THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2019-001316
Case No. 2016-CP-26-1614

Robert Palmer, ... Petitioner,

v.

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

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

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This civil action for monetary relief follows the Petitioner 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, this Court ruled that Palmer was entitled to a directed verdict on both the homicide by child abuse and unlawful conduct towards a child charges. This 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 Petitioner Palmer subsequently filed a timely appeal. The Court of Appeals heard oral argument and thereafter issued a published opinion affirming the trial court's dismissal of the State of South Carolina as a party-defendant. The Court of Appeals denied a petition for rehearing. Palmer now seeks a writ of certiorari.

ARGUMENTS

I. A writ of certiorari is unwarranted because the dismissal of the State of South Carolina as a party-defendant would ultimately be affirmed by application of the "two-issue" rule and unappealed rulings of the Circuit Court.

As a threshold issue, this Court should assess whether this case is even an appropriate case for further review on a writ of certiorari. Should the Court grant a writ of certiorari, affirmance of the State's dismissal would be required on preservation grounds. In effect, based on the application of the "two-issue" rule, the decision of the Circuit Court in dismissing the State of South Carolina should be affirmed.

In applying the "two-issue" rule, this 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). In other words, "[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." *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839, 845 (Ct. App. 1986).

In his Petition for Writ of Certiorari, Palmer suggests that a civil remedy for wrongful conviction should be available pursuant to the United States Constitution. However, in fully dismissing Palmer's federal constitutional claims, the Circuit Court ruled that the State of South Carolina is not a "person" amenable to suit under 42 U.S.C. § 1983. Palmer does not raise an exception to that ruling, and on that basis alone, the dismissal order with respect to the federal claims is subject to affirmance pursuant to the "two-issue" rule and the law of the case. Even if the Court considers the merits, 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). This Court has applied that black-letter law in *Cone v. Nettles*, 308 S.C. 109, 417 S.E.2d 523 (1992). Accordingly, the State of South Carolina cannot be sued under Section 1983. Thus, the dismissal of any federal constitutional claim alleged against the State -- even one premised on a wrongful conviction -- must be affirmed on that basis.

Similarly, Palmer does not raise any exception in his Petition for Writ of Certiorari to the Circuit Court's ruling based on absolute prosecutorial immunity. The Circuit Court found that "[s]uit against the State is barred by prosecutorial immunity." (R. 8). The Circuit Court, in fact, ruled that any civil claim brought by Palmer for alleged prosecutorial misconduct by the State, including a *Bivens* type claim urged by Palmer, would be barred by prosecutorial immunity. The Circuit Court cited to *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), wherein the Court of Appeals held that "a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims 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. The Court of Appeals 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 Supreme 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.[1]

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, state law tort claims brought pursuant to the Tort Claims Act, and even a private right of 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. The Circuit Court was correct in so ruling. Palmer does not challenge those rulings in his Petition for Writ of Certiorari, and as a result, the application of the "two-issue rule" and the law of the case doctrine will result in an affirmance of the dismissal of the State as a party-defendant and renders the issuance of a writ of certiorari in this matter as unnecessary.

II. The Court of Appeals correctly ruled that there is no remedy for a wrongful conviction under the Takings Clauses of the United States Constitution and the South Carolina Constitution.

The Court of Appeals correctly ruled that the Takings Clauses of the United States and South Carolina Constitutions do not provide for a cause of action for wrongful conviction. Even if such claims were cognizable, they would be barred by absolute prosecutorial immunity as well as the fact that the State of South Carolina is not a "person" under 42 U.S.C. § 1983. Nonetheless, as the Court of Appeals ruled, there is no legal basis for finding that Palmer can allege a takings claim

[1] 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).

for a wrongful conviction. As the Court of Appeals correctly recognizes, Palmer made no showing and presented no authority that supports any 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 argue 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.[2]

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[2] Palmer's reliance on the United States Supreme Court's decision in *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), is misplaced. The Supreme Court did not recognize a cause of

In sum, Palmer contends that it is fundamentally unfair that South Carolina does not recognize a cause of action for wrongful conviction. However, as the Court of Appeals points out and Palmer confirms, the South Carolina General Assembly has considered but not enacted legislation to recognize a wrongful conviction cause of action. The recognition of such a cause of action is a political question within the prerogative of the legislature. Moreover, a wrongfully convicted person is not without available causes of action under state law where a conviction was not supported by probable cause. *See*, *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005). Likewise, as stated above, 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. Moreover, a wrongfully convicted person may pursue a procedural due process claim where acts or omissions, such as withholding of exculpatory evidence, results in a denial of his right to a fair trial. *Albright v. Oliver*, 510 U.S. 266 (1994). Thus, there are available remedies for a wrongfully convicted person under certain factual circumstances, just not against the State of South Carolina.

III. The Petitioner is not entitled to pursue a *Bivens* claim against the State of South Carolina.

Palmer also argues in a fairly conclusory manner that the Court of Appeals did not address whether a "Bivens style remedy" is available under the United States Constitution. The law, however, is well settled that a *Bivens* action may not be pursued against the State for the alleged

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action for a "taking" of liberty under the Fifth or Fourteenth Amendments or any entitlement to "just compensation" for a wrongful conviction. Instead, the Supreme Court ruled that Colorado could not retain costs, fees, and restitution paid upon conviction after the conviction is invalidated. The Court explained that "Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated convictions, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." 137 S.Ct. at 1256. (Emphasis in original).

violation of his federal constitutional rights. 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 would be attempting to assert a *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. Thus, contrary to Palmer's argument, the Court of Appeals did not err in refusing to recognize an implied cause of action under *Bivens* for wrongful conviction against the State of South Carolina.

