THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SC Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing and Rehearing *En Banc* was made and finally ruled upon by the Court of Appeals on July 12, 2019.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in not addressing the constitutional issues raised in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017)?

II. Did the Court of Appeals err in failing to hold that the Fifth and Fourteenth Amendments of the United States Constitution require a civil remedy for a wrongful conviction?

III. Did the Court of Appeals err in failing to hold that Article I Section 3 of the South Carolina Constitution applied to this case?

IV. Did the Court of Appeals err in holding that there was no supporting case law or authority for Petitioner's argument?

V. Did the Court of Appeals err in failing to hold that Petitioner's labor was protected by both the South Carolina and United States Constitutions?

VI. Did the Court of Appeals err in not addressing Petitioner's argument that fundamental fairness requires a civil remedy for a wrongful conviction?

VII. Did the Court of Appeals err in failing to hold that Article I Section 9 of the South Carolina Constitution requires relief for the Petitioner?

VIII. Did the Court of Appeals err in failing to hold a civil remedy for wrongful conviction exists under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)?

IX. Did the Court of Appeals err in not addressing Petitioner's argument that an implied cause of action exists under the South Carolina Constitution or under the Restatement of Torts 2d § 747?

X. Did the Court of Appels err in not addressing Petitioner's argument that the South Carolina Tort Claims Act does not preempt the South Carolina or United States Constitution?

XI. Did the Court of Appeals err in its reliance on *Spackman Ex Rel. Spackman v. Bd. Of Educ. of Box Elder Ctr. Sch. Dist.*, 16 P.3rd 533, 535 (Utah 2000).

STATEMENT OF THE CASE

On July 29, 2015, the South Carolina Supreme Court in *State v. Palmer*, 413 S.C. 410, 776 S.E.2d 558 (2015) held that Robert Palmer had been wrongfully convicted and found him not guilty of homicide by child abuse and aiding and abetting homicide by child abuse along with unlawful conduct towards a child. Palmer was convicted by a jury in 2011 and had been committed to the South Carolina Department of Corrections until this Court ordered he be freed. In reaching its ruling this Court stated:

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

In the wake of this Court's opinion in *Palmer supra*, the Petitioner brought a civil action in the Horry County Court of Common Pleas on March 7, 2016. Petitioner's Complaint had causes of action for malicious prosecution, false arrest, negligence, violation of 42 U.S.C. §1983 and for declaratory judgment. Specifically, the declaratory judgment cause of action requested the circuit court to declare a civil remedy existed for wrongful conviction in South Carolina under both the United States and South Carolina Constitutions. (Complaint, R. p. 31). The Defendant State of South Carolina filed its Motion to Dismiss which was granted by the Circuit Court. Petitioner then filed a Motion for Reconsideration which the Circuit Court also denied. This appeal was timely filed.

The South Carolina Court of Appeals heard Petitioner's appeal and denied any relief in a written opinion. Petitioner timely filed a Petition for Rehearing and a request for hearing *en banc* which was denied on July 12, 2019.

REASONS FOR GRANTING CERTIORARI

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

Currently, thirty-three states, the District of Columbia and the federal government have enacted statutes establishing a claim against the government for wrongful conviction and incarceration. Petitioner refers to the following authorities in those states:[1]

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

[1] Kansas enacted a wrongful compensation statute on May 15, 2018 making it the thirty-third state to do so.

CODE ANN. §§ 8.01-195.10 to .12 (2007); W.VA. CODE ANN. § 14-2-13a (LexisNexis 2004); WIS. STAT. ANN. § 775.05 (West 2001).

Significantly, seventeen states including South Carolina have no remedy established for wrongful conviction.[2] This is a tragedy of epic proportions and has been reported on by the New York Times in a series of articles and recent studies.[3]

Petitioner believes that there are significant public policy reasons for granting certiorari in this case. The issue in this case is one which has been the subject of legal debate for centuries. The question is what civil remedies does a person have who has been wrongfully convicted under either the United States or the South Carolina Constitutions against the State. The Court of Appeals answered this question finding no remedy but failed to address each of the legal theories advanced by the Petitioner.

