THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2017-000567
Case No. 2016-CP-26-1614

Robert Palmer, ... Appellant,

v.

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

Of Whom, State of South Carolina is ..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This civil action for monetary relief follows the Appellant Robert Palmer's acquittal on appeal on criminal charges of homicide by child abuse, aiding and abetting homicide by child abuse and unlawful conduct towards a child. Palmer, together with his live-in companion. Julia Gorman, were both convicted of such offenses for the death of Gorman's seventeen month old grandson. On direct appeal, the South Carolina Court of Appeals reversed Palmer's aiding and abetting conviction but affirmed the convictions on the other charges. *See*, *State v. Palmer*, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014). Thereafter, on a writ of certiorari, the South Carolina Supreme Court ruled that Palmer was entitled to a directed verdict on both the homicide by child abuse and unlawful conduct towards a child charges. The Supreme Court found an absence of evidence to support those convictions. *See*, *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015).

After his acquittal, Palmer filed this civil action on March 7, 2016 against the Respondent State of South Carolina as well as the Defendants Horry County and David Weaver. Palmer alleges a federal cause of action pursuant to 42 U.S.C. § 1983 for violations of his Fifth and Fourteenth Amendment rights. He also alleges state law causes of action for false imprisonment, false arrest, malicious prosecution, and negligence. Finally, Palmer includes a sixth cause of action for a

declaratory judgment whereby he "requests the Court find a remedy for wrongful conviction is available under both the United States and South Carolina Constitutions including the due process clause." (R. 32).

In his Complaint, Palmer alleges the absence of probable cause to bring the charges. Palmer also alleges "a policy of prosecuting people such as the Plaintiff with other Defendants when there is no evidence as to who [sic] the perpetrator of the crime might be." (R. 26).

The Respondent State filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. (R. 34-36). That motion was heard by Circuit Court Judge Benjamin H. Culbertson on June 14, 2016. (R. 70-80). By Order entered on November 17, 2016, Judge Culbertson granted the motion and dismissed the State of South Carolina with prejudice. (R. 3-9). Palmer subsequently filed a Rule 59(e) motion for reconsideration, which was denied by Form Order entered on February 15, 2017. (R. 1-2).

The Appellant Palmer thereafter filed a timely appeal to this Court.

ARGUMENTS

I. The purely legal issues raised by the Appellant were properly adjudicated by the Circuit Court on a Rule 12(b)(6) motion to dismiss.

As an initial issue on appeal, the Appellant Robert Palmer argues that he raised a novel issue on appeal, that being whether the United States Constitution and the South Carolina Constitution require that the State of South Carolina provide a civil monetary remedy for wrongful conviction. Because he contends this is a novel issue, Palmer insists that the issue may not be properly adjudicated on a Rule 12(b)(6) motion to dismiss. However, existing South Carolina Supreme Court precedent rejects that contention.

In the case of *Unisys Corp. v. South Carolina Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001), the Supreme Court explained as follows:

> As a general rule, important questions of novel impression should not be decided on a motion to dismiss. 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 dismiss.

551 S.E.2d at 267. The Supreme Court in *Unisys* proceeded to consider and affirm the lower court's dismissal of the case. The Supreme Court noted that the case raised only issues of law and that "Unisys points to no factual issues that require

further development." *Id.* *See also*, *Madison v. American Home Products Corp.*, 358 S.C. 449, 595 S.E.2d 493, 494 (2004) ("[w]e find development of the record unnecessary as the present case presents [a] purely legal issue").

In the case at bar, Palmer raises a novel issue of law. Yet, like the appellants in *Unisys* and *Madison*, Palmer fails to point to any factual issues that require further development before determining whether a plaintiff whose criminal conviction is overturned on appeal has a private right of action under the South Carolina Constitution for money damages. The issue presented is purely a legal question and thus was appropriate for adjudication on a Rule 12(b)(6) motion to dismiss.

II. The Circuit Court was correct in dismissing the Appellant's federal constitutional claims because the State is not a "person" amenable to suit under Section 1983 and no *Bivens* claim may be asserted against a State.

