ed. 884 (1954) (liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective).

VI. SOUTH CAROLINA'S COURTS HAVE DEFINED FUNDAMENTAL FAIRNESS UNDER THE DUE PROCESS CLAUSE BROADLY.

This case is about fundamental fairness. Here, Plaintiff spent four and a half years in prison based on an unlawful and erroneous conviction. The Courts of South Carolina have gone out of their way to define fundamental fairness in such a manner as to obtain justice. See *Hipp v. South Carolina Department of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009) (fundamentally unfair to suspend a driver's license twelve years after conviction).

The Court has, when discussing fundamental fairness, indicated that the fundamental fairness doctrine should be used when it implicates a property or liberty interest. See *Sloan v. Board of Physical Therapy*, 370 S.C. 452, 636 S.E.2d 598 (2006) (a liberty interest is freedom to practice a profession).

Thus, Appellant asserts there is a due process claim under South Carolina's Constitution (Art. I, Section 3) since there is no statutory remedy for a wrongful conviction. Our courts have repeatedly held fundamental fairness is that which is shocking to the universal sense of justice. See *McWee v. State*, 357 S.C. 403, 593 S.E.2d 450 (2004) (If one seeks to infringe on a liberty interest then fundamental fairness is implicated.); *Santosky v. Kramer*, 455 U.S. 745 (1982) (South Carolina Supreme Court finds liberty interest at issue in an action for termination of parental rights since it is a highly cherished right to be a parent).

In sum, our Court has interpreted the State Constitution and the due process revisions in the State Constitution in a more expansive manner than the United States Supreme Court has in interpreting the United States Constitution. See *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015) (A fundamental right to a fair trial under the State Constitution includes a failure to preserve exculpatory evidence in the context of an entire record). *See also State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013) (lifetime monitoring without a hearing unconstitutional). In *Dykes*, Justice Hearn

in her dissent stated that there were certain liberty interests that were violated by the mandatory non-reviewable provision of the monitoring law. 744 S.E.2d at 506. Appellant asserts that just such a liberty interest arises in this case since Appellant has served a sentence for a wrongful conviction and now finds himself without any civil remedy for that wrongful conviction. The Due Process clause of South Carolina's Constitution (Art. I, Section 3) and the case law mandate a remedy from the State for serving a sentence as a result of a wrongful conviction. A failure to offer such a remedy violates fundamental fairness and is shocking to the universal sense of justice. See *McWee v. State*, 357 S.C. 403, 593 S.E.2d 456 (2004). Thus, Appellant requests that this Court find that the failure of South Carolina to offer a remedy for wrongful conviction implicates the South Carolina Constitution and thus such a remedy is derived from it.

VII. *BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*, 403 U.S. 388 (1971) CREATES A REMEDY FOR THE WRONGFULLY CONVICTED IN SOUTH CAROLINA.

In *Bivens*, the United States Supreme Court ruled for the first time that an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizure had been violated by federal agents. Appellant claims that this same right exists for a wrongful conviction. In *Bivens*, the United States Supreme Court held "We hold defendants have no immunity to protect them from damage suits charging violations of constitutional rights." (See *Bivens,* 403 U.S. 388 (1971)). Significant in *Bivens* was Justice Brennan's decision to hold that "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." *Bivens*, 403 U.S. at 392. The *Bivens* Court also held that damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal

interest in liberty. *Bivens,* 403 U.S. at 395. See *Nixon v. Condon,* 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932).

In the decade after *Bivens* was delivered, the United States Supreme Court has recognized constitutional tort actions for violations of rights protected under the Fifth and Eighth Amendments to the United States Constitution. *See Carlson v. Green,* 446 U.S. 14, 64 L.Ed.2d 15 (1980) (allowing damage action against prison based on Eighth Amendment provision against cruel and unusual punishment since Congress neither prohibited damages nor expressly provided another equally effective remedy); *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979) (permitting damage claim for violation by Congressman of Fifth Amendment due process guarantee in context of wrongful discharge of employee).

Thus, where legal rights have been invaded, courts may use any available remedy to make right the wrong inflicted. This is despite the fact that the Constitution does not in so many words provide for its enforcement by an award of money damages for the consequences of the violation. As Justice Brennan most aptly said "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens,* 403 U.S. at 397.