This case is a unique one-of-a-kind opportunity for this Court to address a novel issue which has not been addressed by any other Court in the nation. This is especially important since South Carolina is one of seventeen states that does not have a wrongful conviction compensation statute and thus a plaintiff's remedy depends solely on where the conviction occurred. If the conviction occurred in New York or one of the other thirty-three states that have the wrongful conviction compensation statutes, Petitioner's claim would be viable. If the wrongful conviction occurred in one of the other seventeen states, there is no statutory remedy. This is patently unfair and as is demonstrated unconstitutional based on multiple theories.

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

[3] African Americans are seven times more likely to be wrongfully convicted. See Race and Wrongful Convictions in the United States, Samuel Gross, National Registry of Exonerations, March 7, 2017.

Petitioner asserts to this Court that there must be a remedy for a wrongful conviction based on fundamental fairness and that this Court should fashion a remedy in this case (as it has done in other cases). A ruling by this Court granting relief to the Petitioner would offer guidance for the seventeen other states that have no laws which protect the wrongfully convicted. Further, it would place South Carolina in the forefront of protecting individual liberty as envisioned by the framers of both the South Carolina and United States Constitutions.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ADDRESS THE CONSTITUTIONAL ARGUMENTS PETITIONER ADVANCED BASED ON *NELSON V. COLORADO*, 137 S.CT. 1249 (2017).

Prior to the hearing, Petitioner advised the Court that he had become aware of a recent United States Supreme Court opinion which had a bearing on this case. Petitioner by email supplemented his brief to add the case of *Nelson v. Colorado*, 137 S.Ct. 1249 (2017) to his argument. In 2006, Nelson was convicted by a Colorado jury of two felonies and three misdemeanors arising from the alleged sexual and physical abuse of her children. The trial court sentenced her to a prison term of 20 years to life. Pursuant to Colorado law, which provides that persons convicted of criminal activity are responsible immediately upon their conviction, for certain costs and fees, the court ordered Nelson to pay those fees. During her incarceration, the fees were deducted from her inmate account to satisfy the debt she owed to the state. In 2009, the Colorado Court of Appeals reversed the judgment against Nelson, finding that the testimony of an expert witness at her trial had been improperly used, and remanded her case for a new trial. A new jury was empaneled. It acquitted Nelson of all charges at the second trial and she was released from state prison.

Upon her acquittal, Nelson filed a motion with the trial court seeking the return of her monies based on the ground that her acquittal eliminated whatever claim the state may have had to the funds. The trial court denied the motion, but the Colorado Court of Appeals ruled in Nelson's favor holding that all assessments of costs, fees and restitution must be tied to a valid conviction, absent which a court must return the defendant to the *status quo ante*. The State appealed and the Colorado Supreme Court over a vigorous dissent reversed. On certiorari the United States Supreme Court reversed the Colorado Supreme Court agreeing with Nelson that Colorado's scheme offends the Fourteenth Amendment's guarantee of due process. Justice Ruth Bader Ginsburg, joined by Chief Justice John Roberts and Justice Anthony Kennedy, Stephen Breyer, Sonya Sotomayor and Elena Kagan, wrote the majority opinion.

Justice Ginsburg in writing the decision 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.[4]

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 Petitioner has cited for authority in this case.

The due process clause protects liberty as well as property. The very core of the Fourteenth Amendment holds 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 interest in property. The question thus arises: If due process requires nothing more than minimal procedures to vindicate recovery of one's property, why should it require

[4] Justice Ginsburg also said, "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions." 137 S.Ct. at 1256-1257. It makes no logical sense to refund a fine paid by the wrongfully convicted and not allow compensation for imprisonment for the wrongfully convicted.

anything more for deprivation of one's liberty? The answer of course is that property and liberty are found in the same sections of the Constitution and each requires a civil remedy when an individual's rights are violated.

The Petitioner asserts that *Nelson* is directly applicable to the facts in this case. Both liberty and property are equally enumerated in the due process clause of the United States Constitution and ought to be treated equally. Justice Ginsburg eloquently makes this point in the above-quoted passage.