In fully dismissing Palmer's federal constitutional claims, Judge Culbertson was correct in ruling that the State of South Carolina is not a "person" amenable to suit under 42 U.S.C. § 1983. It does not appear that Palmer raises an exception to that ruling, and on that basis alone, the dismissal order is subject to affirmance

pursuant to the "two-issue" rule with respect to the federal claims.[1] Nonetheless, the United States Supreme Court has clearly held that neither the state, nor a state official acting in his official capacity, are "persons" who may be sued under Section 1983. *Will v. Michigan State Police*, 491 U.S. 58 (1989). *See also*, *Cone v. Nettles*, 308 S.C. 109, 417 S.E.2d 523 (1992). As a result, the State of South Carolina cannot be sued under Section 1983.

Throughout his brief, however, Palmer also mentions *Bivens* actions. To the extent that he maintains that a *Bivens* action may be pursued against the State for the alleged violation of his federal constitutional rights, he is in error. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court held that a plaintiff may bring suit for money damages against a federal official for violations of the plaintiff's Fourth Amendment rights. The Supreme Court found it necessary to create a direct cause of action under the Constitution because Section 1983 does not provide a remedy for constitutional violations committed by federal officials acting under color of federal law. However, *Bivens* has no applicability in the case at bar because Palmer is attempting to assert a

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[1] In applying the "two-issue" rule, the South Carolina Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

Bivens action against the State of South Carolina and not a federal official. Section 1983 is the exclusive means by which a federal constitutional claim may be brought for the alleged unconstitutional conduct committed by state or local officials, and as stated, the State of South Carolina is not a "person" amenable to suit under Section 1983. *See generally, Thomas v. Shipka,* 818 F.2d 496 (6th Cir. 1987); *Stefanovic v. University of Tennessee*, 935 F.Supp. 950 (E.D. Tenn. 1996). Instead, a claim for a federal constitutional violation must be made by direct action against the state official who allegedly committed the violation, and that state official must be sued in his/her individual capacity.[2]

In sum, Judge Culbertson was correct in dismissing Palmer's federal constitutional claims against the State of South Carolina. There is simply no theory pursuant to which such claims may be asserted against the State.

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[2] Notably, the United States Supreme Court also confirmed in *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471 (1994), that a *Bivens* action may *not* be brought against a federal agency. A *Bivens* action may be asserted only against a federal official. In *Meyer*, the Supreme Court reiterated that "the purpose of *Bivens* is to deter *the officer*," and "[i]f we were to imply a damages action directly against federal agencies .... there would be no reason for aggrieved parties to bring damages actions against individual officers," and "the deterrent effects of the *Bivens* remedy would be lost." 510 U.S. at 485. (Emphasis in original). The Supreme Court also observed that "[i]n our most recent decisions, we have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." 510 U.S. at 484, *citing Schweilker v. Chilicky*, 487 U.S. 412 (1988). Certainly, the Supreme Court has never allowed a *Bivens* action to be brought against a state or state agency.

III. South Carolina law does not recognize a private right of action for money damages for a violation of the State Constitution.

The primary issue raised on appeal by the Appellant Palmer is his contention that South Carolina should recognize an implied private right of action for money damages brought pursuant to the South Carolina Constitution and more specifically, that South Carolina should provide a remedy for a wrongful conviction. Palmer appears to raise this issue in a number of different sections of his opening brief and seems to take a scatter-shot approach to the issue. The Respondent State seeks to address all such related arguments or issues in this section by focusing on Palmer's basic premise and explaining that South Carolina law does not and should not recognize a private right of action under the State Constitution for monetary relief.