Accordingly, Appellant submits that both the United States and South Carolina Constitutions provide a *Bivens* remedy and that the failure to do so is itself a constitutional violation.

VIII. MANY STATES HAVE ADOPTED *BIVENS* FOR CONSTITUTIONAL TORTS.

While South Carolina has not adopted a *Bivens* style cause of action for constitutional torts, Appellant urges the Court to do so. A number of states have recognized causes of action against individuals and governments for constitutional torts based on an implied cause of action for damages pursuant to their respective Constitutions. Appellant requests that this court recognize that

implied cause of action exists under the South Carolina Constitution. Examples of other states which have adopted this approach include *Brown v. State of New York*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S. 2d 223 (1996). In that case, a class action was filed against the State of New York when the defendant police officers illegally searched and seized every African-American university student based on a rape investigation that was ongoing. The New York Court of Appeals recognized a damage remedy implied by its own state constitution. The Court noted:

> The state courts that have implied damage causes of action have traditionally rested their decisions on (1) the reasoning contained in the Restatement, Tort 2d § 874A, (2) analogy to a *Bivens* action, (3) common law antecedents of the constitutional provision at issue, or a combination of all three....
>
> Section 874 of the Restatement, Tort 2d, states that a court may imply a civil remedy from legislative or constitutional provisions, even though one is not expressly provided, if it determines that a remedy is appropriate in furtherance of the purpose of the provision and needed to assure its effectiveness. *Brown* 89 N.Y.2d at 174.

Significantly, the *Brown* Court found that if the remedy is not forthcoming from the political branches of government, then the courts must provide it by recognizing a damage remedy against the violators much the same as the courts earlier recognized and developed equitable remedies to enjoin unconstitutional conduct. Implicit in this reasoning is the premise that the Constitution is the source of positive law, not merely a set of limitations on government.

The *Brown* logic has been applied by other state courts. See *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (a direct cause of action is available under North Carolina State Constitution for free speech clause); *Binett v. Sabo*, 244 Conn. 23 710 A.2d 688 (Conn. 1998) (holding a constitutional cause of action under the Connecticut Constitution for violations of Article I, Sections 7 and 9 of the State Constitution for unreasonable search and seizure and wrongful arrest since the legislature did not prohibit the creation of a constitutional remedy and did not created a meaningful alternative remedy); *see also Widgeon v. Eastern Shore Hospital*

Center, 300 Md. 520 479 A.2d 921 (1984); *Gay Law Students v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3rd 458, 595 P.2d 592 (1979); *Phillips v. Youth Development Program, Inc.*, 390 Mass. 650, 459 N.E.2d 453; *Newell v. Elgin*, 34 Ill. App. 3rd 719, 340 N.E.2d 342 (1976); *Bott v. DeLand*, 922 P.2d 732 (Utah 1996); *Smith v. Dept. of Public Health*, 428 Mich. 540, 410 N.W.2d 749 (1987).

Recently the Oklahoma Supreme Court found an implied cause of action under the Oklahoma Constitution notwithstanding the Oklahoma Governmental Tort Claims Act. See *Bosh v. Cherokee County Building Authority*, 2013 OK 9, 305 P3d 994 (2013) (OK 2013) (Oklahoma Constitution Article 2, Section 30 provides a private right of action for excessive force). As of 1998 twenty-one states have recognized an implied cause of action for State Constitutional violations. *Dorwart v. Canaway*, 312 Mont 1, 58 P3d 128 (Mont 2002) The majority of legal scholars on the topic of state constitutional tort actions have favored an expansive right of action. (*Dorwart* 58 P3d 129) Footnote #31); see also *Widgeon v. Eastern Shore Hospital Center*, 300 Md. 520, 479 A.2d 921 (1984) (damage remedy for violation of state constitutional rights involving illegal search); *Lloyd v. Borough of Stone Harbor*, 179 N.J. Super 496, 432 A2d 572 (1981) (affirming damage award under tort claims act for violation of state constitutional rights); *Mayes v. Till*, 260 SO2d 578 (Miss. 1972); *Bull v. Armstrong*, 254 Ala 390, 48 SO2d 467 (1950); *State v. Lindway,* 131 Ohio St 166, 2 NE2d 490 cert denied 299 U.S. 506, 57 S.Ct. 36, 81 L.Ed. 375 (1936); *Sparkman v. Bd of Education* 2000 UT 87, 16 P3d 533 (2000); *In Re Wretlind* 225 Minn 554, 32 NW2d 161 (1948) and *Nelson v. Town of St. Johnsbury Select Board,* 115 A3d, 423 2015 VT 5 (VT 2015) (Vermont Constitution self-executing and enforceable without implementing legislation). All these cases hold that an individual may redress a state or federal constitutional deprivation by instituting a damage claim regardless of the lack of State law; See generally Friesen, State Constitutional Law, Section

