

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5641 (S.C. Ct. App. Filed April 17, 2019)

Robert Palmer ..... Petitioner

vs.

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

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

APPENDIX

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Brief of Appellant ..... attached

Reply Brief of Appellant ..... attached

Brief of Respondent..... attached

# The South Carolina Court of Appeals

Robert Palmer, Appellant,

v.

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

Of which State of South Carolina is the Respondent.

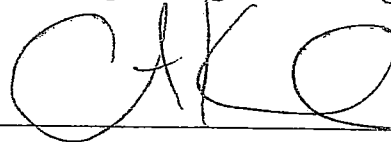
Appellate Case No. 2017-000567

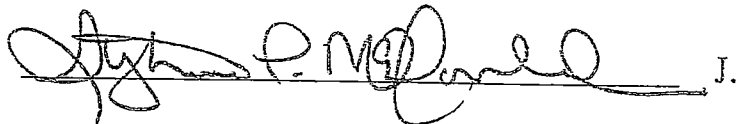
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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_ J.

  
\_\_\_\_\_ J.

  
\_\_\_\_\_ J.

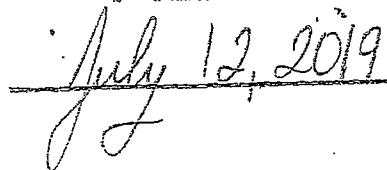
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**FILED**

  
July 12, 2019

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The Honorable Benjamin H. Culbertson

**THE STATE OF SOUTH CAROLINA**  
**In The Court of Appeals**

Robert Palmer, Appellant,

v.

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

Of which State of South Carolina is the Respondent.

Appellate Case No. 2017-000567

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Appeal From Horry County  
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5641  
Heard December 6, 2018 -- Filed April 17, 2019

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**AFFIRMED**

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Gene McCain Connell, Jr., of Kelaher Connell &  
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Attorney General Alan McCrory Wilson, Solicitor  
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for Respondent.

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**KONDUROS, J.:** Robert Palmer appeals the circuit court's dismissal of his complaint under Rule 12(b)(6), SCRCP. He contends the circuit court erred in finding no constitutional or civil remedy exists for a previous wrongful conviction. We affirm.

## **FACTS/PROCEDURAL HISTORY**

Palmer and Julia Gorman—his girlfriend—were caring for Gorman's seventeen-month-old grandson (Victim) while Gorman's daughter traveled across the country. After suffering from ant bites and allergies on July 1, 2008, Victim was prescribed a liquid antihistamine (Xyzal), which has a sedative effect. The prescribed dosage of Xyzal was half a teaspoon per day. Victim was regularly given more than the prescribed dosage, up to 2.5 teaspoons per day—five times the prescribed amount. On July 14, Palmer was alone with Victim while Gorman was at work. Gorman returned home at 4 p.m. that day and observed Victim sleeping and breathing normally. Gorman checked on victim again at 6 p.m. and found him "slack," making "really strange noises," and with saliva at his mouth. Victim was treated at multiple hospitals before finally being removed from life support by his parents on July 16. Doctors that examined Victim before death and during the autopsy found evidence indicating he received hits to the head as well as atypical bruises on various portions of his body.

Palmer and Gorman were tried jointly for the death of Victim. At the conclusion of trial, both were convicted of homicide by child abuse, aiding and abetting homicide by child abuse, and unlawful conduct towards a child. On appeal, this court reversed both Palmer's and Gorman's aiding and abetting convictions but affirmed their homicide and unlawful conduct convictions.

