

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

RECEIVED

CASE NO. 2016-CP-26-1614

OCT 13 2017

SC Court of Appeals

Robert Palmer Appellant

vs.

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

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

FINAL REPLY BRIEF OF APPELLANT

Gene M. Connell, Jr. (S.C. Bar No. 1358)
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Roger Dale Johnson (S.C. Bar No. 71987)
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

I. SOUTH CAROLINA’S CONSTITUTION IS SELF-EXECUTING 1

II. APPELLANT HAS CLEARLY RAISED A TAKINGS CLAIM.....2

III. RESPONDENT’S CITATION OF *GIBBS V. SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES* IS OF NO IMPORT.3

IV. MANY OF THE CASES DEFENDANTS CITE ARE NOT APPLICABLE.5

V. FUNDAMENTAL FAIRNESS IS AT STAKE IN THIS CASE7

Conclusion7

TABLE OF AUTHORITIES

Cases

<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971).....	6
<i>Brown v. State of New York</i> , 674 N.E.2d 1129 (N.Y. 1996)	3
<i>Corum v. University of North Carolina</i> , 330 N.C. 761, 413 S.E.2d 276 (1992).....	2
<i>Gibbs v. South Carolina Department of Probation, Parole and Pardon Services</i> , 2003-UP-363 filed May 21, 2002.....	3
<i>Godfrey v. State of Iowa</i> , Opinion No. 15-0695	1
<i>Jones v. Memorial Hospital System</i> , 746 S.W.2d 891, 893-894 (Texas Ct. App. 1998)	5
<i>Leger v. Stockton United School District</i> , 149 Cal. Rptr. 688, 690 (Cal. Ct. App. 1988)	4
<i>Patterson v. I. H. Services, Inc.</i> , 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988)	5
<i>Schreiner v. McKenzie Tank Lines and Risk Management Service, Inc.</i> , 408 So.2d 711, 714 (Fla. Dist. Ct.App. 1982), affirmed 432 So.2d 567, 568 (Fla. 1983)	4
<i>State v. Lagerquist</i> , 254 S.C. 501, 176 S.E.2d 141 (1970).....	6
<i>Widgeon v. Eastern Shore Hospital Center</i> , 479 A.2d 921, 924 (Md. Ct. Special Appeals 1984)	4
<i>Williams v. Ozmint</i> , 380 S.C. 473, 671 S.E.2d 600 (S.C. 2008).....	7
<i>Winchester v. Howard</i> , 64 P. 692, 693 (Cal. 1901)	4
<i>Wright v. Colleton County School District</i> , 301 S.C. 282, 391 S.E.2d 564 (1990)	6

Rules

S.C. Code § 15-78-120(a)	6
--------------------------------	---

Constitutional Provisions

South Carolina Constitution Article I, Section 3.....	1
South Carolina Constitution Article I, Section 9.....	6
South Carolina Constitution Article I Section 10.....	1
South Carolina Constitution Article I Section 24.....	5
Maryland Declaration of Rights, Article 26.....	4

Other Authorities

Restatement Second Torts § 874A	5
---------------------------------------	---

The Appellant offers the following Reply to the Respondent's Initial Brief.

ARGUMENT

I. SOUTH CAROLINA'S CONSTITUTION IS SELF-EXECUTING.

The State in its brief argues at great length that there is no implied cause of action for money damages under any provision of the South Carolina Constitution.¹ At the same time the State concedes that enabling statutes are not needed where "a constitutional provision is self-executing." (See Respondent's Brief, p. 8). Under the State's argument, Article I, Sec. 3 of the South Carolina Constitution and Article I, Sec. 10 of that same Constitution would never be enforceable in court which sends the wrong message. In effect, a governmental entity would never be held accountable for any violations of these sections of the Constitution in this state unless a citizen is in criminal court and the usual penalty for constitutional violations is normally exclusion of evidence from any trial.

Since Appellant's initial brief, the Iowa Supreme Court has considered similar issues in the case of *Godfrey v. State of Iowa*, Opinion No. 15-0695 filed June 30, 2017. In *Godfrey*, Justice Appel writing for the Court stated:

It would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to insure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement.

Justice Appel added in a later part of the Opinion:

A constitutional violation is different from an ordinary dispute between two private parties.... When a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future.

¹ This argument is nonsensical since injunctive relief is routinely used by courts in constitutional cases all the time.

This line of reasoning has been adopted by our closest sister state, North Carolina, in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). In *Corum*, the Supreme Court of North Carolina reaffirmed the importance of freedom of expression for public employees and held that damages were available for violations of the North Carolina Constitution despite the fact there was no enabling statutory language. The Court explained:

We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to person and property. This Court has recognized a direct cause of action under the State Constitution against State officials for violations of rights guaranteed by the declaration of rights. 330 N.C. 761, 413 S.E.2d 276, 290 (1992).