Here, the Court of Appeals does not address the issue, nor does it address whether there is a civil remedy for liberty or for the restriction of liberty as defined in the due process clause. In other words, one's liberty is just as important as the taking of one's property, if not more important, and a civil remedy under the Constitutions of the United States and South Carolina ought to allow such a remedy as a matter of law.

In sum, Petitioner asserts that the Fifth and Fourteenth Amendments to the United States Constitution provides, in relevant part "nor shall any state deprive any person of life, liberty or property, without due process of law." In this case, Petitioner asserts the Court of Appeals has not answered the question and that if it had answered the question, Petitioner would be entitled to a remedy as a matter of law.[5]

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[5] See Bruce Ackerman, Essay, The Emergency Constitution, 113 Yale Law Journal, 1029, 1064-1065 (2004) (decrying the scandalously unjust lack of compensation for liberty deprivation which cannot be justified...).

II. THE COURT OF APPEALS ERRED IN NOT ADDRESSING PETITIONER'S ARGUMENT THAT THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION REQUIRE A REMEDY FOR A WRONGFUL CONVICTION.

The due process clause of the Fifth Amendment reads:

> No person shall be deprived of life, liberty or property without due process of law.

The Fourteenth Amendment to the Constitution states:

> Nor shall any state deprive any person of life, liberty or property without due process of law...

The Petitioner cited as authority *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) which defines "liberty" to include certain specific rights that allows persons, within a lawful realm to define and express their identity. While not entirely on point, *Obergefell* held that the liberty provision of the Constitution allows the right of same sex couples to marry. This same constitutional provision should be construed to require a civil remedy for those wrongfully convicted by the State. See also, *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (The due process clause, like its forbearer, the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government.)[6] Due process of law is a constitutional guarantee that prevents governments from impacting citizens in an abusive manner. It is the most important safeguard against tyranny and the Fourteenth Amendment makes it applicable to the states. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswald v. Connecticut*, 381 U.S. 479 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Chapman v. California*, 386 U.S. 18 (1967) ("we cannot leave to the states the formulation of the authoritative...remedies designed to protect people from infractions by the states of federally guaranteed rights.")

[6] Justice Felix Frankfurter once explained in a concurring opinion: "To suppose that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945); Frankfurter, J. concurring.

III. ARTICLE I SECTION 3 OF THE SOUTH CAROLINA CONSTITUTION IS APPLICABLE TO THIS CASE.

Petitioner also advanced the argument that Article I, Section 3 of the South Carolina Constitution was more expansive than the United States Constitution because it is found under the subheading "Declaration of Rights."[7] South Carolina Constitution, Article I, Section 3 states:

> **§3 Privileges and immunities: due process; equal protection of laws.**
>
> The privileges and immunities of citizens of this State and of the Untied States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, not shall any person be denied the equal protection of the laws. (1970 (56) 2684; 1971 (57 315.)

This Court has also previously held that due process is implicated when there is a deprivation of liberty interest. See *Kearse v. State Health and Human Services Finance Commission*, 318 S.C. 198, 456 S.E.2d 892 (1995).

The Petitioner urges that Article I Section 3 of the South Carolina Constitution provides a constitutional authority for a wrongful conviction remedy. The due process clause found in the South Carolina Constitution incorporates the right of Petitioner to have a civil remedy for a wrongful conviction despite the fact that no South Carolina statute exists which gives the Petitioner that right. It is without question that Petitioner's liberty interest was at stake and there could be no due process without a civil remedy for wrongful conviction after his release. This Court has repeatedly said that one cannot be arbitrarily deprived of a fundamental right to life, liberty and property. A wrongful conviction and the right to a civil remedy is a fundamental right and thus Petitioner is entitled to a remedy. *See Simmons v. Western Telegraph Co.*, 63 S.C. 425, 41 S.E. 521 (1902).

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[7] See South Carolina Constitution.

This Court has also consistently held that a claim of denial of due process must be analyzed in a two part inquiry: (1) whether the interest involved can be defined as "liberty" or "property" within the meaning of the due process clause and if so (2) what process is due under the circumstances. This Court has also frequently said due process is flexible and calls for procedural protections as the particular situation demands. See *South Carolina Department of Social Services v. Wilson*, 352 S.C. 445, 574 S.E.2d 730 (2002). *State v. Binnarr*, 400 S.C. 156, 733 S.E.2d 890 (2012).