On July 29, 2015, the South Carolina Supreme Court affirmed the reversal of both Palmer's and Gorman's aiding and abetting convictions but overturned Palmer's convictions for homicide and unlawful conduct towards a child. *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015). Palmer initiated a civil action against the State, alleging malicious prosecution, false arrest, negligence, and violation of 42 U.S.C. § 1983. Palmer also sought a declaratory judgment, requesting the circuit court declare a remedy existed for wrongful conviction in South Carolina under both the United States and South Carolina Constitutions. The State moved to dismiss under Rule 12(b)(6), SCRCP. The circuit court granted the State's motion

on November 17, 2016, with prejudice. Palmer moved the court to reconsider, which the court denied. This appeal followed.<sup>1</sup>

## STANDARD OF REVIEW

"Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), [SCRPC,] an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Spence*, 368 S.C. at 116, 628 S.E.2d at 874.

## LAW/ANALYSIS

### I. Consideration of Novel Issue under Rule 12(b)(6), SCRPC

Palmer argues the circuit court erred in dismissing his case because it presented a novel issue of whether the South Carolina or the United States Constitutions require South Carolina to provide a civil monetary remedy for a wrongful conviction. We disagree.

"[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). "Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to

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<sup>1</sup> On November 28, 2017, the State moved to certify this case for immediate review by the South Carolina Supreme Court pursuant to Rule 204(b), SCACR. The supreme court denied the motion on February 1, 2018.

dismiss." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

In this case, neither party disputes Palmer raises a novel issue. However, the issue is solely one of constitutional interpretation. In his brief, Palmer does not argue that any factual issues exist. Therefore, because the issue concerns the interpretation of the law, we find the circuit court did not err in dismissing the case pursuant to Rule 12(b)(6) in spite of it being a novel issue.

## II. Takings Clause

Palmer contends the circuit court erred in dismissing his action because the Takings Clauses of the United States Constitution and the South Carolina Constitution provide his right to a remedy for a wrongful conviction in South Carolina. We disagree.

The Takings Clause from the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The takings clause of the South Carolina Constitution states: "The privileges and immunities of citizens of this State and 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." S.C. Const. art. I, § 3.

"The Fifth Amendment is implicit in the due process clause of the Fourteenth Amendment to the United States Constitution and applicable to the states." *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 429 n.3, 548 S.E.2d 595, 601 n.3 (2001). "The Fifth Amendment to the United States Constitution provides that 'private property shall not be taken for public use, without just compensation.'" *Id.* (quoting U.S. Const. amend. V). "Because both a Takings Clause cause of action and substantive due process cause of action focus on a party's ability to protect their property from capricious state action, parties claiming both of these violations must first show that they had a legitimate property interest." *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 437, 661 S.E.2d 73, 79 (2008).

We find the circuit court correctly determined Palmer's argument has no merit. In his appellate brief, Palmer attempts to equate the prohibition against governmental takings of property without just compensation to wrongful imprisonment.

However, Palmer fails to cite any statutory or case law to demonstrate he has a legally protected property interest. Furthermore, Palmer concedes no state supreme court throughout the nation has found a civil remedy for wrongful imprisonment exists under the Takings Clause of any state constitution or the United States Constitution. Because Palmer fails to provide any supporting law for his claim, we affirm the circuit court's finding on this issue.

### III. South Carolina Constitution

Palmer asserts the circuit court erred in dismissing his action because the South Carolina Constitution protects his right to a remedy for a wrongful conviction by way of an implied right of action for money damages. We disagree.

"The general presumption of law is that all constitutional provisions are self-executing, and are to be interpreted as such, rather than as requiring further legislation, for the reason that, unless such were done, it would be in the power of the Legislature to practically nullify a fundamental of legislation." *Beatty v. Wittekamp*, 171 S.C. 326, 332, 172 S.E. 122, 125 (1933) (quoting *Brice v. McDow*, 116 S.C. 329, 331, 108 S.E. 84, 87 (1921)). "A self[-]executing provision is one which supplies the rule or means by which the right given may be enforced or protected, or by which a duty enjoined may be performed." *Id.* (quoting 8 Cyc. 753).

A constitutional provision is self-executing as to a civil remedy when it "provides any rules or procedures by which its declaration of rights is to be enforced, and, in particular, whether it provides citizens with a specific remedy by way of damages for its violation in the absence of legislation granting such a remedy." *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 1454 (Ct. App. 1988). A constitutional provision

must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the [c]onstitution itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the [l]egislature for action; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation.