A. South Carolina Has No Enabling Legislation

Unlike some of the states that recognize a private right of action for money damages for a violation of a state constitution, South Carolina does not have an enabling statute allowing for such a right of action.[3] In essence, South Carolina does not have an enabling statute the equivalent of 42 U.S.C. § 1983. It is well

[3] *See e.g.*, Ark. Code Ann. § 16-123-105 (Arkansas); Cal. Civ. Code § 52.1 (California); Mass. Gen. Laws Ann. Ch. 12 § 11I (Massachusetts); Me. Rev. Stat. Ann. Tit. 5, § 4682 (Maine); N.J. Stat. Ann. § 10:6-2 (New Jersey).

settled that Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994).[4] There is no such "method" under state law. In other words, there is no procedural mechanism whereby a party may seek a private right of action for money damages for a state constitutional deprivation.

Admittedly, an enabling statute is not needed where a constitutional provision is deemed self-executing. In the case at bar, the Appellant Palmer is relying on Article I, § 3 of the State Constitution, which prohibits the denial of life, liberty or property without due process of law, and Article I, § 10, which prohibits "unreasonable searches and seizures." Neither of these constitutional provisions provide the framework for a private right of action for money damages and thus is not self-executing in that context. Moreover, it is well settled that these provisions are strictly mandatory and prohibitory and do not, by their express terms, create any affirmative substantive rights including a private right of action for money damages. *See*, S.C. Const. art. I, § 23 ("The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or promissory by its own terms").

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[4] Prior to the passage of the Ku Klux Klan Act of 1871, which enacted what is codified today as 42 U.S.C. § 1983, there was no private right of action that could be pursued for the deprivation of a federal constitutional right.

Courts in other jurisdictions have explained that a constitutional provision is self-executing "to the extent that anything done in violation of it is void." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-149 (Tex. 1995). *See also*, *Leger v. Stockton Unified School District*, 202 Cal. App. 3d. 1448, 1454 (1988) ("in the absence of express language to the contrary, every constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene constitutional provisions. Every constitutional provision is self-executing to this extent, that everything done in violation of it is void"). Thus, a prohibitory constitutional provision is self-executing to the extent that declaratory and injunctive relief may be granted in the absence of enabling legislation to enforce the constitutional right, but a private right of action for money damages presents a much different situation. *See*, *City of Beaumont*, 896 S.W.2d at 149 ("[t]here is a difference between voiding a law and seeking damages as a remedy for an act").

Nonetheless, as the California Court of Appeals has recognized, in the context of an action for money damages, "[t]he question here is whether [the safe-schools clause] is 'self-executing' in a different sense." *Leger*, 202 Cal. App. 3d. at 1454. A court should consider whether the constitutional provision at issue "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." *Id.* (Emphasis in original). In other words, a constitutional right is self-executing only "if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution 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 Legislature for action." 202 Cal. App. 3d. at 1455. By way of further explanation, the California Court held that "[a] constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Id.*

With this background, it is clear that the due process and unreasonable search and seizure clauses in the South Carolina Constitution are not self-executing to the extent that a money damages remedy is not clear from the very terms of those clauses. As previously mentioned, the same is true with those very same clauses in the United States Constitution. Until a private right of action was provided by enabling legislation, specifically 42 U.S.C. § 1983, a violation of those clauses could not be remedied by an award of money damages. Consequently, South Carolina does not recognize a private right of action for money damages

under the state constitution, and as a result, Judge Culbertson was correct in concluding that no such cause of action exists.[5]

B. *Bivens* Not Applicable to State Constitutional Claims

Despite the clear absence of enabling legislation, the Appellant Palmer nonetheless contends that a private right of action for money damages should be implied in the law. The State disagrees for several reasons.

First, the "implied right of action" approach is based on a misapplication of the *Bivens* case. In *Bivens*, as discussed above, the United States Supreme Court allowed a private right of action for money damages to proceed only against a federal official acting under federal law. *Bivens* has never been extended by the Supreme Court to recognize an implied cause of action against a state or its political subdivisions or even against state or local officials. The Supreme Court has indeed observed that "[i]n our most recent decisions, we have responded

