

No. 21-625

**In the
Supreme Court of the United States**

ROBERT PALMER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**On Petition For Writ Of Certiorari
To The South Carolina Court of Appeals**

**BRIEF IN OPPOSITION 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 successful appeal of his conviction on criminal charges of homicide by child abuse, aiding and abetting homicide by child abuse and unlawful conduct towards a child. The Petitioner, 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 the Petitioner'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 the Petitioner was entitled to a directed verdict on both the homicide by child abuse and unlawful conduct towards a child charges. The State 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 the resolution of the criminal charges, the Petitioner 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, the Petitioner 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."

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."

The Respondent State of South Carolina filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCF. That motion was heard by Circuit Court Judge Benjamin H. Culbertson on June 14, 2016. By Order entered on November 17, 2016, Judge Culbertson granted the motion and dismissed the State of South Carolina with prejudice. The Petitioner then filed a Rule 59(e) motion for reconsideration, which was denied by Form Order entered on February 15, 2017.

The Petitioner subsequently filed a timely appeal to the South Carolina Court of Appeals which 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. The Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court which was denied.

REASONS FOR DENYING THE PETITION

The Petitioner contends that the Respondent State of South Carolina is required by the United States Constitution to provide a state law action *and* a state law remedy for one who is "wrongfully convicted." He insists that the "liberty clause" of the Fifth Amendment mandates that the states take such legislative and/or judicial action.

As the Petitioner correctly states, South Carolina, like a number of other states, has not adopted a state law statutory scheme to compensate persons who were "wrongfully convicted" and later released after serving some term of confinement. However, that is a matter of state law which, as the South Carolina Court of Appeals has recognized, is the prerogative of the legislature which to date has not adopted a cause of action for wrongful conviction nor laid out the parameters for such a cause of action. (App. 11). In addition, the State Court of Appeals declined to "create an implied cause of action for wrongful conviction in South Carolina." (App. 11).

The Petitioner cites no dispositive authority from this Court nor any court even remotely suggesting that the United States Constitution requires the enactment or adoption of a state law tort cause of action and remedy to compensate an individual who was "wrongfully convicted." Of course, if a person's conviction violates federal constitutional principles, then the remedy, if any, would be provided under federal law. This Court has already explained that

"the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

However, there are limitations as to the parties against whom a § 1983 remedy may be sought. In *Will v. Michigan State Police*, 491 U.S. 58 (1989), this Court held that the state is not a "person" amenable to suit under § 1983. Indeed, "a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 169 n.14 (1985). Similarly, in *Arizonians for Official English v. Arizona*, 520 U.S. 43 (1997), this Court held that "§ 1983 creates no remedy against a State." 520 U.S. at 69.

The Petitioner in the case at bar is the State of South Carolina. There is no remedy under § 1983 against the State. That is true even with respect to the declaratory relief that the Petitioner sought in the courts below and now seeks in this Court. That alone should warrant a denial of the writ of certiorari that the Petitioner seeks.

There are other Defendants in this case, including Horry County and David Weaver, which have been sued for their law enforcement and prosecutorial roles. This is an interlocutory appeal in that the Petitioner's federal and state law claims against the other Defendants have not been adjudicated to final judgment in the South Carolina state courts. If a state actor violated the Petitioner's federal constitutional rights resulting in a "wrongful

conviction" in some respect, then a remedy exists under § 1983 against that state actor in his or her individual capacity or against a local governmental entity under a municipal liability theory, if applicable. Such a remedy is not available against the State itself. Again, the only Defendant implicated in this appeal is the State of South Carolina which is not a "person" amenable to suit under § 1983.

Importantly, a wrongfully convicted person is not without available causes of action under South Carolina 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 § 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.

Despite not having fully adjudicated his federal claims under § 1983 or his state law tort claims against the other Defendants, the Petitioner insists that *state law* must provide him a wrongful conviction cause of action and remedy against the

State, and it is a federal constitutional requirement for a state to provide that remedy as part of its state law. In offering this novel and unprecedented theory, the Petitioner relies exclusively on the maxim *ubi jus ibi remedium* meaning "where there is a right, there is a remedy." There is, however, not a single reported decision from this Court or any lower federal court applying that maxim in the context of a wrongful conviction or even more broadly in the context of any substantive due process claim.

Without disclosing the source of the theory he espouses, the Petitioner clearly is relying on a law review article entitled "Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process," 41 San Diego L. Rev. 1633 (2004), written by Professor Tracy A. Thomas. The Petitioner does not actually cite this article in his Petition, but numerous passages in his Petition match verbatim (or substantially verbatim) that article. These passages are also out of context with the article. Even Professor Thomas does not take the position that federal due process mandates that a state adopt a state law cause of action and remedy for wrongful conviction or some other previously unrecognized tort.

In fact, Professor Thomas cites to Justice Scalia's dissent in *Webster v. Doe*, 486 U.S. 592 (1988), recognizing that "it is simply untenable that there must be a judicial remedy for every constitutional violation." 486 U.S. at 613 (Scalia, J., dissenting).

Justice Scalia gave as examples claims barred by sovereign immunity or claims that raise political questions. *Id.* Claims to which qualified immunity is applicable would be an additional example. Thus, Professor Thomas agrees that there are compelling interests that "have been found to outweigh the right to a remedy." 41 San Diego L. Rev. at 1644.