*Id.* (quoting *Taylor v. Madigan*, 53 Cal. App. 3d 943, 951 (1975)).

In essence, a self-executing constitutional clause is one that can be judicially enforced without implementing legislation. To ascertain whether a particular clause is self-executing, we consider several factors. This court has stated as follows

[a] constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed . . . ." Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.

*Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533, 535 (Utah 2000) (alterations by court) (quoting *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996)). "[A] constitutional provision that prohibits certain government conduct generally qualifies as a self-executing clause 'at least to the extent that courts may void incongruous legislation.'" *Id.* (quoting *Bott*, 922 P.2d at 738).

The court in *Spackman* recognized "the Utah Constitution does not expressly provide damage remedies for constitutional violations," and thus, "there is no textual constitutional right to damages for one who suffers a constitutional tort." *Id.* at 537. It further noted the legislature had declined to "enact[] any laws authorizing damage claims for constitutional violations in general." *Id.* The court concluded "a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law." *Id.* at 538.

Both parties recognize South Carolina has not previously addressed this issue. Our review of cases throughout various jurisdictions shows that states are divided on

whether a civil remedy can exist for the violation of a constitutional provision without enabling legislation. We will not create an implied cause of action for wrongful conviction in South Carolina because it is not for this court to create such an action when the legislature has specifically declined to do so.<sup>2</sup> Considering the South Carolina Constitution does not provide for monetary damages for civil rights violations and the legislature has not enacted an enabling statute, we affirm the circuit court on this issue.

#### IV. Tort Claims Act

Palmer argues the circuit court erred in dismissing his action because the South Carolina Tort Claims Act (SCTCA) cannot override a constitutionally implied right of action. We find this issue to be abandoned.

"An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

Palmer provides a conclusory argument that the SCTCA cannot override an express constitutional provision or implied cause of action under the South Carolina Constitution. However, Palmer failed to cite any law in his brief to support his assertion. For this reason—and pursuant to our discussion in Section III—we affirm the circuit court's decision.

#### CONCLUSION

Based on the foregoing, the circuit court did not err in dismissing the case under Rule 12(b)(6), SCRCP. First, the circuit court did not err in dismissing this case

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<sup>2</sup> A bill creating a cause of action for wrongful conviction was introduced in the South Carolina Senate but was not passed. See S. 1037, 119th Gen. Assemb., Reg. Sess. (S.C. 2012), to amend Chapter 13, Title 24 of the South Carolina Code to read "Article XXII Compensation for a Wrongful Conviction." The bill passed in the senate but did not pass the house of representatives.

despite Palmer's raising a novel issue. Additionally, the circuit court did not err in finding Palmer had no remedy under the Takings Clauses of the South Carolina Constitution and the United States Constitution. Moreover, the circuit court did not err in finding the South Carolina Constitution did not provide Palmer a remedy. Finally, Palmer abandoned his argument that the circuit court erred in finding the SCTCA barred his claim. Thus, the circuit court's order is

**AFFIRMED.**

**MCDONALD and HILL, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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CASE NO. 2016-CP-26-1614

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Robert Palmer ..... Appellant

vs.

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

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

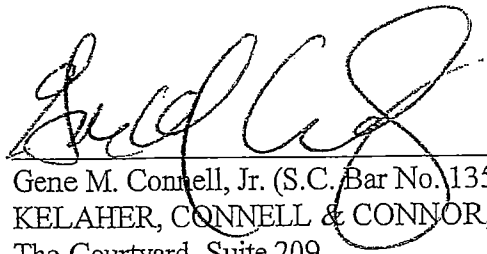
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PETITION FOR REHEARING  
AND REHEARING *EN BANC*

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The Appellant, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its Opinion filed April 17, 2019 and received by Appellant's attorney on April 17, 2019. Further, pursuant to South Carolina Appellate Court Rule 219, Appellant requests a rehearing *en banc*. The basis of Appellant's request for rehearing and rehearing *en banc* is set forth in the attached Memorandum of Law.