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[5] The South Carolina appellate courts have not previously addressed this issue in any published opinion, and as a result, there is no binding precedent. However, the Court is advised that in a prior unpublished decision in *Gibbs v. South Carolina Department of Probation, Parole, and Pardon Services*, Opinion No. 2002-UP-363 (Ct. App. 2002), this Court noted the split in other jurisdictions on the issue and ultimately ruled as follows: "We agree that no viable cause of action exists where, as here, the state Constitution does not provide for a private cause of action for civil rights violations and the legislature has not enacted a statute enabling this type of action." It is further noted that the South Carolina Supreme Court denied a petition for writ of certiorari in *Gibbs* on June 25, 2002.

cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 484 (1994), *citing Schweilker v. Chilicky*, 487 U.S. 412 (1988). As case in point, the Supreme Court declined in *Federal Deposit Insurance Corporation*, *supra*, to allow a *Bivens* claim to be brought against a federal agency. In short, *Bivens* does not direct or even support Palmer's basic premise -- that an implied right of action for a violation of any constitution, federal or state, exists against the State of South Carolina.

Second, Palmer has offered no state constitutional history, and counsel for the State are unaware of any, that suggests that the drafters intended to provide an implied right of action for money damages against the State or its political subdivisions when the State Constitution was adopted in 1868. *See, Unisys Corp. v. South Carolina Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263, 271 (2001) (no constitutional right to a jury trial in an action against the sovereign not recognized at time constitution was adopted in 1868).[6] In 1868, there existed no right of action or remedy recoverable against the State of South Carolina under any circumstances or scenarios. Absolute sovereign immunity existed for the State and all its political subdivisions. *See, Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 584 (2000) (observing that in 1934 "the State was protected by total sovereign

[6] A similar provision to the current versions of Article I, §§ 3 and 10 were adopted as part of the 1868 Constitution. *See*, S.C. Const. Art I, §§ 12 and 22 (1868).

immunity and could be sued in tort or contract only when the State consented"). Similarly, in *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995), the Texas Supreme Court looked to the state constitutional history and found "no historical basis to create the remedy sought." 896 S.W.2d at 148. The Court observed that there was no authority that "at the time the Constitution was written, it was intended to provide an implied private right of action for damages for the violation of constitutional rights." *Id.*

Third, the South Carolina appellate courts have historically been reluctant to recognize implied private rights of action.[7] To recognize an implied private right of action for money damages under the State Constitution, this Court would invade the prerogative of the General Assembly which has not enacted any enabling legislation and would also violate the separation of powers doctrine. *See*, S.C. Const., art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each

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[7] *See e.g., Patterson v. I.H. Services, Inc.*, 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988) (no implied private right of action for violation of Victim's and Witness' Bill of Rights Act); *Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984) (no implied private right of action for violation of Claims Practices Act); *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, 289 S.C. 418, 338 S.E.2d 155 (1985) (statutes making criminal the act of knowingly and willfully encouraging the delinquency of a minor and the act of selling cigarettes to minors do not create an implied right of action); *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (no implied private right of action in tort for violation of Subcontractors' and Suppliers' Payment Protection Act); *Trask v. Beaufort County*, 392 S.C. 560, 709 S.E.2d 536 (Ct. App. 2011) (no implied private right of action for violation of S.C. Code Ann. § 16-17-600).

other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other").

As recognized by the Supreme Court, the "mandate of a separation of powers stems from the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258, 262 (2013). "In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be." *Id.* That should especially include whether South Carolina will expand the remedies as may be awarded against the State and its political subdivisions, which historically implicates critical issues of public policy that are necessarily within the prerogative of the legislative branch.[8] Thus, if South Carolina is to recognize a private right of action for money damages for a violation of the State Constitution or to provide

[8] When the South Carolina Supreme Court issued its decision in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), which abolished common law sovereign immunity with some limitations, the Court nonetheless recognized that "[t]he legislature may find it necessary to take some action to prepare the state and local subdivisions of government for their new tort liability." 329 S.E.2d at 742. The Court thus delayed the implementation of its decision to allow the General Assembly to enact the Tort Claims Act which placed limitations and exceptions on the waiver of sovereign immunity, as are discussed in more detail below. However, the Supreme Court's comment reflects that the policy decisions regarding the limitations to be placed on governmental liability and the remedies that are available for such liability are exclusively within the legislature's prerogative.