7.02(2) and 7.07(1) for a list of states viewing favorable damage remedies for violations of state constitutional provisions.

Based on the above authorities, Palmer requests this Court hold that an implied cause of action arises under the South Carolina Constitution for unreasonable search and seizure (Article I, Section 10), i.e., to include unlawful conviction and for violation of his liberty interest. This is especially important because South Carolina has not adopted an unlawful conviction compensation statute and Appellant is deprived of any remedy. Thus, the Circuit Court erred in denying recovery in two respects. First, finding that Appellant had no implied cause of action under *Bivens* for unlawful conviction pursuant to the United State Constitution. Second, the trial court erred in holding that under the South Carolina Constitution Appellant did not have an implied cause of action for wrongful conviction under the South Carolina Constitution.

IX. THE TRIAL COURT ERRED IN HOLDING THAT THE SOUTH CAROLINA CONSTITUTION AND UNITED STATES CONSTITUTION DO NOT PROVIDE FOR AN IMPLIED CONSTITUTIONAL CAUSE OF ACTION FOR UNLAWFUL CONVICTIONS.

Both the South Carolina and United States Constitutions have provisions in them against unlawful and unreasonable searches and seizures and for restrictions on liberty.[12] The United States Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) held: "Liberty and property are both broad and majestic terms. The liberty provisions of both Constitutions provide for the freedom from bodily restraint, the right to contract, the right to engage in an occupation, the right to marry, the right to acquire useful knowledge, the right to establish a home and raise children and the right to worship God." 408 U.S. at 565.

[12] See Article I, Section 10. "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...."

Appellant urges the Court to define "liberty" to hold that a cause of action exists for unlawful convictions. Appellant's argument is that both the South Carolina and United States Constitutions both provide that the term "liberty" is expansive and broad in nature. *Boling v. Sharp*, 347 U.S. 497 (1954).

If the Court applies the concepts as discussed above, then *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotic*, 403 U.S. 388, 91 S.Ct. 1999 (1971) applies. *Bivens* holds that an individual could seek damages for a constitutional tort under either the United States or South Carolina Constitutions. Appellant urges the Court to adopt a *Bivens* cause of action in South Carolina.

In *Bivens*, the plaintiffs brought a cause of action for an illegal search and seizure by police without a warrant. They also argued that they had suffered humiliation, embarrassment and mental suffering as a result of the defendant's unlawful conduct. In *Bivens*, the defendants argued that the plaintiff's rights were covered by state tort law and not by federal law. The Supreme Court rejected that argument and stated "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." *Bivens*, 403 U.S. at 390.

The Court further went on to find that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for invasion of a personal interest in liberty." *See Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 1984 (1932).

The Supreme Court further found that even though the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation, it is well settled that where legal rights have been invaded, and a federal statute provides

for a general right to sue for such invasion, federal courts may use any available remedy to right a wrong. The same can be said for violations of the South Carolina Constitution.

In sum, in recognizing an implied cause of action under the Constitution, the United States Supreme Court stated "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. " *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803).

Thus, Appellant argues that the circuit judge erred when he held Appellant could not bring a *Bivens* cause of action under the United States or South Carolina Constitution for damages in this matter.