Respectfully submitted,



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April 29, 2019

**Attorneys for Appellant**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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CASE NO. 2016-CP-26-1614

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Robert Palmer ..... Appellant

vs.

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

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MEMORANDUM OF LAW IN SUPPORT OF  
PETITION FOR REHEARING AND  
REHEARING *EN BANC*

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On April 17, 2019 this Court issued its Opinion No. 5641 affirming the trial court's dismissal of this case. The Appellant requests this Court hear this matter *en banc* pursuant to South Carolina Appellate Court Rule 219. Appellant cites SCACR 219 (a)(2) which provides "when the proceeding involves a question of exceptional importance" the Court may hear a matter *en banc*. The question presented is: Can an individual maintain an action in South Carolina for wrongful conviction under the United States or South Carolina Constitutions? This question is one of exceptional importance and thus qualifies for rehearing *en banc*. See *Williamson v. Middleton*, 383 S.C. 490, 681 S.E. 2d 867 (S.C. 2009 (a rehearing *en banc* may be granted only upon the listed grounds)).

The Appellant, in response to this Court's Opinion, offers the following additional arguments concerning issues raised which this Court did not address.

I. THE COURT OF APPEALS DID NOT ADDRESS *NELSON V. COLORADO*, 137 S. Ct. 1249 (2017) AND ITS APPLICATION TO THIS CASE.

Prior to the hearing, Appellant advised the Court that he had become aware of a recent United States Supreme Court Opinion which had direct bearing on this case. Appellant sent an email to the Court supplementing his brief to add the case of *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) to his argument. In *Nelson*, the United States Supreme Court ordered that all fines paid by a person wrongfully convicted must be refunded. The majority opinion written by Justice Ginsburg stated, "Just as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction." 137 S. Ct. at 1250.

Approximately half of the argument before this Court involved the meaning of the *Nelson* case. Appellant asserts that the Supreme Court of the United States based on *Nelson* would find that Appellant has a federal constitutional right to a civil remedy for wrongful conviction.

Justice Ginsburg's discussion of the above quoted passage equates the restoration of liberty with the restoration of property and thus implicates the Due Process clause of the United States Constitution which is one of the points Appellant has cited for authority in this case.

The Due Process clause protects liberty as well as property. The very core of the Fourteenth Amendment states "liberty" is "freedom from personal restraint" And broadly speaking, the Supreme Court and its doctrine has systemically accorded far greater constitutional protection to "liberty" in its essential form than to an interest in property. The question thus arises: If Due Process requires nothing more than "minimal procedures" to vindicate through monetary recovery the deprivation of one's property, why should it require anything more to vindicate the deprivation of one's liberty? The answer of course to the question is a resounding "No."

Appellant asserts that Nelson is directly right on point. Both liberty and property are enumerated in the Due Process clause of the Constitution and ought to be treated equally. Justice Ginsburg makes this point in the above quoted passage.

It is nonsensical to not hold that “liberty” as defined in the Due Process clause does not receive the same protection as “property” when both are in the same sentence in the Constitution. In other words, one’s liberty is just as important as the taking of one’s property. Appellant made this point during oral argument, but the Court failed to address *Nelson* and its impact in its Opinion. Appellant requests the Court do so on rehearing and find a civil remedy exists as a matter of law.

II. THE COURT OF APPEALS DID NOT ADDRESS APPELLANT’S ARGUMENT THAT ARTICLE I SECTION 3 OF THE UNITED STATES CONSTITUTION REQUIRES A REMEDY FOR WRONGFUL CONVICTION.

