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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2018-001321
Unpublished Opinion No. 2022-UP-376

James Nathaniel Allen, #171214 …..…..……. Respondent,

v.

South Carolina Department of Corrections ...…..... Appellant.

APPELLANT'S PETITION FOR REHEARING

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I. SCDC'S PETITION FOR REHEARING

Appellant South Carolina Department of Corrections [SCDC] respectfully petitions the Court, pursuant to South Carolina Appellant Court Rule [SCACR] 221(a), to rehear its recent decision in the instant matter. *See* Unpublished Opinion No. 2022-UP-376, -- S.E.2d --, 2022 WL 6881836 (S.C. Ct. App. Oct. 12, 2022).

II. SUPPORTING ARGUMENT

A. THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT'S JUNE 20, 2018 FINAL ORDER

In its October 12, 2022 unpublished decision, this Court affirmed the Final Order issued June 20, 2018 by the South Carolina Administrative Law Court [ALC] (R. pp. 81 – 90).

In its June 20, 2018 order, the ALC identified the following issues on appeal (R. p. 83):

> Whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in [James Nathaniel Allen's] gross [prison industries pay] for purposes of the calculations mandated in S.C. Code Ann. § 24-3-40(A).

In ruling against SCDC, the ALC concluded as follows (R. p. 90):

> SCDC's failure to include the Social Security withholding, Workers' Compensation premium, and SCDC/Prison Industries Administrative Cost in the gross wages prior to making deductions thereto was an error of law. Accordingly, the parts of [SCDC's] decision dealing with gross wages are **REVERSED** and **REMANDED**. [SCDC] must classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from [Allen's] pay as set forth in [§] 24-3-40(A). [boldface emphasis in original].

In reaching the above-quoted conclusion, the ALC's analysis consisted of the following (R. pp. 88 – 89):

> The agreement between SCDC and the private sector entity (Contractor) establishes an hourly rate that includes a wage, Social Security withholding, a Workers' Compensation premium, and "SCDC/Prison Industries Administrative Cost." [Allen] contends that all these items are

> part of his hourly gross wage and should constitute the back pay owed. The Supreme Court referred to the sum of these items as a diversion from the hourly rate paid for inmate labor and stated:
>
> > [I]f [appellants Torrence and Ward] prove true their allegation that [SCDC] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§] 24-3-40 based on the lower rate, [SCDC] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. *See* § 24-3-40(A).
>
> [*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)].
>
> Based on the analysis in *Torrence* and the contract excerpts quoted above, these items comprise the inmate's gross hourly wages, which must be determined on remand and be recalculated and disbursed accordingly.
>
> …
>
> The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished by SCDC are "the gross wages of the prisoner," as the South Carolina Supreme Court indicated in *Torrence*, These gross wages must be disbursed as provided in § 24-3-40(A). Not to do so is an error of law, a "violation of the plain language of the statute which directs [SCDC] to disburse the money based on the gross wages." *See* [*Torrence*, 646 S.E.2d at 870, n. 4].

As reflected by the above-quoted passages, the ALC exclusively relied upon a single footnote from our Supreme Court's 2007 decision in *Torrence* in rendering its conclusions.

B. THIS COURT'S OCTOBER 12, 2022 UNPUBLISHED DECISION

In its October 12, 2022 unpublished decision, 2022 WL 6881836, *1, this Court acknowledged SCDC raised seven (7) arguments in its appeal of the above-quoted conclusion from the ALC's order:

> [SCDC] appeals an order of the [ALC] reversing and remanding SCDC's final decision regarding [Allen's prison industries pay]. On appeal, SCDC argues (1) the procedure by which the ALC fashioned its ruling was imbued with evidentiary error because the ALC erroneously found the contract between SCDC and the private industry sponsor was not properly included in the record but then contradictorily relied upon the contract when it ruled on Allen's claim; (2) **the procedure by which the ALC fashioned its ruling was imbued with evidentiary error because Allen did not meet the burden mandated by our supreme court in [*Torrence*,**

> **646 S.E.2d at 870, n. 4]**; (3) the procedure by which the ALC fashioned its ruling was imbued with evidentiary error because the ALC erroneously failed to remand Allen's back pay claim to SCDC; (4) **the ALC erroneously relied on dicta from *Torrence* when reversing its denial of Allen's back pay claim**; (5) the ALC erroneously found the workers' compensation premium that SCDC charged the private industry sponsor was part of Allen's gross wages; (6) the ALC erroneously found the social security withholding payment that SCDC charged the private industry sponsor was part of Allen's gross wages; and (7) the ALC erroneously found the "SCDC/Prison Industries Administrative Cost" that SCDC charged the private industry sponsor was part of Allen's gross wages. [emphasis supplied and footnote omitted].