compensation for persons who are wrongfully convicted, that should result from legislative enactment and not by judicial fiat.[9]

C. No Waiver of Sovereign Immunity

In addition to the reasons set forth above, the Court should reject an implied right of action for money damages because of the bar of sovereign immunity. Prior to 1985, when the South Carolina Supreme Court decided the landmark case of *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the State and its political subdivisions enjoyed absolute sovereign immunity with few exceptions. In *McCall*, the Supreme Court recognized that "exceptions [to the doctrine of sovereign immunity] that have been carved out by the legislature reflect a scattered patchwork of sovereign liability that lack continuity, logic or fairness." 329 S.E.2d at 742. At no time, however, has the General Assembly carved out an exception for any so-called constitutional tort claims brought pursuant to the State Constitution.

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[9] Palmer has pointed out in his opening brief that twenty-three states have enacted statutes that specifically provide a civil remedy for persons that were wrongfully convicted. Palmer also notes that the South Carolina General Assembly has considered and did not pass similar legislation. *See*, Appellant's Brief, p. 3. However, as the South Carolina Supreme Court recognizes and the separation of powers doctrine dictates, it remains the prerogative of the legislature through the political process -- and not the courts -- to decide matters of public policy and whether a particular statutory scheme or process will be enacted as law. *See, Sims v. Amisub of South Carolina, Inc.*, 414 S.C. 109, 777 S.E.2d 379, 383 (2015) ("the fairness of such decisions remains within the prerogative of the legislature and not the Court").

In response to the Supreme Court's abrogation of sovereign immunity in *McCall*,[10] the General Assembly enacted the Tort Claims Act in 1986. With the Act, the legislature first reinstated sovereign immunity in full. Section 15-78-20(b) of the Tort Claims Act provides that "[t]he General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter." S.C. Code Ann. § 15-78-20(b). The legislature then proceeded to set forth specific waivers and limitations on sovereign immunity as reinstated.

This historical background has been best summarized by the South Carolina Supreme Court in its 1995 decision in *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995). The Court wrote:

> Historically, all persons were barred from bringing tort claims against governmental entities. The doctrine of sovereign immunity began to come under fire as being "archaic and outmoded." The legislature subsequently passed various exceptions to the doctrine. We noted, however, the exceptions reflected "a scattered patchwork of sovereign liability that lack[ed] continuity, logic or fairness." Thus, in *McCall* we abolished the doctrine of sovereign immunity.

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[10] *McCall* has been described as resulting in the absolute abrogation of sovereign immunity. *See*, *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688, 690 (1995) ("[i]n *McCall* we abolished the doctrine of sovereign immunity."). That is not entirely correct because the *McCall* Court did not abolish common law discretionary immunity as it existed pre-*McCall*. In effect, *McCall* represents only a partial abrogation of sovereign immunity because common law discretionary immunity was left intact.

> In response to our decision in *McCall*, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity. The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity.

455 S.E.2d at 690. (Citations omitted). In effect, as the Supreme Court summarizes in *Murphy*, in 1986, absolute sovereign immunity was restored by the General Assembly.

Since 1986, the General Assembly has taken no action to waive sovereign immunity for any constitutional torts brought for violations of the State Constitution. Thus, in order for a private right of action for money damages to be recognized under the South Carolina Constitution, that will require a legislative waiver of sovereign immunity for that purpose. That cannot be accomplished solely by judicial action.

D. Cases from Other Jurisdictions

In addition to his misplaced reliance on *Bivens*, the Appellant Palmer also relies extensively on cases from other jurisdictions. The analytical framework for the adoption or rejection of a private right of action for money damages for a state constitutional violation, however, varies greatly among the states that have addressed the issue. As indicated above, some states have adopted enabling

legislation and expressly allow for private rights of action. Other states have judicially recognized an implied private right of action, and a number of states have rejected a private right of action.[11] Even states that have recognized an implied right of action have limited that right of action to certain constitutional provisions and rejected others. *See generally*, Humble, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5th (2017). Thus, the authority from other jurisdictions should not control this Court's analysis of the issue under South Carolina law.