The opinion written by the Court does not address Article I Section 3 of the United States Constitution and Appellant’s argument that he was entitled to compensation for deprivation of his “liberty.” This argument is made in Appellant’s brief in Section II in which Appellant argues that he was deprived of liberty without due process of law. Appellant’s counsel respectfully submits that the Court did not address this general principle in regard to the United States Constitution. (See Appellant’s brief (pp. 6-7) and Appellant’s citation of the Fifth Amendment and the case of *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Appellant requests a ruling on this point.

III. THE COURT OF APPEALS DID NOT ADDRESS ARTICLE I SECTION III OF THE SOUTH CAROLINA CONSTITUTION.

This Court’s Opinion is silent as to Article I Section 3 of the South Carolina Constitution and its application to a wrongful conviction. Appellant raised the issue that he was entitled to due process and/or compensation for wrongful conviction (without the takings argument). Appellant cited several South Carolina cases including *Kearse v. State Health and Human Services Finance Commission*, 318 S.C. 198, 456 S.E.2d 892 (1995). However, this issue was not addressed by the

Court. Appellant requests that this specific issue be addressed by the Court. Specifically, Appellant requests that the Court address whether Article I Section 3 of the South Carolina Constitution provides a remedy for wrongful conviction.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANT HAD OFFERED NO SUPPORTING CASE LAW FOR HIS PROPOSITION THAT A CIVIL REMEDY WAS AVAILABLE FOR WRONGFUL CONVICTION.

This Court's Opinion states no case law or citation had been argued for this proposition. Appellant believes that pages 7, 8 and 9 of his brief provide numerous citations as to why there is a civil remedy under the Constitution for wrongful conviction. Appellant cited numerous Supreme Court precedents from other jurisdictions for his proposition.

Appellant cited specific case law from Alabama, Alaska, Michigan, Iowa, Missouri, Oklahoma, Utah, Kansas and Indiana that both the State and Federal Constitutions hold that taking of "labor" is protected under their respective State Constitutions. Appellant respectfully asserts that the Court erred in stating "Palmer fails to cite any statutory or case law to demonstrate he has a legally protected property interest." Appellant asserts that the cases from the above jurisdictions clearly provide such authority. Appellant directs the Court to pages 7, 8 and 9 of his Final Brief. Thus, Appellant requests a specific ruling as to why a wrongful conviction is not a taking of Appellant's labor.

V. THE COURT OF APPEALS DID NOT ADDRESS THE ISSUE THAT THE DUE PROCESS CLAUSE OF THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS PROTECTS LIBERTY AS WELL AS PROPERTY.

The Appellant throughout his brief argued that if property is protected under the due process clause, then liberty must be protected. Those concepts are both found in the same clause. Appellant made this argument and cited *Nelson* and numerous other cases. Appellant requests that the Court

make a ruling as to why it finds “liberty” is not protected in the same manner as property under the due process clause of both the United States and South Carolina Constitutions.

VI. THE COURT OF APPEALS ERRED IN NOT ADDRESSING APPELLANT’S ARGUMENT THAT HIS “LABOR” IS PROTECTED BY THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

Appellant in his briefs argued that the State of South Carolina through its wrongful conviction deprived Appellant of his labor because he was incarcerated and unable to work. This Court in its Opinion wrote: “We find the circuit court correctly determined Plaintiff’s argument had no merit.” This Court further stated: “Palmer fails to cite any statutory or case law to demonstrate that he has a legally protected property interest.”

Appellant respectfully disagrees. Appellant provided exhaustive citations to other cases holding that Appellant’s labor was protected and multiple state courts have explicitly held that governmental appropriation of labor is protected by state or federal takings clause without a finding of a duty. Appellant argued to the Court as an analogy that wrongfully convicting an individual and incarcerating him was a taking of his ability to earn a living, i.e., his labor. Appellant cited the following cases for his proposition: 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).

It is respectfully submitted that this Court erred in not applying the above cases to the situation described in this brief. Finally, the Court fails to explain why both the United States

Constitution and South Carolina Constitution have the terms life, liberty or property in Article I Section 3 and how property has a remedy while the taking of liberty has no remedy.