The footnote from *Torrence* upon which the ALC exclusively relied in reversing SCDC's final decision regarding Allen's prison industries pay claim is the keystone for the ALC's June 20, 2018 order, and this Court twice referred to it in the above-quoted passage from its October 12, 2022 unpublished decision.

In its appeal, SCDC asserted both that the footnote from *Torrence* constituted nothing more than dicta by our Supreme Court and that the ALC erroneously relied upon such dicta as the sole basis for the conclusions it rendered in its June 20, 2018 order.

This Court disagreed with SCDC, 2022 WL 6881836, *2:

> As to issue 4, we hold the ALC properly relied on the footnote in *Torrence* when determining whether the workers' compensation premium, social security withholding payment, and "SCDC/Prison Industries Administrative Cost" were part of Allen's gross wages. *See* [*Sherlock Holmes Pub, Inc. v. City of Columbia*, 697 S.E.2d 619, 621 (S.C. Ct. App. 2010) (expressing reluctance to disregard rulings that were dicta when the rulings were directly on point); *id.* (noting "those who disregard dictum, either in law or in life, do so at their peril" (quoting [*Yaeger v. Murphy*, 354 S.E.2d 393, 396, n. 2 (S.C. Ct. App. 1987))).

C. THE OPERATIVE FOOTNOTE FROM OUR SUPREME COURT'S 2007 DECISION IN *Torrence* CLEARLY CONSTITUTED DICTA RATHER THAN SETTLED LAW

Given the above-quoted ruling as to issue 4, the footnote from our Supreme Court's 2007 decision in *Torrence*, as SCDC argued to this Court in its brief, constituted dicta, and there's likewise no debating the reality this Court found no error in the ALC's reliance upon such dicta.

In the above-quoted passage regarding issue 4, this Court invoked its 2010 decision *Sherlock Holmes Pub*, 697 S.E.2d at 621, specifically a purported axiom from its 1987 decision in *Yaeger*, 354 S.E.2d at 396, n. 2 ("those who disregard dictum, either in law or in life, do so at their peril.").

The axiom from *Yaeger* invoked by this Court in its above-quoted unpublished decision regarding issue 4, however, is taken out of context, as the entire operative passage in *Yaeger* in which the axiom appears reads as follows, *Id.*,

> We fully recognize that our opinion from this point on is no more than dictum. **As everyone knows, dictum technically does not count because it is outside of what is necessary in resolving a matte**r. *See* 12 WORDS AND PHRASES, "Dictum," (1954). But those who disregard dictum, either in law or in life, do so at their peril. [emphasis supplied].

Moreover, our Supreme Court overruled *Yaeger*, as well as several other cases, just last year in *Paradis v. Charleston County School District*, 861 S.E.2d 774, 779 – 80 (S.C. 2021).

In his concurrence in *Gordon v. Lancaster*, 425 S.E.2d 173 (S.C. 2018), Justice Few emphatically reiterated and, for that matter, clarified the definition of dictum this Court recognized in *Yaeger* before articulating the purported axiom this Court invoked in its above-quoted unpublished decision regarding issue 4.

Specifically, Justice Few stated the following in *Gordon*, *Id*. at 177:

> In [*Linda Mc Co. v. Shore*, 703 S.E.2d 499 (S.C. 2010)], this Court created what we called a "narrow" exception to the bright-line ten-year limitation

> for the issuance of an execution on a judgment, which is clearly set forth in section 15-39-30 of the South Carolina Code (2005). *See* [703 S.E.2d at 505] (stating, "We want to stress that this is a narrow holding ...."). Nevertheless, the *Linda Mc* Court proceeded to rewrite [§] 15-39-30 in expansive terms that were completely unnecessary to resolve the narrow dispute before the Court in that case. The Court's expansive language appeared to drastically extend the period of time in which an execution may be issued. [703 S.E.2d at 505]. However, **because the Court's expansive statement was not necessary to the decision of the case, the statement is dictum**. *See* [*Nash v. Tindall Corp.*, 650 S.E.2d 81, 83 (S.C. Ct. App. 2007)] (explaining "**dictum 'is a statement on a matter not necessarily involved in the case, ... is not binding as authority ..., [and] is not the court's decision.**'" (quoting 21 C.J.S. *Courts* § 227 (2006)).[1] **Dictum is not the law**. [emphasis supplied].