IV. The Court of Appeals correctly ruled that South Carolina law does not recognize a private right of action for money damages for a violation of the State Constitution.

Palmer next argues that the Court of Appeals erred in holding that he does not have a private right of action for wrongful conviction under the South Carolina Constitution. The Court of Appeals held that "the South Carolina Constitution does not provide for monetary damages for civil rights violations and the legislature has not enacted an enabling statute." *Palmer v. State of South Carolina*, 427 S.C. 36, 829 S.E.2d 255, 261 (Ct. App. 2019). That ruling was based on a

correct analysis and does not warrant the issuance of a writ of certiorari.

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 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 and provides for money damages as a remedy. In the case at bar, 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. This constitutional provision does not, however, provide a framework for a private right of action for money damages and thus is not self-executing to that extent, as the Court of Appeals correctly explains. Moreover, it is well settled that Article I, § 3 is strictly mandatory and prohibitory and does not, by its express terms, create any affirmative substantive rights including a private right of action for money damages. *See*, S.C. Const. art. I,

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[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).

[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.

§ 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").

As the Court of Appeals agreed, 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").

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.*

Thus, as our Court of Appeals correctly explained in this case, provisions of the South Carolina Constitution are self-executing "at least to the extent that courts may void incongruous legislation." *Palmer*, 829 S.E.2d at 261, *citing Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist.*, 16 P.3d 533, 535 (Utah 2000). However, Article I, § 3 of the South Carolina Constitution is *not* self-executing as to a civil monetary remedy. In other words, the availability of money damages as a remedy is not clear from its terms nor from any other provision of the State Constitution. As previously mentioned, the same is true with the Due Process Clause of United States Constitution. Until a private right of action was provided by enabling legislation, specifically 42 U.S.C. § 1983, a violation of the Federal Due Process Clause could not be remedied by an award of money damages. In short, as the Court of Appeals correctly ruled, absent enabling legislation, South Carolina does not recognize a private right of action for money damages under the State Constitution.

B. *Bivens* Not Applicable to State Constitutional Claims

Despite the clear absence of enabling legislation, 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 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).[5] 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 immunity and could be sued

[5] 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).

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.[6] Moreover, the recognition of an implied private right of action for money damages under the State Constitution would not only invade the prerogative of the General Assembly which has not enacted any enabling legislation but 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 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 this 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."

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[6] *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).

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.[7] Thus, as the Court of Appeals aptly recognized, if South Carolina is to recognize a private right of action for money damages for a violation of the State Constitution or to provide compensation for persons who are wrongfully convicted, that should result from legislative enactment and not by judicial fiat.[8]

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[7] 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.

[8] Palmer has pointed out that various states have enacted statutes that specifically provide a civil remedy for persons that were wrongfully convicted. Palmer also acknowledges that the South Carolina General Assembly has considered and did not pass similar legislation. However, as this 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").

C. No Waiver of Sovereign Immunity

The Court of Appeals was correct in declining to recognize an implied right of action for money damages. Although not specifically addressed by the Court of Appeals, the bar of sovereign immunity also supports that ruling. Prior to 1985, when this 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.

In response to this Court's abrogation of sovereign immunity in *McCall*,[9] 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.

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[9] *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.

This historical background has been best summarized by this Court in its 1995 decision in *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995). This 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.
>
> 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). Thus, as this Court summarizes in *Murphy*, absolute sovereign immunity was restored by the General Assembly in 1986.

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*, Palmer also cited to cases from other jurisdictions. However, the analytical framework for the adoption or rejection of a private right of action for money damages for a state constitutional violation 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.[10] Even states that have recognized an implied right of action have limited that right of action to certain constitutional provisions and rejected others or adopted strict standards of proof applicable to such rights of action. *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.

In sum, the South Carolina Court of Appeals correctly ruled that the South Carolina Constitution does not provide for monetary damages for civil rights violations.

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[10] *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*).

V. Article I, § 9 of the South Carolina Constitution does not guarantee a remedy for a wrongful conviction.

Palmer also contends that the Court of Appeals failed to consider the impact of Article I, § 9 of the South Carolina Constitution in its analysis. Palmer insists that Article I, § 9 "provides the authority to correct the injury to the Petitioner." *See*, Petition for Writ of Certiorari, p. 14. Palmer, however, is mistaken in his application of that constitutional provision and in arguing that it mandates a remedy for wrongful conviction.

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), this Court considered whether the limitation on damages imposed by the Tort Claims Act violates Article I, § 9. In upholding the monetary caps, this 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.[11]

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

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[11] 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.

the application of Article I, § 9, this 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. The Court of Appeals, therefore, did not err in rejecting Palmer's mistaken reliance on Article I, § 9.

CONCLUSION

Based on the foregoing discussion, the Respondent State of South Carolina respectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent State of South Carolina, does hereby certify that service of the **Respondent's Return to Petition for Writ of Certiorari** 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 10th day of September 2019:

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