VII. THE COURT OF APPEALS DID NOT ADDRESS APPELLANT'S ARGUMENT THAT MULTIPLE COURTS AROUND THE COUNTRY HAVE CREATED AN IMPLIED CAUSE OF ACTION UNDER THE UNITED STATES AND/OR THEIR STATE CONSTITUTIONS.

The Court in its Opinion cited *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 16 P.3d 533, 535 (Utah 2000) for the proposition that “the Utah Constitution does not expressly provide damage remedies for constitutional violations,” and thus, “there is no textual constitutional right to damages for one who suffers a constitutional tort.” 16 P.3d at 537. However, Appellant asserts that this Court’s citation of *Spackman* actually stands for the proposition which Appellant has put forth in his brief, i.e., there is a remedy under the Constitution for wrongful conviction.

In *Spackman*, the issue was Utah’s Constitution, specifically Article I Section 7 which is the same clause Appellant cites in the South Carolina Constitution. The Utah Constitution states: “No person shall be deprived of life, liberty or property without due process of law.”

The Utah Supreme Court held that clause is self-executing meaning essentially a cause of action could be brought based on that section of the Constitution. The Utah Supreme Court observed that it had already defined and enforced that particular clause on numerous occasions without implementing legislation and cited several cases for that proposition. *State v. Copeland*, 765 P.2d 1266 (Utah 1988) (invalidating certain statutory provisions on due process grounds); *State v. Fulton*, 742 P.2d 1208 (Utah 1987) (applying the due process principles in an evidentiary issue); *State v. Tarafa*, 720 P.2d 1368 (Utah 1986) (applying due process principles to challenged jury instructions); *Burgess v. Maiben*, 652 P.2d 1320 (Utah 1982) (applying due process principles to contempt proceedings).

The Utah Supreme Court directly addressed money damages for the violation of a self-executing clause of the Utah Constitution which is exactly the same language in the South Carolina Constitution. The Utah Supreme Court further provided that when there is no statutory right to damages for one who suffers a constitutional tort, Utah courts will employ the common law. The Court then went on to hold that a plaintiff must establish three elements before he or she may proceed with a private suit for damages under the constitution. The Court stated as follows:

First, a plaintiff must establish that he or she suffered a “flagrant” violation of his or her constitutional rights. See *Dick Fischer Dev. v. Dept. of Admin.* 838 P.2d 263, 268 (Alaska 1992); see also *Bott*, 922 P.2d at 734-735, 739-740 (describing the level of defendant’s culpability necessary to create damages liability.) In essence, this means that a defendant must have violated “clearly established” constitutional rights “of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982). To be considered clearly established, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted). The requirements that the unconstitutional conduct be “flagrant” ensures that a government employee is allowed the ordinary “human frailties of forgetfulness, distractibility or misjudgment without rendering [him or her] self liable for a constitutional violation.” *Bott*, 922 P.2d at 739-40.

Second, a plaintiff must establish that existing remedies do not redress his or her injuries. This second requirement is meant to ensure that courts use their common law remedial power cautiously and in favor of existing remedies. We urge caution in light of the myriad policy considerations involved in a decision to award damages against a governmental agency and/or its employees for a constitutional violation. Moreover, we urge deference to existing remedies out of respect for separation of powers’ principles. In general, the legislative branch has the authority, and in many cases is better suited, to establish appropriate remedies for individual injuries. By requiring courts to defer to relevant legislative determinations of appropriate remedies, we respect the legislature’s important role in our constitutional system of government.

Third, a plaintiff must establish that equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff’s rights or redress his or her injuries.

*Spackman*, 16 P.3d at 538.

In sum, *Spackman* does not assist this Court, but in fact gives credence to Appellant's arguments. Simply put, if there is a flagrant violation of Appellant's constitutional rights and no available remedy the Constitution mandates a remedy.