Appellant believes that *Corum* is of particular significance to the ruling of this Court. First, much of South Carolina and North Carolina's Constitutions are similar. This is especially true since North Carolina and South Carolina were at one time a single colony under English Common Law. Second, North Carolina's Declaration of Rights is similar to South Carolina's Declaration of Rights in its Constitution and thus the *Corum* decision is significant.² Third, as has been stated previously, Appellant may have no remedy against the State of South Carolina outside of its Constitution for a wrongful conviction. Fourth, fundamental fairness dictates that a citizen wrongfully convicted have rights and remedies that would derive from our State Constitution.

II. APPELLANT HAS CLEARLY RAISED A TAKINGS CLAIM.

In its brief in opposition, the State argues that Appellant has not properly raised a takings claim under the United States and South Carolina Constitutions. In fact, Appellant raised takings claims in pages 7, 8, and 9 of his Initial Brief. For instance, see page 9 of Appellant's brief and those cases in which some states have explicitly held that labor of a citizen is protected by the

²A review of the Declaration of Rights in both the North Carolina and South Carolina Constitutions, reveals exactly the same rights enumerated in each constitution. (North Carolina does have 37 sections, while South Carolina has 24 sections). Also, both North and South Carolina Constitutions were adopted by their legislators in the same year 1776.

federal or state takings clauses. Appellant requests a ruling on this issue and has clearly stated so in his opening brief.

III. RESPONDENT'S CITATION OF GIBBS V. SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES IS OF NO IMPORT.

In Respondent's Brief, the State has cited in a footnote an unpublished opinion of the Court of Appeals in the case of *Gibbs v. South Carolina Department of Probation, Parole and Pardon Services*. (2003-UP-363 filed May 21, 2002). First, Appellant notes that unpublished opinions are not binding or persuasive in South Carolina and have no precedential value. See SCAR 220 (memorandum opinions shall not be published in the official reports and shall be of no precedential value). There are also other reasons why *Gibbs* is not applicable. In that case, the Court specifically withheld judgment on any other case except *Gibbs* by stating:

We address only the question of whether a private cause of action for damages exists under the South Carolina Constitution for violations of civil rights as specifically raised by Gibbs. The opinion is not intended as a comment on all private causes of action pursuant to the State Constitution.

A second reason why *Gibbs* is not applicable is the Court's observation that the Post Conviction Relief Act would provide Gibbs with a more efficient method of challenging the revocation of his probation.³

Third, as *Gibbs* makes clear there is a substantial split of opinion by courts deciding whether or not there can be an implied right of action under a state constitution. Appellant notes that in *Gibbs* the Court cited several cases including the seminal case *Brown v. State of New York*, 674 N.E.2d 1129 (N.Y. 1996). It is important to realize that *Brown* and the other courts that have followed it have based their decision on one of three theories of law.

³ Gibbs had been convicted of a crime, while Palmer has been declared innocent by the Supreme Court.

Appellant now reviews those theories of recovery which have been considered by other courts in adopting an implied cause of action for a constitutional violation.

A. The Self-Executing Doctrine.

The first theory by which courts have held that most constitutional rights are enforceable for damage remedies is called the self-executing rights doctrine. Those courts hold the presumption of a self-executing constitutional provision can be overcome only if a contrary intent is shown.⁴ See *Winchester v. Howard*, 136 Cal. 432, 64 P. 692, 693 (Cal. 1901); *Leger v. Stockton United School District*, 149 Cal. Rptr. 688, 690 (Cal. Ct. App. 1988). See also *Schreiner v. McKenzie Tank Lines and Risk Management Service, Inc.*, 408 So.2d 711, 714 (Fla. Dist. Ct.App. 1982), affirmed 432 So.2d 567, 568 (Fla. 1983) (ruling that the ban on discrimination “because of race religion or physical handicap” in the Florida Constitution is self-executing).

B. English Common Law.

Some states have grounded the right to sue for constitutional violations in the common law of England. For example, the Special Court of Appeals of Maryland has recognized such a cause of action because “under the common law of England, or individual rights, such as those now protected by Article 26 (of the Maryland Declaration of Rights) where preserved by a fundamental document (e.g., the Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages.” See *Widgeon v. Eastern Shore Hospital Center*, 479 A.2d 921, 924 (Md. Ct. Special Appeals 1984).⁵

⁴ The Defendant has cited examples of this on page 13, footnote 7 of its brief.

⁵ The Maryland Declaration of Rights was adopted in that state on November 11, 1776. Thus, North Carolina, South Carolina and Maryland all adopted their Constitutions within months of each other. Significantly both North Carolina and Maryland Courts have adopted the right to sue for money damages based on their respective Constitutions.

C. Restatement Second of Torts, § 874(A).

Section 874(A) of the Restatement Second of Torts has been held to be a source of definition for a private cause of action in constitutional violations. The section provides as follows:

When a legislative provision protects a class of persons by prescribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and need it to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.⁶

Appellant asserts that this Court should adopt the logic of all of these theories and hold that South Carolina recognizes an implied cause of action for constitutional violations. To hold otherwise leaves Appellant without a remedy for his illegal conviction.