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[11] *See e.g.*, *State Board of Education v. Drury*, 263 Ga. 429, 437 S.E.2d 290, 294 (1993) (Georgia Supreme Court ruled that "[a]lthough a citizen may be entitled to seek enforcement of his constitutional rights, the means of that enforcement does not necessarily take the form of a recovery of damages against the state"); *Figueroa v. State*, 61 Haw. 369, 604 P.2d 1198 (1979) (Hawaii Supreme Court declined to create a private right of action for damages based on provisions of the state constitution); *Livingood v. Meece*, 477 N.W.2d 183, 190 (N.D. 1991) ("this court has specifically applied sovereign immunity as a bar to a direct cause of action against the state based on the alleged violation of state constitutional provisions, assuming that such a cause of action exists"); *Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992) ("we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer"); *Hunter v. City of Eugene*, 309 Or. 298, 787 P.2d 881 (1990) (Oregon Supreme Court declined to recognize private right of action for money damages under Oregon Bill of Rights; if right of action is to be recognized, it must come from the legislature); *Garcia v. Reyes*, 697 So.2d 549 (Fla. Dist. Ct. App. 1997) (no implied right of action for money damages available under the due process clause of the Florida Constitution); *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997) (Missouri Court of Appeals declined to recognize implied private right of action and explained that "no Missouri precedent exists permitting suits for monetary damages by private individuals resulting from violations of the Missouri Constitution"); *Board of County Commissioners of Douglas County v. Sundheim*, 926 P.2d 545 (Colo. 1996) (*en banc*) (Colorado Supreme Court rejected implied right of action for damages for violation of rights secured by state constitution); *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995) (as discussed *infra*).

IV. Contrary to the Appellant's position, Article I, § 9 of the South Carolina Constitution does not guarantee a remedy for a wrongful conviction.

Citing to Article I, § 9 of the South Carolina Constitution, Palmer argues that the State Constitution "mandates that there be a remedy for every wrong including wrongful conviction." *See*, Appellant's Brief, p. 11. Palmer is mistaken in his application of that constitutional provision.

Article I, § 9 provides that "[a]ll courts shall be public, and every person shall have a speedy remedy therein for wrongs sustained." S.C. Const. art I, § 9. In *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990), the South Carolina Supreme Court considered whether the limitation on damages imposed by the Tort Claims Act violates Article I, § 9. In upholding the monetary caps, the Supreme Court explained that Article I, § 9 "is not a guarantee of full compensation to all injured persons." 391 S.E.2d at 570. Article I, § 9 was also discussed by the United States District Court in *Doe v. American National Red Cross*, 790 F. Supp. 590 (D.S.C. 1992). Citing the case of *Central Railroad & Banking Co. v. Georgia Construction & Investment Co.*, 32 S.C. 319, 11 S.E. 192 (1890), the federal district court explained that the purpose of Article I, § 9 is "to secure to the inhabitants of the state, for which the constitution was made, access

to the courts for redress of any injury which they may have received." 790 F. Supp. at 592.[12]

In essence, Article I, § 9 provides for a right of access to the judicial system, but by no means does the provision guarantee a remedy or monetary compensation for any wrong committed. Indeed, in *State v. Lagerquist*, 254 S.C. 501, 176 S.E.2d 141 (1970), in addressing the application of Article I, § 9, the State Supreme Court explained that "[r]emedy simply denotes the means by which such a wrong is redressed in a civil proceeding." 176 S.E.2d at 143. Thus, Article I, § 9 is focused on the availability of the courts for redress of wrongs but, contrary to Palmer's position, it does not guarantee or require that the law provide a private right of action in every conceivable context nor ensure a monetary remedy is available for any possible wrong committed.

V. The Appellant does not have a right to a remedy for a wrongful conviction under the United States Constitution and the South Carolina Constitution.