This Court observed as follows regarding dictum in its 2007 decision in *Nash*, 650 S.E.2d at 83, which Justice Few quoted in part in *Gordon*:

> **Judicial dicta is "not essential to the decision."** *Black's Law Dictionary* 465 (7th ed. 1999). Dicta or, as it is also known, **dictum "is a statement on a matter not necessarily involved in the case, and is not binding as authority**. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 21 C.J.S. *Courts* § 227 (2006).[2]

This Court's decision in *Nash* and Justice Few's concurrence in *Gordon* hews with the declarations about dicta and, specifically, its limitations by the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

In crafting the majority opinion, Chief Justice Roberts recognized dicta's limitations, 551 U.S. at 735 – 38:

> [Justice BREYER's dissent] **selectively relies on inapplicable precedent and even dicta** while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today's decision.
>
> …

[1] See also 21 C.J.S. *Courts* § 223 (Nov. 2022 Update) ("**Dictum** is a statement on a matter that is not necessarily involved in the case and **is not binding as authority.")**. [emphasis supplied].

[2] *See* note 1 above.

> Justice BREYER's dissent next relies heavily on dicta from [*Swann v. Charlotte–Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)] – far more heavily than the school districts themselves. Compare *post*, at 2801, 2811 – 2815, with Brief for Respondents in No. 05–908, at 19–20; Brief for Respondents in No. 05–915, at 31. **The dissent acknowledges that the two-sentence discussion in *Swann* was pure dicta**, *post*, at 2811 – 2812, **but nonetheless asserts that it demonstrates a "basic principle of constitutional law" that provides "authoritative legal guidance,"** *post*, at 2811 – 2812, 2816. Initially, as the Court explained just last Term, **"we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."** [*Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006)]. That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. See n. 16, *infra*. There is nothing "technical" or "theoretical," *post*, at 2816, about our approach to such dicta. See, *e.g.*, *Cohens v. Virginia*, 6 Wheat. 264, 399–400, 5 L.Ed. 257 (1821) (Marshall, C.J.) (**explaining why dicta is not binding**).
>
> …
>
> **Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is**, it not only did not address the question presented in *Swann*, it also does not address the question presented in these cases—whether the school districts' use of racial classifications to achieve their stated goals is permissible.

[emphasis supplied].

The United States Supreme Court, as Chief Justice Roberts described in the above-quoted passage, in *Central Va. Community College*, 546 U.S. at 363, offered the following explanation concerning dicta applicable to SCDC's instant petition:

> We acknowledge that statements in both the majority and the dissenting opinions in [*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)], reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. See also [*Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 105 (1989)] (O'CONNOR, J., concurring). Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in [*Cohens*] **we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated**. See *id.*, 6 Wheat., at 399–400 ("**It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a**

> **subsequent suit when the very point is presented for decision.**"). [emphasis supplied].

Our own Supreme Court, in *In re Peele's Estate*, 67 S.E. 135, 136 (S.C. 1910), articulated an axiom strikingly like the one articulated by Chief Justice Marshall in *Cohens*:

> The remarks of Chief Justice McIver in the case of [*In re Neubert*, 36 S. E. 908 (S.C. 1900)] indicate his view to have been that the statute under consideration prohibited the appointment of a nonresident as administrator.[3] **But the case in no wise depended on that point, and the remarks of the Chief Justice are obiter dicta, not attended by any analysis of the statute**. Even an obiter dictum from Chief Justice McIver is entitled to great consideration; but **it should not control when opposed to the result of careful examination of the law in a case where the question is directly involved**. [emphasis supplied].

See also *Stubbs v. Ratliff*, 24 S.E.2d 127, 128 (S.C. 1943) (quoting *In re Peele's Estate, supra*).