Other state Supreme Courts have adopted this view and have gone even further. At least one Supreme Court has found an implied right of damages under Article XI of its Constitution since this Opinion was issued. See *Zullo v. State of Vermont*, 2019 VT 1 (Vt. 2019) (Vermont Supreme Court holds that Vermont Constitution requires a meaningful remedy.) See also *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) (equal protection and due process clauses provided direct action for money damages in Iowa). (The Iowa Supreme Court found it was the Court's duty to act in situations in which the political branch of the government fails to do so.)

See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (United States Supreme Court rules that an implied cause of action exists for an individual whose Fourth Amendment freedom from unreasonable search and seizure had been violated by federal agents); *Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15 (1980) (Supreme Court allows damage claim against prison based on Eighth Amendment since Congress neither expressly provided nor prohibited a damages remedy); see also *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979) (permitting damage claim for violation of Fifth Amendment due process guarantee in context of wrongful discharge of employee).

Further, many states have adopted implied causes of action for constitutional torts including New York. See *Brown v. State of New York*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S. 2d 223 (1996); *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (direct cause

of action available under North Carolina Constitution for free speech);<sup>1</sup> *Binett v. Sabo*, 244 Conn. 23 710 A.2d 688 (Conn. 1998) (holding a cause of action under the Connecticut Constitution for violations of Article I, Sections 7 and 9 of the State Constitution for unreasonable search and seizures); *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. 3<sup>rd</sup> 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. 3<sup>rd</sup> 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).

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).<sup>2</sup>

As of 1998, twenty-one states have recognized an implied cause of action for State Constitutional violations. The majority of legal scholars on the topic of state constitutional tort actions have favored an expansive right of action. 42 N.Y.L. Sch. L. Rev. at 450 n. 12. *Dorwart v. Caraway*, 312 Mont 1, 58 P3d 128 (Mont 2002); *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); *Mayer v. Till*, 260 SO2d 578 (Miss. 1972 ); *Bull v. Armstrong*, 254 Ala 390, 48 SO2d 467 (1950); *State v.*

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<sup>1</sup> This case is noteworthy in that much of South Carolina law comes from North Carolina because it is our closest sister state.

<sup>2</sup> This case is support for Appellant's argument in Section XII of the Petition for Rehearing since the Oklahoma Supreme Court held that the Tort Claims Act could not override the Oklahoma Constitution.

*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 N.W.2d 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 a specific statute. 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.

It is respectfully submitted that this Court did not in its Opinion address those states which have adopted *Bivens* style causes of action for constitutional torts. Appellant requests this Court rule that a *Bivens* style implied cause of action exists under the South Carolina Constitution.

VIII. THE COURT OF APPEALS DID NOT ADDRESS WHETHER A BIVENS STYLE CAUSE OF ACTION IS AVAILABLE UNDER THE UNITED STATES CONSTITUTION.

The Opinion does not address Appellant's request that the Court hold the United States Constitution allows a *Bivens* style cause of action for wrongful conviction (especially in light of *Nelson*). Appellant raised this issue in his brief and at oral argument. However, this Court has not ruled on that point. Appellant made such a request on page 16 of his brief: "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." Appellant asserts it was error for the Court not to hold such a right exists under the United States Constitution. See *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) for authority.

IX. THE COURT OF APPEALS DID NOT ADDRESS APPELLANT'S ARGUMENT THAT FAILURE TO PROVIDE A REMEDY FOR WRONGFUL CONVICTION VIOLATED FUNDAMENTAL FAIRNESS.

As cited in his brief, Appellant made the argument that fundamental fairness requires a remedy for wrongful conviction. The South Carolina Supreme Court has gone out of its 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) (the court finds it was fundamentally unfair to suspend a driver's license twelve years after conviction).

The Court in its Opinion does not address the issue of fundamental fairness and Appellant's argument that the case law and the South Carolina Constitution require a remedy for wrongful conviction. 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); See also *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013) (lifetime monitoring without a hearing is unconstitutional).