The following cases are examples of this Court's opinions about the liberty interest as described in Article I Section 3 and the due process clause: See *State v. Cowart*, 251 S.C.360, 162 S.E.2d 535 (S.C. 1968) (this Court finds indigent accused of a crime has a right to counsel and to due process); *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (tenured professor has property interest in continued employment which is safeguarded by due process.); *Ex Parte Rice*, 307 S.C. 469, 415 S.E.2d 819 (S.C. 1991) (prisoner denied due process because of family court's denial of leave to proceed *in forma pauperis* where the family court found that the prisoner was not indigent based on monthly earning of $36.50).

Each of these cases, coupled with the explicit language of our Constitution, clearly provides a civil remedy for a wrongful conviction and this Court should so hold.

These arguments were advanced in the circuit court. They were again advanced in the Court of Appeals and still Petitioner has no answer as to whether the South Carolina Constitution (Article I Section 3) or the United States Constitution coupled with the Fifth and Fourteenth Amendments provide a civil remedy for a wrongful conviction.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THERE WAS NO SUPPORTING CASE LAW OR AUTHORITY FOR PETITIONER'S ARGUMENT.

The Court of Appeals in its Opinion wrote "Because Palmer fails to provide any supporting law for his claim, we affirm the circuit court's finding on this issue." Petitioner believes the Court of Appeals was referring to the takings clause in ruling against the Petitioner. It is respectfully submitted that Petitioner's argument about the takings clause including supporting case law was extensively briefed. Petitioner references pages 7-9 of his Final Brief which provided legal theories and case law. Petitioner also submits many of the most significant legal issues decided by this Court do not have direct case law, but are simply logical, fair and based on broad ideals and principles found in the Constitution.

V. THE COURT OF APPEALS ERRED IN FAILING TO HOLD PETITIONER'S LABOR WAS PROTECTED BY THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS.

Petitioner has cited court decisions holding "labor" is a form of property protected by eminent domain principles and thus individuals such as Petitioner who have been wrongfully convicted should be able to assert that they are entitled to the productive value of their labor while being imprisoned. Petitioner cited this precedent; however, the Court of Appeals in its opinion says Petitioner cited no such precedent. Petitioner respectfully disagrees. Petitioner's citation for this argument is found on pages 8 and 9 of Petitioner's Final Brief to the Court of Appeals. See *United States v. Lewis*, 342 F.Sup. 833, 836 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973); *accord State v. Superior Court*, 40 P.3d 1239 (Alaska Ct. App. 2002) (relying on *Lewis* to conclude that Due Process principles require compensation when a fine is wrongfully collected); *Ex parte McCurley* 412 So.2d 1236 (Ala. 1982) (same) *People v. Nance*, 542 N.W.2d 358, 359 (Mich. Ct. App. 1995), *appeal denied*, 554 N.W.2d 899 (Mich. 1996) (same). Accordingly, if a fine which was wrongfully collected because of a conviction should be returned, then logically Petitioner has

an equal claim for his liberty being restricted as a result of a wrongful conviction and thus the State must provide him a remedy.

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

VI. THE COURT OF APPEALS DID NOT ADDRESS PETITIONER'S ARGUMENT THAT FUNDAMENTAL FAIRNESS REQUIRES A CIVIL REMEDY FOR A WRONGFUL CONVICTION.

This Court has consistently held that due process is violated when a party is denied fundamental fairness. See *Theisen v. Theisen*, 382 S.C. 213, 676 S.E.2d 133 (2009), *rehearing denied*; and *Hipp v. South Carolina Department of Motor Vehicles*, 381 S.C. 323, 673 S.E.2d 416 (2009).