D. THIS COURT MISAPPREHENDED THE DICTA FROM OUR SUPREME COURT'S 2007 DECISION IN *Torrence* BY ACCEPTING IT AS SETTLED LAW

Given the precedent from this Court, our Supreme Court, and the United States Supreme Court, SCDC respectfully asserts this Court misapprehended the dicta from our Supreme Court's 2007 decision in *Torrence*, specifically the footnote in question, by accepting it as settled law.

In its entirety, the footnote from *Torrence*, 646 S.E.2d at 870, n. 4, reads as follows:

> We recognize [SCDC] will need to implement new regulations to allow these claimants access to the agency's internal grievance system. *Furthermore, if [Torrence and Ward] prove true their allegation that [SCDC] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§] 24-3-40 based on the **lower** rate, [SCDC] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. See* § 24-3-40(A). [boldface emphasis in original; italicized emphasis supplied].

The first sentence of the footnote is in accordance with the passages to which it relates, *Torrence*, 646 S.E.2d at 869 – 70:

[3] *In re Naubert* is now styled as *Burkhim v. Pinkhussohn*, 36 S.E. 908 (S.C. 1900).

> Likewise, regarding the victim and dependent beneficiaries, [*Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004)] and [*Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004)] apply to bar an action in circuit court. As we stated in *Adkins*: "the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general." [*Adkins*, 602 S.E.2d at 54]. Because the statutes are not for the special benefit of the victim and dependent beneficiaries, there is no private right of action. *See id.*
>
> Nonetheless, the trial court erred in suggesting that these beneficiaries could rely on the prisoners' own inmate grievance claims. We made clear in *Wicker* that a state-created right cannot be denied "without affording due process of law." [*Wicker*, 602 S.E.2d at 57]. Since the victim and dependent beneficiaries are directly entitled to a portion of the prisoners' wages earned through the Prison Industries Program, the DOC must afford a process for these beneficiaries to have their claims addressed.
>
> Accordingly, we hereby hold that, like inmates, the victim and dependent beneficiaries shall be able to maintain **their own** claims through [SCDC's] internal grievance procedure.[4]

[boldface emphasis in original].

The footnote's second sentence simply is not relevant to the above-quoted substantive notions articulated in the passages to which it is connected, and as SCDC argued in its brief, it appeared like a proverbial bolt of lightning from an otherwise tranquil sky.

Thus, the dicta comprised by the second sentence of the footnote under examination was not fully debated, let alone partially debated, in our Supreme Court's 2007 decision in *Torrence*, and as the United States Supreme Court acknowledged in *Parents Involved in Community Schools* and *Central Va. Community College*, supra, it is not binding or otherwise controlling as to whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Allen's gross prison industries pay for purposes of the calculations required § 24-3-40(A).

[4] Footnote 4 in our Supreme Court's 2007 decision in *Torrence* appears at the end of this sentence.

As Justice Few emphatically stated in *Gordon*, *supra*, the dicta represented by the second sentence of the footnote from *Torrence* under examination "is not the law," and for the reasons it articulated above, as well as in its brief(s), SCDC respectfully urges this Court to reverse the ALC's ruling which itself reversed SCDC's denial of Allen's demand for back pay consisting of $2.01 per hour for every hour of labor he provided to the federally certified PIECP project in which he participated.

At a minimum, SCDC respectfully urges this Court, for the reasons it articulated above, as well as in its brief(s), to remand this matter back to SCDC for further proceedings under the provisions of SCDC Inmate Grievance Policy GA-01.12 and, specifically, to allow the parties the opportunity to submit evidence into the record, including Allen's prison industries pay records, to resolve the issue of whether SCDC withheld, collected, deducted, removed, or diverted $2.01 per hour, or any of the three (3) costs that comprised the $2.01 per hour figure, from Allen's gross hourly pay.

III. CONCLUSION

SCDC, based upon the preceding analysis, hereby respectfully petitions the Court to rehear – and reconsider – its October 12, 2022 unpublished decision by which it affirmed the conclusion(s) articulated by the ALC in its June 20, 2018 Final Order.

RESPECTFULLY SUBMITTED:

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PROOF OF SERVICE

I certify that I have served the **APPELLANT'S PETITION FOR REHEARING** on the above named self-represented Respondent by mailing a copy to him, first class postage pre-paid, at the following address:

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