IV. MANY OF THE CASES DEFENDANT CITES ARE NOT APPLICABLE.

Defendant in its brief, cites many cases which have no application to the facts of this case. For instance, Defendant argues *Patterson v. I. H. Services, Inc.*, 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988) is applicable. A close reading of that case indicates it was an employment matter in which the issue came up as to whether or not the Victim's Rights provision of the Constitution created a private right of action (Article I, Sec. 24). The court correctly noted that the Victim's Rights section of the Constitution had clearly delineated its stated purpose and specifically states no civil action shall be brought against the State. Obviously, when constitutional provisions have specific language versus general language, the specific language always controls. This is not the case in regard to the constitutional provisions which are at issue in this case which involve basic constitutional freedoms that protect all citizens and have no such specific language.

⁶ See *Jones v. Memorial Hospital System*, 746 S.W.2d 891, 893-894 (Texas Ct. App. 1998) (citing § 874A for the proposition that the Texas Constitution constitutes an independent legal basis for a cause of action claiming an infringement of the right of free speech).

The Defendant in another section of its brief, argue that Article I Sec. 9 of the South Carolina Constitution is not applicable and cites *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990) as authority for that proposition. In fact, in *Wright*, the plaintiff at least had a limited remedy under the South Carolina Tort Claims Act. Here, the Defendant State of South Carolina argues there is no remedy available. Article I, Sec. 9 of the Constitution was reaffirmed in *Wright* since the Court basically held that Article I, Sec. 9 guaranteed some monetary compensation (just not unlimited) to the plaintiff. The rationale of *Wright* supports Appellant's position that he ought to be entitled to a civil remedy. The South Carolina Tort Claims Act provided *Wright* some relief and, thus, Article I, Sec. 9 and S.C. Code § 15-78-120(a) can be constitutionally reconciled.

Next, Respondent argues *State v. Lagerquist*, 254 S.C. 501, 176 S.E.2d 141 (1970) is applicable. In fact, *Lagerquist* is a criminal case in which the Court held that Article I Sec. 9 of the Constitution had no application to a criminal prosecution. Significant to this case, the Court stated: "The word 'wrongs' embraces 'every injury to or impairment of rights of person or property'."⁷ (254 S.C. at 506). Thus, a fair reading of the opinion is that the term "wrongs" would clearly implicate a right of recovery. Accordingly, Respondent's argument rings hollow.

In sum, a fair reading of the cases cited by the Respondent is that if Appellant was provided some remedy, not necessarily unlimited compensation, for his injuries, then this would comply with the Constitution. Here, Appellant has spent years of his life in prison because of a wrongful conviction. It is fundamentally unfair to deny him a civil remedy for all he has been through in this case. The State's position is especially alarming since violations of individual constitutional protections in criminal cases normally provoke strong responses from judges.

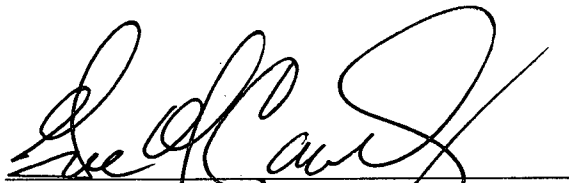
⁷ See *Bivens*. Justice Brennan stated, "The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives and injury." 403 U.S. at 389.

V. **FUNDAMENTAL FAIRNESS IS AT STAKE IN THIS CASE.**

Our Courts have on numerous occasions discussed fundamental fairness as an event which is “shocking to the universal sense of justice.” See *Williams v. Ozmint*, 380 S.C. 473, 671 S.E. 2d 600 (2008). Appellant can think of nothing more shocking than being incarcerated wrongfully and not having the right to bring a claim for damages for that incarceration.

It is for the reasons set forth that this Court should reverse the trial court and find that Appellant has a state constitutional remedy for his wrongful conviction.

Respectfully submitted,



Gene M. Connell, Jr. (S.C. Bar No. 1358)
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Roger Dale Johnson (S.C. Bar No. 71987)
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

October 12, 2017

Attorneys for Appellant

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

CASE NO. 2016-CP-26-1614

RECEIVED
OCT 13 2017
SC Court of Appeals

Robert Palmer Appellant

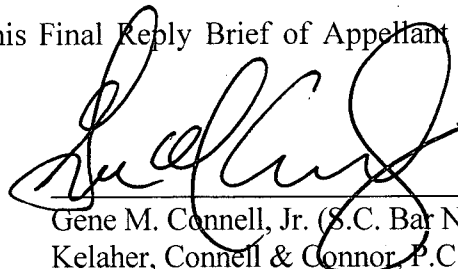
vs.

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 Reply Brief of Appellant complies with Rule 211(b) SCACR.



Gene M. Connell, Jr. (S.C. Bar No. 1358)
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Roger Dale Johnson (S.C. Bar No. 71987)
Law Office of Roger Johnson
607 Main Street
Conway, SC 29526
(843) 488-9933
(843) 488-9934
attorneyrogerjohnson@gmail.com

October 12, 2017

Attorneys for Appellant