This Court has further been mindful of the concepts of fundamental fairness and injustice in its decisions. Some of the most significant examples in which the Court has remedied serious and significant injustices include *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) in which this Court overruled sovereign immunity. In *McCall*, the Court cited numerous cases in which it felt fundamental fairness was at stake. See *Kensey Construction Co. v. South Carolina Department of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978) (court eliminates immunity from suit for state based upon contractual obligations); *Fitzer v. Greater Greenville South Carolina Young Men's

Christian Association, 277 S.C. 1, 282 S.E.2d 230 (1981) (Court abolishes charitable immunity). See also *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (Court adopts comparative negligence as the law in South Carolina); *Abbeville County School District v. State of South Carolina*, 410 S.C. 619, 767 S.E.2d 157 (2014) (Court rules students in economically disadvantaged school districts are entitled to the same education as students in other areas of the state); *Stone v. Thompson*, Opinion 27908, July 24, 2019 (Court follows national trend abolishes common law marriage when legislature failed to act).

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

Further, this Court has discussed fundamental fairness and that the theory should be applied when it implicates a property or liberty interest. See *Sloan v. Board of Physical Therapy*, 370 S.C. 452, 636 S.E.2d 598 (2006) (a liberty interest is freedom to practice a profession).

This Court has also said that fundamental fairness is that which is shocking to the universal sense of justice. It is shocking for an innocent person to have no statutory remedy for a 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.).

In sum, this Court has interpreted our State Constitution in a more expansive manner than the United States Supreme Court has in interpreting the United States Constitution. (This of course takes nothing away from the Petitioner's argument that the United States Constitution also provides a remedy.) See *State v. Reaves*, 414 S.C. 118, 777 S.E.2d 213 (2015) (A fundamental right to a fair

trial under the State Constitution includes a failure to preserve exculpatory evidence in the context of an entire record). *See also State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013) (lifetime monitoring without a hearing is unconstitutional).

VII. THE COURT OF APPEALS ERRED IN NOT ADDRESSING ARTICLE I SECTION 9 OF THE SOUTH CAROLINA CONSTITUTION.

South Carolina's Constitution has a unique feature which is not found in many other State Constitutions. Article I, Section 9 entitled Courts: Speedy Remedy provides as follows:

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

Petitioner made this argument in the Court of Appeals, but the opinion does not address it. The Petitioner believes that the case law supports Article I Section 9 of the South Carolina Constitution as being applicable to this matter. See *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171 (1911) (Court defines the term wrongs "in its broadest legal sense embracing every injury to or impairment of legal rights of person or property.") See also *State v. Lagerquist*, 254 S.C. 501 (1970), 176 S.E.2d 141, *cert denied*, 91 S.Ct. 912, 401 U.S. 937, 28 L.Ed. 2d 216 (1970) (citing with approval the definition of wrongs).

In sum, Article 1 Section 9 of the South Carolina Constitution provides the authority to correct the injury to the Petitioner. It clearly contemplates freedom from bodily restraint and mandates a civil remedy if one is illegally restrained. This is especially true since the meaning of liberty is defined by this Court to be interpreted in its broadest sense. *See Boling v. Sharp*, 347 U.S. 497; 74 S.Ct. 693, 98 L.Ed. 884 (1954) (liberty extends to the full range of conduct which the individual is free to pursue).

VIII. THE COURT OF APPEALS ERRED IN FAILING TO HOLD A CIVIL REMEDY EXISTED UNDER *BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*, 403 U.S. 388 (1971).

The Court of Appeals did not in its opinion address whether or not a *Bivens* style remedy was available under the United States Constitution for wrongful conviction. In *Bivens*, the United States Supreme Court held "We hold defendants have no immunity to protect them from damage suits charging violations of constitutional rights." (See *Bivens,* 403 U.S. 388 (1971)). Significant in *Bivens* was Justice Brennan's decision to hold that "where federally protected rights have been invaded it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

In this case Petitioner specifically asked the Court of Appeals for a *Bivens* remedy pursuant to the United States Constitution. The Court of Appeals made no ruling on Petitioner's request. Petitioner asserts that there is a *Bivens* remedy under the United States Constitution for wrongful conviction. *See Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15 (1980) (damage suit against prison based on Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979) (damage claim for violation by Congressman of Fifth Amendment due process guarantee in context of wrongful discharge of employee).

In sum, this Court should hold that the United States Constitution allows for a damage claim for a wrongful conviction based on *Bivens*.