In addition to asserting a right to relief under Article I, § 9 of the South Carolina Constitution, Palmer also includes a section in his opening brief

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[12] The federal district court in *Doe* explained that the Supreme Court in *Central Railroad* was construing a constitutional provision that was the predecessor of Article I, § 9 and contained similar but not identical phrasing. *See, Doe*, 790 F. Supp. at 592, n.4.

suggesting that such a right exists under the Fifth Amendment to the United States Constitution and Article I, § 3 of the South Carolina Constitution, both of which include Due Process Clauses. These arguments lack merit.

Specifically, Palmer identifies the Due Process Clause of the Fifth Amendment as the textual source for the right to a remedy for wrongful conviction which he seeks. Palmer is mistaken. In addition to the fact that the State of South Carolina is not a "person" amenable to suit under 42 U.S.C. § 1983, the Fifth Amendment provides no basis for a claim against the State. It is well settled that the Fifth Amendment Due Process Clause only applies to actions of the federal government and not those of state or local governments. *See, Scott v. Clay County*, 205 F.3d 867, 873, n.8 (6th Cir. 2000) ("[t]he Fourteenth Amendment's Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment's Due Process Clause circumscribes only the actions of the federal government").

Moreover, to the extent that Palmer is relying on the Takings Clause of the Fifth Amendment, which is unclear from the arguments, that also provides no basis for the recovery of money damages against the State. Palmer has made no showing and presented no authority that supports any reasonable proposition that a conviction constitutes a taking of private property for public use that is actionable under the Takings Clause or that time spent in prison may be recovered in some

measure as "just compensation." Palmer seems to make some argument that a "taking" of liberty is subject to just compensation under the Fifth Amendment; however, the express language of the Takings Clause requires a taking of "private property" for public use without the payment of just compensation. *See*, U.S. Const. Amend V. ("nor shall private property be taken for public use, without just compensation"). In short, there is no cognizable claim under the Takings Clause for the "taking" of a person's liberty.

Palmer also complains generally that he should have a claim for "fundamental fairness" and that an "unlawful and erroneous" conviction implicates "fundamental fairness." However, as the United States Supreme Court has explained, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994), *citing Graham v. Connor*, 490 U.S. 386 (1989). Similarly, the Fourth Circuit has explained that "[t]he Due Process Clause does not constitute a catch-all provision that provides a remedy whenever a state actor causes harm." *Evans v. Chalmers*, 703 F.3d 636, 646, n.2. Further, as the *Evans* case states, "[b]ecause the Fourth Amendment provides an explicit textual source for § 1983 malicious prosecution claims, the Fourteenth Amendment provides no alternative basis for

those claims." *Id.* The same is likewise true for the Fifth Amendment Takings Clause which does not provide the textual source for a "loss of liberty" claim.

Finally, in the same general discussion, Palmer takes exception to Judge Culbertson's statement as follows: "Plaintiff received due process. His conviction was vacated and he was released. He received all the due process available in South Carolina." (R. 8). Palmer describes that ruling as "shocking since it holds that there is no remedy in South Carolina for wrongful imprisonment and makes no apologies for this significant wrong visited on Palmer." *See*, Appellant's Brief, p. 7. Of course, no "apologies" are required from the trial judge, and furthermore, Judge Culbertson did not hold there are no state law causes of action in South Carolina for false imprisonment and malicious prosecution. Indeed, such causes of action exist under South Carolina law for arrest and/or prosecution without probable cause. *See*, *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005). Moreover, a Fourth Amendment claim is available under Section 1983 against a "person" upon a showing that the arrest and prosecution were unlawful, i.e., in the absence of probable cause, but Judge Culbertson is also correct that Palmer received the process that he was due, and it resulted in his acquittal.

In sum, Judge Culbertson's order of dismissal of the State of South Carolina should be affirmed on all of Palmer's proffered theories of recovery and/or his claimed textual sources for the constitutional rights asserted.

VI. The Circuit Court was correct in holding that the Appellant's claims for wrongful conviction under any theory alleged are barred by absolute prosecutorial immunity.