Appellant requests a specific ruling on Appellant's fundamental fairness argument.

X. THE COURT OF APPEALS DID NOT ADDRESS APPELLANT'S ARGUMENT THAT ARTICLE I SECTION 9 OF THE SOUTH CAROLINA CONSTITUTION IS APPLICABLE.

Appellant made the argument in his brief and at the hearing that South Carolina's Constitution required a remedy for every wrong. Article I Section 9 of the South Carolina Constitution Courts: Speedy Remedy provides as follows:

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

Appellant argued that a wrongful conviction is a wrong as defined in Article I Section 9 of the South Carolina Constitution which requires Appellant be given a remedy. Our Supreme Court in *State v. Lagerquist*, 254 S.C. 501, 176 S.E.2d 141 (1970), *cert denied*, 91 S.Ct. 912, 401 U.S.

937, 28 L.Ed. 2d 216 (1970) cited with approval the definition of “wrongs” to include every injury as described in *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171 (1911),

Appellant requests that this Court issue its ruling requiring that South Carolina Constitution provide a remedy for a wrongful conviction pursuant to Article I Section 9 of the South Carolina Constitution.

XI. THE COURT OF APPEALS ERRED IN FAILING TO ADOPT RESTATEMENT OF TORTS 2D § 874A.

In his brief, Appellant requested that the Court issue a ruling finding that Restatement of Torts, 2d § 874A be adopted by the Court. It provides that a court may imply a civil remedy from a legislative or constitutional provision even though one is not expressly provided.

Appellant requested that the Court adopt Restatement of Torts, 2d § 874A. The Opinion issued by this Court does not address this issue. Appellant requests that the Court adopt Restatement of Torts, 2d § 874A and thus find a remedy for Appellant for his wrongful conviction. See *Brown v. State of New York*, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S. 2d 223 (1996).

XII. THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANT HAD NOT PRESERVED AND ARGUED THAT THE SOUTH CAROLINA TORT CLAIMS ACT CANNOT PREEMPT THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

In its Opinion the Court held that Palmer had abandoned his argument that the South Carolina Tort Claims Act cannot override the South Carolina and United States Constitution. This Court indicated that no authority had been cited in Appellant’s brief as to this issue. Appellant directs the Court to Section 10 of its brief (page 21).<sup>3</sup> In that section of the brief, Appellant argued that the South Carolina Tort Claims Act could not override the South Carolina or United States

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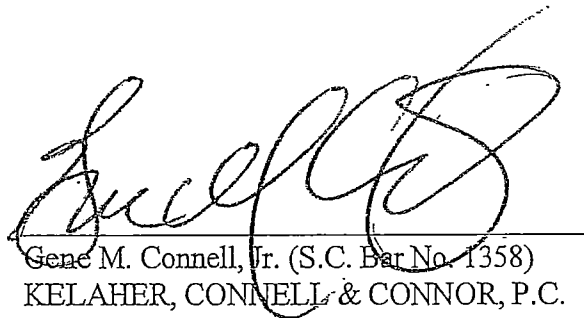
<sup>3</sup> See also *Bush v. Cherokee County Building Authority*, 305 P.3d 994 (OK 2013) for additional authority for this proposition.

Constitution. Appellant argues that the South Carolina Constitution is supreme and that the legislature cannot limit constitutional torts through the enactment of a statute. (S.C. Code Ann. § 15-78-10, et seq. Further, because the South Carolina Constitution is supreme, no other citation is necessary for Appellant's argument. In effect, Article I, Section 3 of the South Carolina Constitution cannot be overridden by the Tort Claims Act. Thus, Appellant's arguments were preserved for review by this Court.

XIII. CONCLUSION

Appellant requests the Court reconsider and rehear this case *en banc*. This is a matter of statewide importance and the entire Court should hear this case *en banc* pursuant to SCACR 219(a)(2) which provides an *en banc* hearing is appropriate when a question is of exceptional importance.

Respectfully submitted,



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