IX. THE COURT OF APPEALS FAILED TO ADDRESS PETITIONER'S REQUEST FOR A *BIVENS* STYLE CAUSE OF ACTION BASED ON THE SOUTH CAROLINA CONSTITUTION OR § 874 OF RESTATEMENT 2D.

Petitioner requested of the Court of Appeals that it find an implied cause of action for a constitutional tort based on the South Carolina Constitution. While South Carolina has not adopted a *Bivens* style cause of action for constitutional torts, Petitioner urges the Court to do so. A number

of states have recognized this theory and Petitioner believes an implied cause of action should be adopted in this state.

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

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

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

The *Brown* logic has been applied by other state courts. See *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (a direct cause of action is available under North Carolina State Constitution for free speech clause); *Binett v. Sabo*, 244 Conn. 23 710 A.2d 688 (Conn. 1998) (holding a constitutional cause of action under the Connecticut Constitution for violations of Article I, Sections 7 and 9 of the State Constitution for unreasonable search and seizure

and wrongful arrest since the legislature did not prohibit the creation of a constitutional remedy and did not create a meaningful alternative remedy); *see also Widgeon v. Eastern Shore Hospital Center*, 300 Md. 520 479 A.2d 921 (1984); *Gay Law Students v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3rd 458, 595 P.2d 592 (1979); *Phillips v. Youth Development Program, Inc.*, 390 Mass. 650, 459 N.E.2d 453; *Newell v. Elgin*, 34 Ill. App. 3rd 719, 340 N.E.2d 342 (1976); *Bott v. DeLand*, 922 P.2d 732 (Utah 1996); *Smith v. Dept. of Public Health*, 428 Mich. 540, 410 N.W.2d 749 (1987).

The Oklahoma Supreme Court found an implied cause of action under the Oklahoma Constitution notwithstanding the Oklahoma Governmental Tort Claims Act. See *Bosh v. Cherokee County Building Authority*, 2013 OK 9, 305 P3d 994 (2013) (OK 2013) (Oklahoma Constitution Article 2, Section 30 provides a private right of action for excessive force).

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

deprivation by instituting a damage claim regardless of the lack of State law; See generally Friesen, State Constitutional Law, Section 7.02(2) and 7.07(1) for a list of states viewing favorable damage remedies for violations of state constitutional provisions.

Based on the above authorities, Palmer requests this Court hold that an implied cause of action arises under the South Carolina Constitution. This is especially important because South Carolina has not adopted a unlawful conviction compensation statute and Petitioner has no remedy. Thus, the Court of Appeals erred in denying recovery in two respects. First, finding that Petitioner had no implied cause of action under *Bivens* for unlawful conviction pursuant to the United State Constitution. Second, the Court of Appeals erred in holding that under the South Carolina Constitution Petitioner did not have an implied cause of action for wrongful conviction.

X. THE COURT OF APPEALS ERRED IN NOT ADDRESSING PETITIONER'S ARGUMENT THAT THE SOUTH CAROLINA TORT CLAIMS ACT DOES NOT PREEMPT THE SOUTH CAROLINA OR UNITED STATES CONSTITUTION.

In its opinion the Court of Appeals held that Palmer had abandoned his argument that the South Carolina Tort Claims Act cannot override the South Carolina and United States Constitutions. The Court stated that Petitioner had provided no authority in his Brief. Petitioner directs the Court to Section X of his Brief (page 21). See also *Bosh v. Cherokee County Building Authority*, 2013 OK 9, 305 P3d 994 (2013) (OK 2013). In summary, the Court of Appeals is in error in its holding on this issue. It is blackletter law that no statute can ever under any circumstances override the Constitution. Accordingly, both the Court of Appeals and the trial court erred in so holding in this case.

XI. THE COURT OF APPEALS CITATION OF *SPACKMAN EX REL. SPACKMAN v. BD. OF EDUC. OF BOX ELDER CTY. SCH. DIST.*, 16 P.3d 533, 535 (Utah 2000) IS ERRONEOUS.