X. THE CIRCUIT COURT ERRED IN HOLDING THAT THERE WAS NO REMEDY FOR APPELLANT IN THIS CASE.

The Circuit Court in its order does not discuss the causes of action allowed under the South Carolina and United States Constitutions. Instead the court holds that the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10, et seq.) prohibits this action. (Circuit Court Order, R. p. 3). Appellant asserts that the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10, et seq.) cannot override an express Constitutional provision or implied cause of action under the South Carolina or United States Constitutions. Palmer's liberty interest and civil remedy for unlawful confinement are clearly protected by the Constitution no matter what the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10, et seq.) states in its preamble. The legislature cannot limit constitutional torts by the enactment of the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10, et seq.). All actions brought pursuant to the United States and South Carolina Constitutions under the supremacy clause need not comply with the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10, et seq.) because they derive from the Constitution which is supreme. Accordingly

the Circuit Court judge erred as a matter of law in ruling that this action based upon a constitutional theory could not be brought against the State of South Carolina for unlawful conviction.

XI. *WALLACE V. CONDON*, 347 SC 227, 553 S.E.2d 496 (SC App. 2001) HAS NO APPLICATION TO THIS CASE.

The Circuit Court dismissed this action finding that the suit against the State was barred by prosecutorial immunity. (Circuit Court Order, R. p. 3). However, the trial court misunderstood Palmer's argument found in the Sixth Cause of Action entitled Declaratory Judgment. To put it succinctly, Palmer urged the court to declare that there is a constitutional remedy in South Carolina for a wrongful conviction despite the fact there is no statutory scheme for recovery.

The *Wallace* case only dealt with the civil liability of a prosecutor for a conviction. It did not discuss nor decide whether the South Carolina or United States Constitutions require a civil remedy for a wrongful conviction. Accordingly, the court's decision was erroneous in holding *Wallace* was applicable to this case. ("A prosecutor in the employ of this state is immune from personal liability under § 1983 and the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant.") (*Wallace*, 553 S.E.2d at 498). Thus, Appellant claims error in dismissing the declaratory judgment cause of action based on *Wallace* as it does not answer the specific legal questions presented to the trial court.

XII. *CONNICK V. THOMPSON*, 131 S.CT. 1356 (2011) IS APPLICABLE.

The trial court also found Appellant's reliance on *Connick* was misplaced. (Circuit Court Order, R. p. 3). The trial court decision fails to discuss in its reasoning as to why *Connick* is not applicable. In fact, the trial court dismissed the action without allowing any discovery which would have been relevant to showing a pattern of violations by prosecutors which may be actionable under § 1983. (a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference). (*Connick*, 563 U.S. at 52). Thus, Palmer asserts

the trial court erroneously dismissed this case without allowing discovery to prove a pattern of Brady violations. Thus, Appellant was denied relevant and vital discovery to prove a § 1983 case consistent with the United States Supreme Court's decision in *Connick*. Accordingly, the trial court order should be reversed.

CONCLUSION

In summary, the Court should reverse the decision of the trial court. Counsel is reminded of this quote he came across while writing this brief which completely sums up the plight of Mr. Palmer. Edwin Borchard in researching the topic over eighty years ago wrote:

> If, in spite of (the) practical precautions against error, an innocent man is convicted of a crime, and it is later established that he has no connection with it, the least that the state can do to vindicate itself is to grant him an indemnity, not as a matter of grace and favor, but as a matter of right.[13]

Palmer requests this Court find such a right is inherent in the South Carolina and United States Constitutions and that this Court so find and hold such a remedy is consistent with fundamental fairness. Accordingly, Appellant requests the trial court Order be reversed and remanded wit instructions.

(SIGNATURES ON FOLLOWING PAGE)

[13] Edwin M. Borchard was an international jurist and leading advocate of compensation for victims of wrongful conviction. He wrote **Convicting the Innocent** in 1932 and the quote is from his book (p. 378).

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October 12, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-1614

Robert Palmer ..... Appellant

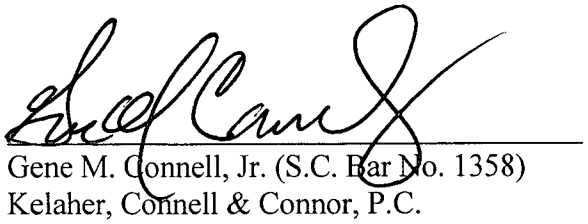
vs.

State of South Carolina, Horry County and David Weaver..... Defendants

Of which State of South Carolina is the..... Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR.



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