However, it bears repeating that the Petitioner is not arguing that the State of South Carolina must provide a state law remedy for a violation of federal constitutional law. Instead, he maintains that the United States Constitution compels the State to provide a state law cause of action and a state law remedy where an individual claims to be "wrongfully convicted."

The Petitioner makes an alternative argument that the Takings Clause of the United States Constitution provides a remedy for a "wrongful conviction." The South Carolina Court of Appeals correctly ruled that there is no legal basis for finding that the Petitioner can allege a takings claim for a wrongful conviction. As the state court correctly recognized, the Petitioner 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." The Petitioner appears 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.¹

There are numerous reasons why this case does not present an appropriate case for issuance of a writ of certiorari.

First, the Petitioner is raising an issue or theory of novel impression. The Thomas law review article has never been followed or even cited in any reported decision of any state or federal court. Moreover, there is no reported decision from any state or federal court that has even tangentially addressed this theory.² As explained by Justice Ginsburg, "[w]e

¹ The Petitioner's reliance on this Court's decision in *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), is misplaced. This Court did not recognize a cause of action for a "taking" of liberty under the Fifth or Fourteenth Amendments or any entitlement to "just compensation" for a wrongful conviction. Instead, this Court ruled that Colorado could not retain costs, fees, and restitution paid upon conviction after the conviction is invalidated. This 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).

² The Petitioner cites only to the tax cases of *Reich v. Collins*, 513 U.S. 106 (1994), and *Harper v. Va. Dept. of*

have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23, n.1 (1995) (Ginsburg, J., dissenting). *See also, Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S.Ct. 1780, 1784 (2019) (Thomas, J., concurring in denial of petition for writ of certiorari) ("further percolation may assist our review of this issue of first impression"). Thus, a period of "percolation" allows for the lower courts "to serve as laboratories in which the issue receives further study before it is addressed by this Court." *See, McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari).

Taxation, 509 U.S. 86 (1993), for the proposition that the federal due process requires the states to provide a meaningful remedy. However, those cases involved the imposition of a tax that violated federal law. This Court nonetheless recognized that "federal law does not necessarily entitle [plaintiffs] to a refund," and thus, it was ordered that the state "provide relief consistent with federal due process principles." *Harper*, 509 U.S. at 100. The states had "flexibility" in providing a remedy; it could provide an exclusively pre-deprivation remedial scheme, an exclusively post-deprivation remedial scheme, or a hybrid, and "[s]uch choices are generally a matter of state law." *Reich*, 513 U.S. at 110-11. To reiterate, this Court in those tax cases was not requiring the states to adopt a state law cause of action and remedy for a violation of state law. Those cases were also not decided based on the maxim *ubi jus ibi remedium*.

Second, the State of South Carolina is not the proper Defendant. Clearly, the State is not a "person" amenable to suit under § 1983. Likewise, the Petitioner has made no showing that the State is a proper party under state law.

Third, as mentioned, this is an interlocutory appeal. The case has not proceeded to final judgment in the state courts. The Petitioner may ultimately succeed in proving a federal or state cause of action against a co-Defendant and may obtain a remedy for his "wrongful conviction." That would moot the issues raised in this appeal.

Fourth, the proper consideration and resolution of this case will require the Court to address factual issues that remain unresolved. As a prime example, the Petitioner offers no definition or explanation of his use of the term "wrongful conviction." Most states which have adopted statutory schemes for compensation require the plaintiff to prove that they were actually innocent of criminal charges, not simply that they were wrongfully convicted on some procedural or evidentiary basis. That is particularly pertinent in this case. The Petitioner's basic premise is that the State must provide a civil remedy where an "innocent" person is wrongfully convicted. However, the Petitioner has not shown that he is "innocent." The South Carolina Supreme Court reversed the denial of a directed verdict at his criminal trial without finding that the Petitioner was proven to be innocent. In fact, evidence regarding culpability was presented after the State

rested and thus could not be considered. At the criminal trial, Julia Gorman, the Petitioner's live-in companion, testified that the Petitioner was alone with the victim when the fatal injury must have been inflicted. The State Supreme Court did not credit that testimony because it was presented after the directed verdict motion was made. The Court explained:

In our review we rely solely on evidence from the State's case-in-chief in order to avoid any of the directed verdict issues that can arise when jointly tried codefendants blame each other in their defense cases. *See State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) (waiver rule bars consideration of codefendant's testimony in reviewing denial of midtrial directed verdict motion). Here, Gorman testified in her own defense and stated that Palmer was alone with the victim during the time when the fatal injury must have been inflicted. We do not rely on her trial testimony because it cannot be used against Palmer, and because no evidence adduced in the defense cases are necessary to a determination whether Gorman's directed verdict motions were properly denied.

(App. 23). In short, given the basis for the State Supreme Court's reversal of the Petitioner's

conviction, it is questionable at best and likely doubtful that the Petitioner even qualifies as an "innocent" person who will benefit from the type of wrongful conviction cause of action and civil remedy that he argues South Carolina must provide. This key factual question remains unresolved in the current posture of this case, and that, among the other reasons discussed, militates against the issuance of a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, the Respondent State of South Carolina submits that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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