The Court in its Opinion cited *Spackman* for the proposition that "the Utah Constitution does not expressly provide damage remedies for constitutional violations." However, the South Carolina Court of Appeals assertion is incorrect. In fact, the Utah Supreme Court held that Article I Section 7 of its Constitution was self-executing. *Spackman* actually stands for the proposition that Petitioner has set forth in this case that the South Carolina Constitution is self-executing and that causes of action arise directly from the Constitution. This view has also been endorsed by other courts which have found an implied right of damages under their Constitutions. See *Zullo v. State of Vermont*, 2019 VT 1 (Vt. 2019); and *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017).

Thus, Petitioner believes that the Court of Appeals reliance on *Spackman* and its interpretation are a wholly erroneous interpretation of the South Carolina Constitution and that this Court must grant certiorari to review these novel and weighty Constitutional issues.

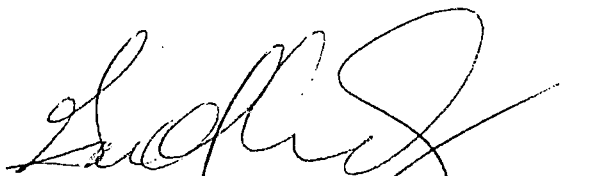
CONCLUSION

In summary, this Court must reverse the decision of the Court of Appeals. This case involves significant legal questions of statewide and nationwide importance since seventeen states do not have a wrongful conviction compensation statute. This Court should weigh in on an issue which has been debated by scholars for years. As Justice Learned Hand said in 1923: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

In this case, Petitioner has been in an unreal dream and requests this Court hold a civil remedy exists for Petitioner's loss. Accordingly, Petitioner requests this Court boldly issue a writ of

certiorari to address the important constitutional and fairness issues at stake for those wrongfully convicted.

Respectfully submitted,



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August _6_, 2019

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 07 2019
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Petition for Writ of Certiorari** on the Respondent, on the 6th day of August 2019, by depositing a copy of same in the United States Mail, postage prepaid, to:

Andrew F. Lindemann, Esquire
Lindemann, Davis & Hughes, PA
P. O. Box 6923
Columbia, SC 29260

J. Emory Smith, Jr, Deputy Solicitor General
Robert D. Cook, Solicitor General
Alan Wilson, Attorney General
Office of Attorney General
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Lisa A. Thomas, Esquire
Thompson & Henry, P.A.
P. O. Box 1740
Conway, SC 29528

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 6th day of August 2019.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26

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August 6, 2019

RECEIVED
AUG 07 2019
SC Court of Appeals

The Honorable Daniel E. Shearouse
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: *Robert Palmer vs. State of South Carolina, Horry County and David Weaver*
Appellate Case No. 2017-000567
C/A No. 2016-CP-26-1614
Our File No. 2015-0325C

Dear Mr. Shearouse:

Enclosed please find the following in the above-captioned matter:

(1) Original and seven (7) copies of our Petition for Writ of Certiorari and Proof of Service;

(2) Two (2) copies of the Appendix (one of which is unbound).

(3) Our check for $250.00 for the filing fee;

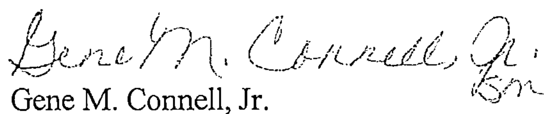
(4) A self-addressed, stamped envelope for return of one filed copy of the Petition for Writ of Certiorari to this office.

By copy of this letter, I am also filing the Petition for Writ of Certiorari with the South Carolina Court of Appeals.

Further, by copy of this letter, I hereby serve attorneys for Respondent with the Petition for Writ of Certiorari.

With best regards, I am

Sincerely yours,

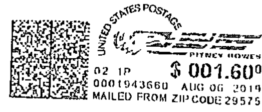


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Jenny A. Kitchings, Clerk
South Carolina Court of Appeals

cc w/enc.: Andrew F. Lindemann, Esquire
Lisa A. Thomas, Esquire
J. Emory Smith, Jr., Deputy Solicitor General
Robert D. Cook, Solicitor General
Alan Wilson, Attorney General
Roger Dale Johnson, Esquire



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SC Court of Appeals

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