As part of his rulings, Judge Culbertson also found that "[s]uit against the State is barred by prosecutorial immunity." (R. 8). In a conclusory manner,[13] Palmer claims that prosecutorial immunity has "no application" to this case. The State disagrees. As Judge Culbertson necessarily concluded, any civil claim brought by Palmer for alleged prosecutorial misconduct, including a *Bivens* type claim urged by Palmer, would be barred by prosecutorial immunity.[14]

Judge Culberson cited to *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), where this Court held that "a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims

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[13] It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

[14] The United States Supreme Court has held that absolute prosecutorial immunity protects federal prosecutors in a *Bivens* action. *See, Hartman v. Moore*, 547 U.S. 250, 262 (2006).

Act for actions relating to the prosecution of an individual as a criminal defendant -- regardless of the prosecutor's motivation -- provided the actions complained of were committed while the prosecutor was acting as an 'advocate,' as defined by *Imbler v. Pachtman* and its progeny." 553 S.E.2d at 509. This Court in *Williams* cited extensively to the seminal case of the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), wherein the Supreme Court recognized the defense of absolute prosecutorial immunity in Section 1983 litigation against state prosecutors. The Court concluded that absolute immunity applies to all prosecutorial acts that are intimately associated with the judicial phase of the criminal process. The functions included the initiation of the prosecution and the presenting of the state's case at trial as well as pre-trial and post-trial matters.. 424 U.S. at 431.[15]

As a related argument, Palmer maintains that Judge Culbertson erred in rejecting Palmer's reliance on the United States Supreme Court's decision in *Connick v. Thompson*, 563 U.S. 51 (2011). *Connick*, however, does not support Palmer's position. *Connick*, in fact, is a municipal liability case brought against a Louisiana district attorney only in his official capacity for the alleged failure to adequately train his prosecutors. The Supreme Court explained that "the only issue

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[15] In addition to common law prosecutorial immunity, South Carolina law also provides statutory immunity from suit under the Tort Claims Act. *See*, *O'Laughlin v. Windham*, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998); S.C. Code Ann. § 15-78-60(1) and (2).

before us is whether Connick, as the policymaker for the district attorney's office, was deliberately indifferent to the need to train the attorneys under his authority." 563 U.S. at 71. The Supreme Court ultimately found that Connick was entitled to judgment as a matter of law on the failure-to-train claim. Again, *Connick* is easily distinguishable from the present case because it was brought as a municipal liability claim. The State of South Carolina, in addition to not being a "person" amenable to suit under Section 1983, cannot be sued under a municipal liability theory. *See*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

In sum, regardless of the cause of action alleged, a claim for wrongful conviction resulting from alleged misconduct by a state prosecutor is subject to dismissal on the basis of absolute prosecutorial immunity. That would include federal claims brought pursuant to Section 1983 and *Bivens*, state law tort claims brought pursuant to the Tort Claims Act, and even the *Bivens* type action brought pursuant to the State Constitution that Palmer asks this Court to recognize. Under any of those theories of recovery, a suit against the State of South Carolina for alleged prosecutorial misconduct is barred. Judge Culbertson was correct in so ruling.[16]

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[16] In his statement of the issues on appeal, Palmer also raises the following: "Did the Circuit Court err in finding that malicious prosecution claims were excluded from tort immunity under the Tort Claims Act?" *See*, Appellant's Brief, p. 1. While this issue on appeal is non-sensical because it is unclear what is meant by "excluded from tort immunity," the issue was nonetheless abandoned because it was never argued in the body of the brief. *See*, *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285 (Ct. App. 1993) ("Although the

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent State of South Carolina respectfully requests that this Court affirm the orders of Circuit Court Judge Benjamin H. Culbertson filed November 17, 2016 and February 15, 2017, dismissing the State of South Carolina as a party to this action.

Respectfully submitted,

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[appellants] raise this alternative holding in their statement of the issues on appeal, they fail to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court").

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The undersigned counsel for the Respondent State of South Carolina certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent State of South Carolina certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent State of South Carolina, does hereby certify that service of the **Final Brief of Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 17th day of October 2017:

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